Kingoo v Republic (Criminal Appeal 04 of 2023)
[2024] KEHC 10636 (KLR) (13 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 04 OF 2023

RC RUTTO, J

SEPTEMBER 13, 2024

BETWEEN

ALEX MUTUKU KINGOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. H. M Nganga PM) at Gatundu Chief Magistrate Court Sexual Offence Case No. 30 of 2019 delivered on 20th January 2021)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* Cap 63A has lodged this appeal against his conviction and sentence to serve twenty years imprisonment. The Appellant prays that the Appeal be allowed, conviction quashed and sentence set aside.

2. The appeal is premised on the grounds set out in the petition as follows, that:

    a. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding, prosecution failed to prove case beyond reasonable doubt.

    b. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding that the charge sheet was defective.

    c. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding that the crucial prosecution witnesses were not availed.

d. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding, the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.

e. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding the plausible defence of the Appellant was not given due consideration.

f. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding the vital ingredients of the offence charged were not proved as stipulated by law.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 21st day of October 2019 at Kiambu County he willfully and intentionally caused his penis to penetrate the vagina of MW a child aged 15 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 21st October 2019 at Kiambu County touched the buttocks, breast, vagina of MW a child of 15 years with penis.

4. The appellant pleaded not guilty to both charges. The prosecution called 6 witnesses to prove its case. At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence where he gave un-sworn evidence. He called no witness in his defence

5. Upon consideration of the evidence on record and the parties' submissions, the trial court convicted the Appellant for the offence of defilement as charged under Section 215 of the Criminal Procedure Code. The Appellant was sentenced to 20 years imprisonment.

C. The Prosecution Case

6. The complainant MY testified as PW1. She stated that she was 15 years old. She testified that on 21st October 2019 after arriving at Gitwe Petrol Station she met A and requested him to escort and help her carry her luggage. That when she got home, her mother was furious, beat her up, and locked her in the toilet. The following day, her mother told her not to bath and took her to Gitare Hospital where she was tested and told nothing was wrong with her, she was given drugs to prevent what she did not know.

7. When asked that it was noticed in the P3 that she had sex, PW1 stated that, she was a friend with someone, her boyfriend was A, her mother asked if she had ever had sex, and she said no. When her mother insisted, she said yes, that it was with him. That the act occurred on 21st October 2019 at a coffee plantation on her way from her aunty place. She was forced to have sex and could not scream as she had a cold. That they were no people and it was at night. She could not remember the time.

8. PW1 also testified that the appellant got annoyed as he was asking questions. He removed her dress and pants. That he finished what he was doing and had sex with her through the vagina. It took two hours. Thereafter, she took her things and went home, found the gate closed, then her mum beat her up. She confirmed not telling her mother because she started beating her instead of asking what happened,

9. PW1 identified the Appellant as A by pointing at him, and stated that he was her friend and they had sex. That she knew him since he was a neighbour and they used to meet.

10. PW2, AN stated that she was the mother of PW1 and produced a Birth Certificate as Prosecution Exhibit 1. She stated that she was expecting PW1 to arrive from visiting her sister. That she waited

but PW1 did not arrive and she went looking for her but could not find her. That PW1 arrived home at mid-night, she beat her up and after the beating she informed her that she was with M. She then took the child to Gitari hospital where the child was examined and the doctor confirmed that she was defiled. The victim denied but later confirmed that it was true. She then reported the matter at Gitari Post and later at Gatundu Police Station.

11. PW3, Dr. Kelvin Kimani, a doctor at Gatundu Level 5 Hospital stated that he filled the P3 Form. On history, the victim was defiled by a person known to her. She was 15 years. The genital examination showed bruises and lacerations on the vagina wall and bleeding. Urinalysis showed pus cells, epithelial cells and red blood cells. No sperms were seen. He stated that it is possible for the sperms not to be seen if the offender was wearing a condom or patient went to hospital late. The injuries were caused by penetration. PW3 produced Lab Request/Report from Gachere as Prosecution Exhibit 2; Lab Request Form from Gatundu Level 5 as Prosecution Exhibit 3; Treatment Card from Gatundu Level 5 as Prosecution Exhibit 4 and PRC Form for M.W.N as Prosecution Exhibit 5 and P3 Form as Prosecution Exhibit 7. On cross examination he stated that injuries on the vagina can only be caused by forceful penetration and breaking of the hymen.

12. PW4. PC Stephen Rugari stated that on 23rd October 2020 he was sent by his OCS to assist effect arrest of A M who was reported to have defiled a juvenile. That the complainant showed where the Appellant worked and identified the suspect. The Appellant was then arrested and escorted to Gatundu Police Station. PW4 identified the person he arrested as the Appellant appearing on the screen.

13. PW5, PC Eric Sudi states that on 23rd October 2020 he accompanied PC Margaret Nzonga and PC Stephen to Gitwe area to assist effect an arrest. At Gitwe, the complainant directed them to the home of the suspect and identified him and he was arrested. That the minor saw the suspect in the car and identified him. PW5 identified the person they arrested as the one on the screen.

14. PW6, PC Margaret Nzaga, the investigating officer, she stated that PW2 reported that her daughter had been defiled and she took her to Gitwe Health Centre and reported at Gitwe post where she was referred to Gatundu Police Station. That PW1 explained that on 21st October 2020, on her way home through the coffee plantation, she met a man, and identified him as the man who worked in the nearby home. The man took her to the coffee plantation and defiled her. She wanted to scream but the man held her mouth and covered her face. That the man left her there and she sat for a while and later went home. When she got home her mother beat her for being late and the next day took her to Gitwe hospital. That they arrested the accused and on interrogation he admitted knowing the girl but denied defiling her. She testified that since the medical evidence revealed defilement, she decided to charge him and later took HDS and underpants the girl was wearing to the Government Chemist but the results were not yet out. She confirmed that the Treatment Notes, P3 Form, Birth Certificate had already been produced in court. She also produced MW's Black stocking as Prosecution Exhibit 9, the yellow Kitenge the victim was wearing as Prosecution Exhibit 10, and pink panty as Prosecution Exhibit 11.

15. PW7 Pamela Okolo, a Government Chemist stated that acting under the request of PC Nzonga of Gatundu Police Station, she examined M2-multi coloured dress for MW, M3-black stocking in khaki envelop for MW, M4-pink under pant in khaki envelop to determine biological identity. That several samples were also taken from A M K to determine the biological evidence. They were interested to look for presence of blood/semen. All the items swab, dress, under pant were found to be stained with blood but no semen. The DNA profile of blood stain showed female DNA that was similar to buccal swab of MW. She produced the Chemist Report as Prosecution Exhibit 8.

16. It is upon an appraisal of this evidence that the trial court placed the appellant on his defence.

D. The Defence case

17. In his defence, the appellant gave un-sworn statement, and did not call any witness. He stated that on 23rd October 2020 while at work at the home of Mr. M he heard being called and he responded. He thought they were customers. They came to where he was, held his hand and told him to escort them to the main tarmac road. When they reached the road he saw a police vehicle and was told to get in. A woman was then brought and was asked if he knew her and he responded in the affirmative. That he was then told that he would be told the reason for his arrest at the Police Station. While at the Police Station he was taken to the cell and he explained that he did not know about the act and did not do the offence. That the following day the investigation officer interrogated him and told him that he will be jailed if he does not say the truth. Later he told him to do a confession which he did and signed and was taken to Court and later to KNH for DNA.

18. Ultimately, upon evaluation of the entire evidence on record, the trial court found the prosecution had proved its case, found the appellant guilty and convicted him accordingly, sentencing him to twenty years in prison.

E. The Appeal

19. The appeal proceeded by way of written submissions.

a. Appellant's Submissions

20. The appellant submitted on seven grounds of appeal as follows:

    a. Whether the constitutional unfairness accorded during trial is material to quash the conviction and sentence.

    b. Whether the charge was incurably defective.

    c. Whether the expert evidence and documented exhibits were illegally admitted and misconstrued.

    d. Whether paramount facts were ignored and case proved to the legal standard of proof required amid imminent contradiction.

    e. Whether witnesses summoned were credible, lack of corroboration & non-production of significant witnesses.

    f. Whether the defence was well thought out.

    g. Whether the punishment imposed upon the appellant stands or was disproportionate severe, illegal and unconstitutional.

21. On the first issue, the Appellant makes reference to Article 50(2) (h) of the *Constitution*, the Miranda Rights and states that he was denied legal aid representation, and relies on the cases of Meshack Juma Wafula v Republic (2019) eKLR, Republic v Karisa Chengo & 2 others [2017] eKLR. submitting that he is a lay man and it is not expected that he would have known all the rigmaroles of court procedures, more so during sentencing.

22. The Appellant alleges that he was denied interpretation of evidence by some witnesses who averred in English. That he was ambushed to participate in an adversarial litigation which involved experts and professional's contrary to the provisions of section 198 of the Criminal Procedure Code (CPC).

23. On the second issue, whether the charge sheet was defective, it was the Appellant's submission that there was a violation of his right under Article 50(2)(b) of the *Constitution* as well as section 137 of the CPC. That the trial court did not adopt the dint of section 137(f) which requires the need to include clear information such as the place, time, thing, matter, act or omission. He avers that there were contradictions on the time as to when the allegations were transacted. The P3 and PRC forms are controversial on this. That in the victim's original statement at the Police Station, the offence is alleged to have been committed around 2100hrs, the PRC indicates that the offence was committed at 0800hrs.

24. On the element of place the Appellant stated that PW1 was not a credible witness as she gave varying information regarding the purported incident. Reference was made to the case of *Nedzamba v S* (911/2012)(2012)ZASCA 69 (27 May 2013).

25. On the third issue the appellant urged the court to invoke Article 50(2)(j) and (k) of the *Constitution* and sections 208(2) and (3) of the CPC and find that he was denied an opportunity to challenge the medical evidence by PW3 and the absentee Medical Officer at Gitwe Health Centre where it was alleged that PW1 was first medically examined. He made reference to the case of *Elizabeth Gathoni Kibiku v Republic* (2007) eKLR. Further he contests how pertinent documents were admitted in evidence.

26. On the fourth issue the appellant submitted that the age element was not proved as a genuine age assessment was not done and seeks to rely on the Court of Appeal case in Cr. App No 504 of 2010 Kaingu Elias Kasomo v R. The Appellant stated that there was unproved peno vaginal penetration component and relied upon the case of *Langat Dinyo Domokonyang v Republic* (2017) eKLR. Further, that identification was unsatisfactory and not as per the standard of proof required. That the trial court got it wrong by convicting the Appellant on the basis of identification by the PW2, 4, 5, and 6 which was not conclusive. To support this assertion, reliance was placed on the case of *Charles Matianyi V Republic* and *Kariuki Njiru & 7 others vR* Cr.App No.6 of 2001. He alleged that given the weak evidence on identification and the glaring contradictions in the evidence of PW3 and 4, a DNA test would have sufficed as a concrete hammer to nail the appellant. However, this was not done thus raising doubts whether it is the appellant who committed the offence.

27. On the fifth issue, the appellant relied upon section 143 of the *Evidence Act* and sections 144 and 150 of the CPC to fault the prosecution for relying upon witnesses from a single family set up. The Appellant relied upon the case of Geoffrey Kipngéno v R Cr. App No. 366 of 2008 as well as Khalif Haret v the Republic (1979)KLR 308. Further that the evidence of PW1, 2 and 3 have sharply disagreed on the chronology of events and the real facts. That PW2 conduct of beating PW1 and continued interrogating on her whereabouts is enough to render the evidence coerced. He urged court to find that the prosecutor has discretion to call someone as a witness, and if he does not call a vital witness, he runs the risk of the court presuming that if the evidence had been produced it would have been unfavourable to the prosecution.

28. On the sixth issue, it was submitted that he was a victim of circumstances since he was in the area to fend for his family and not to defile children. He alleged that the trial court rejected his defence for unrevealed reasons, he urged the court to rely upon sections 169(i) and 212 of the CPC.

29. On the last issue he submitted that the minimum mandatory sentences provided for in section 8(3) of the SOA for which he was convicted with is discriminatory and disproportional punishment hence it is invalid.

b) Respondent's Submissions

30. The respondent opposed the appeal in its entirety and relied on their submissions dated 12th February 2024. The submissions were guided by the ground of appeal as raised by the Appellant. The submitted that the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant.

31. The respondent submitted that the complainant was 15 years old and her age was proven by way of a birth certificate and corroborated by the evidence of PW2 the complainant's mother and PW6 the investigating officer who produced the child's birth certificate. Reliance was placed on the case of *Mwalongo Chichoro Mwanjembe v Republic* (2016) eKLR. On penetration, while making reference to the case of *Mark Oiruri Mose V Republic* (2013) eKLR it was submitted that the evidence produced during trial clearly proved the element of penetration to the required standards. On identification of the perpetrator, it was submitted that the Appellant was well known to the victim and there was no possibility of mistaken identity.

32. While responding on the ground that the charge sheet was defective, he submitted that this ground lacks merit since the offence and penalty were clearly stated and the particulars were read to the Appellant to which he answered not guilty.

33. The Respondent urged the court to dismiss ground 4 of the Appeal since all prosecution witness were consistent and corroborated each other.

34. The respondent further submitted that the Appellant defence was analysed and considered by the trial court but the prosecution discharged its burden. They urged the court to dismiss the appeal for lack of merit and uphold the conviction and sentence of the trial court.

F. Analysis and determination

35. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 *David Njuguna Wairimu v. Republic* [2010] eKLR where the Court of Appeal held that:

> " the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

36. Having considered the record of appeal as well as the rival submissions by parties, I discern the following issues for determination:

    a. Whether the prosecution failed to prove its case beyond reasonable ground.

    b. Whether the charge sheet was defective;

    c. Whether the prosecution case was marred with contradictions and inconsistencies

d. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

a. Whether the prosecution failed to prove its case beyond reasonable ground.

37. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While Section 8(3) states that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

38. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as:

a. Proof of the age of the victim;

b. Proof of penetration or indecent act;

c. Identification of the perpetrator.

39. On the issue of age, the record shows that the birth certificate marked as Prosecution Exhibit 1 was produced by the mother who testified as PW2 and it confirms that the child was born on 4th February 2004 and she was therefore 15 years old and 8 months at the time of the offence. From the record, the appellant did not dispute the production of the birth certificate or challenge its veracity. He did not equally challenge the age of the complainant. However, in his submissions before this appellate court, the Appellant alleges that the issue of age was not determined since the victim was never taken for Age Assessment to confirm the exact age of the victim. This court takes note that this is an appeal and a party is refrained from introducing new evidence and or facts that were not before the trial court.

40. The trial court in finding that this ingredient was satisfied, relied on the birth certificate as evidence that the victim was aged 15 years old and 8 months at the time of the occurrence of the alleged offence. Further, the court noted that the age was not in any way challenged by the accused person.

41. It is trite law that there is no one particular preferred means of proving age. In the case of *Mwalango Chichoro MwanjembeV. Republic*, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR the Court of Appeal held as follows:

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*,Cr. Appeal No.19 of 2014 and *Omar Uche v R*,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in F*rancis Omuroni v Uganda*, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

42. This court therefore, finds that there is no better way of establishing age other than by way of a Birth Certificate. I therefore agree with the finding of the trial court that this ingredient was fully and sufficiently established. There was sufficient evidence to proof the age of the victim as being 15 years

old and 8 months at the time the offence was committed. Hence, she was aged 15 years as she had not yet celebrated her sixteenth birthday.

43. On penetration, Section 2 of the *Sexual Offences Act* defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. It is proved through the evidence of the victim corroborated by medical evidence. The trial court in its determination held that the circumstance revealed that the appellant forced MW to the sexual act which was unlawful. The medical evidence proved that there was penetration hence the ingredient had been proved beyond peradventure.

44. Turning on to the evidence of the witnesses PW1 testified giving a winding story but when told that the P3 Form, Exhibit 7 indicated that she had sex, she stated that her boyfriend was A, that the act occurred in the coffee plantation as she was leaving her aunty place on 21st October 2020, that she was not able to scream as she had a cold. That she was forced to have sex, there were no people it was at night and she couldn't remember the time. PW1 further stated that the appellant was asking questions and he got annoyed, he removed her clothes one by one and asked if she had another boyfriend and she said no. He removed her dress and pants, he finished what he was doing with me through the vagina. She then pointed at A saying he was her friend and they had sex. This evidence was not rebutted and the witness was not adjudged not credible.

45. Notably, PW1's evidence was further corroborated by the evidence of PW 3 who testified that on history the victim was defiled by a person known to her. The genital examination showed bruises and lacerations on vagina wall and bleeding. The injuries were caused by penetration.

46. In the case of *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court held that;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

47. The Appellant submitted that his DNA sample analysis was never done, yet this would have led to his acquittal. Section 36 of the Act that provides for DNA testing is not couched in mandatory terma but rather grants the trial court discretion to order for medical testing and evidence, which include DNA testing. Further, in *IMA v Republic* [2019] eKLR it was stated that:

> " 32. It is well established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. In *AML v Republic* [2012] eKLR the Court of Appeal succinctly held that:-
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> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.""

48. Consequently, I find that the evidence of the victim and the medical Doctor, PW3 was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court. Lack of DNA testing of the accused did not in any way impugn the strong prosecution evidence. I affirm that penetration was proved.

49. With regard to identification of the perpetrator, from the record it is noted that at the start of her testimony PW1 stated that she borrowed a phone and called A M as he had his number. Further, while still testifying he pointed at the accused and stated that he was my friend. The appellant too in his

defence while giving his un-sworn statement admitted knowing the victim. The appellant does not dispute the fact that he was well known to the victim.

50. The trial court also observed that the appellant was well known to PW1 and PW2 and there was no possibility of error in his identification.

51. Based on the above set of facts I find that the appellant was positively identified as the person who defiled MW. The identification was not only by way of dock identification when the victim identified the appellant in court (on the screen) but more fundamentally, it was identification by recognition.

52. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground of appeal thus falls, for lack of merit.

b. Whether the charge sheet was defective;

53. The Appellant submitted that the charge sheet was defective for failing to comply with Article 50(2)b of the *Constitution* as well as section 137 of the CPC. That the trial court did not adopt the dint of section 137(f) which requires the need to include clear information such as the place, time, thing, matter, act or omission hence his right was violated. This was not raised during hearing before the trial court.

54. In response the Respondent submitted that this ground lacks merit since the offence and penalty were clearly stated and the particulars were read to the Appellant to which he answered not guilty.

55. The Court of Appeal in the case of *Benard Ombuna v Republic* (2018)eKLR held that:

> " the test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of charges preferred against him and as a result, he was not able to put up an appropriate defence."

56. Similarly in the case of *Peter Ngure Mwangi v Republic* (2014)eKLR the Court of Appeal addressed itself on the issue of a defective charge when it set out two factors for consideration namely; whether or not the charge sheet is indeed defective and whether or not even with such defect justice will still be met.

57. The substantive law on a defective charge is section 134 of the Criminal Procedure Code which provides that; " every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged."

58. In this instance case, the appellant allege that his right was violated by failure to adhere to the requirements of article 50 (2) (b) require that the charge should be framed so as to enable the accused: "to be informed of the charge, with sufficient detail to answer it...". and section 137 (f) of the CPC which provides for the General Rule as to description.—subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;

59. I have reviewed the charge sheet on record and note that it provides for all the requirements set out under section 137(f) save for the time of the occurrence of the alleged offence. Applying the test already set out by the courts in the above authorities, I find that the appellant has not stated how the omission of the time on the charge sheet prejudiced his understanding of the offence and prosecution of his case.

60. In this case the appellant responded to the charge by entering a plea of not guilty, and proceeded to have the case heard and determined. In all this he has not shown how the omission of time of the occurrence of the offence prejudiced his case. The prosecution evidence adduced before court, which the appellant cross-examined on was that he defiled PW1 on her way from her aunty's place. Notably, in his defence, the appellant chose not to comment on the occurrences on the day of the incident. He focused on the day of his arrest. Consequently, I find no merit in this ground and it fails.

c. Whether the prosecution case was marred with contradictions and inconsistencies

61. The appellant submitted that there were contradictions and inconsistencies in the prosecution case. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In *Mwangi v Republic* [2021] KECA 345 (KLR) it was held:

> " 34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993, that:
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> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

62. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

63. The Appellant submitted that PW1 was not a credible witness as she gave varying information regarding the purported incident. That he was denied an opportunity to challenge the medical evidence by PW3 and the absentee Medical Officer at Gitwe Health Centre where it was alleged that PW1 was first medically examined. He alleged that given the weak evidence on identification and the glaring contradiction on the evidence of PW3 and PW4, a DNA test would have sufficed as a concrete hammer to nail the appellant, however this was not done thus raising doubts whether it is the appellant who committed the offence.

64. I have gone through the evidence of PW1 and noted that the PW1 gave a winding statement and kept beating around the bush until when she was told that it was noticed in the P3 that she had sex. This is when the victim opened up and gave a detailed description of how the events unfolded. The evidence adduced at this point showed that indeed the appellant was a neighbour, and well known to the victim for they had an existing relationship between themselves; that the appellant had carnal knowledge with the victim and the victim understood what sex was for they had been taught in school. I do not see any contradiction in this evidence. I also take note of the trial court's finding in its decision that the complainant was being a truthful and reliable witness. There is no any other version of events given by another witness on record to warrant the assertion that there is a contradiction in the two or more versions.

65. Further the Appellant allege that he was denied an opportunity to challenge the medical evidence by PW3 and the absentee Medical Officer at Gitwe Health Centre where it was alleged that PW1 was first medically examined. The record speaks for itself. While the medical doctor at Gitwe Health Centre was

not a witness in the case, the Appellant was given an opportunity to cross examine PW3, the doctor who testified and produced the medical exhibits. The details of the cross-examination proceedings are well captured in the proceedings. PW3 confirmed that the victim was first treated by the doctor who noted that there was blood in the vagina. Notably, PW3 is the one that filled the P3 form and produced it in court. In filing a p3 form, the doctor, in this case, PW3 makes reference to the medical notes of the first examining doctor. Consequently, I find failure to call the initial doctor that examined PW1 not fatal to the prosecution witness. Further, I find no contradiction apparent in this evidence as alleged by the appellant. It is also noted that the Appellant did not object to the production of the medical evidence during trial.

66. On the on identification by PW3 and PW4, I do not find any contradiction in their evidence since PW3 testified on the medical process and examination of the victim while the evidence of PW4 was on the arrest of the Appellant.

67. Ultimately, this court finds no contradictions in any way to result in setting aside of the conviction. I thus find that the trial court did not err in relying on the witnesses' evidence to convict the appellant. This ground of appeal fails.

d. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional

68. The appellant was sentenced to 20 years imprisonment. The appellant argues that the court was wrong in concluding that the offence had a mandatory sentence since jurisprudence gives the courts discretion. Further that the maximum-minimum sentences provided for in section 8(3) of the SOA for which he was convicted with is discriminatory and disproportional punishment hence its invalid.

69. While courts have enjoyed judicial discretion in sentencing in sexual offences since the decision in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition Eo17 of 2o21) [2o22l KEHC 13118 (KLR) that had declared the minimum mandatory sentences in the SOA unconstitutional, this court is bound by the recent Supreme Court decision in Petition *No. E018 of 2023*, Republic vs Joshua Gichuki Mwangi & 3 others (Unreported) Judgment dated 12th July 2024, in which the apex Court held that the mandatory sentences under the SOA were constitutional.

70. Consequently, I find no reason to interfere with the trial court decision on sentencing. Given that the appellant was in custody since the time of his arrest on 23rd October 2019 till when judgment was delivered this period should be considered in computing sentence in accordance with Section 333 (2) of the *Criminal Procedure Code*.

71. The upshot is that I find this appeal has no merit. Both conviction and sentence are upheld.

72. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF SEPTEMBER 2024.

For Appellants:

For Respondent:

Court Assistant: