Mutua v Republic (Criminal Appeal E102 of 2022)
[2024] KEHC 17237 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 17237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E102 OF 2022

TM MATHEKA, J

SEPTEMBER 18, 2024

BETWEEN

DAVID MUTUNGA MUTUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of B. Ireri (SPM) in Makindu Sexual Offence Criminal Case No. E043 of 2021 delivered on 4th August 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 20th February 2021 and 5th March 2021 at [Particulars Withheld], Twaandu Location in Makindu Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.N.M a child aged 12 years.

2. 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*, No. 3 of 2006. The particulars of the offence were that during the same period and at the same place, the appellant intentionally and unlawfully touched the vagina of J.N.M a child aged 12 years.

3. The appellant pleaded not guilty and after a full trial, he was convicted on the main charge and sentenced to 20 years' imprisonment.

The Appeal

4. Aggrieved by that decision, the appellant filed this appeal on the following grounds

1. That the trial court did not consider article 49 of the CPC (sic)which protects every person against arbitrary imprisonment.

2. That the honorable court failed to consider the circumstances of the accused and his mitigation factors as basic factors when giving the sentence.

3. That the trial magistrate appeared biased on the accused person whenever he raised his claims and issues on the prosecutions side.

4. That the trial magistrate was dishonest, incompetent and negligent when delivering the ruling and judgment.

5. He raised the following grounds in his submissions;

    1. That the learned trial magistrate erred in law and fact when he convicted and sentenced him without observing that the charges were defective for, they failed to establish the exact day when the alleged incident took place.

    2. That the learned trial magistrate erred in law and fact when he shifted the burden of proof to him, misapprehending and misdirecting himself on the evidence hence arriving at the wrong conclusion, by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies, which required him to resolve the doubt in favor of the appellant.

    3. That the learned trial magistrate erred in law and fact by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of defilement to the required standards of law of beyond reasonable doubt.

    4. That the learned trial magistrate erred in law and fact by convicting him without properly applying section 124 of the *evidence Act* and using uncorroborated evidence to convict and sentence the appellant.

    5. That the learned trial magistrate erred in law and fact when he missed the sworn-in defence statement which alleged the possibility of being a framed-up case due to the existing dispute between him and the family of the complainant.

6. The prosecution's case was that the appellant proposed marriage to the complainant and she declined. Shortly thereafter, he found her grazing in the bush and defiled her. She informed her brother wo informed their grandmother and the matter was reported to the police. The appellant was arrested and prosecuted.

7. The prosecution called 4 witnesses; the complainant (PW1), the complainant's grandmother (PW2), the Doctor (PW3) and the investigating Officer (PW4). The exhibits produced were; P3 Form (P. Ex 1), PRC Form (P. Ex 2) and Birth Certificate (P. Ex 3).

8. The appellant gave sworn evidence and did not call any witness. His testified that he fears God and was brought up in a Christian family. That on 05/05/21, he woke up, had breakfast and his parents went to work. He remained at home to make a chicken shed. He had some visitors at around 11.00am who asked for his names and told him that he was under arrest. They got to the police post at around 3.40pm, they took his mobile phones and one of the officers asked him for Kshs 3000/= in order to release him. He told them that he had no money they took him to Makindu police station. On 6/5/2021, he was taken to the hospital where he was tested for HIV Aids and found to be negative. On 7/5/2021, he was charged in court and he denied the offence. He denied having committed the offence.

9. On cross examination, he told the court that he did not defile the girl and did not know her.

That he saw her in court. That the officers went to his home. That he was not lying.

10. The appeal was canvassed through written submissions.

The Appellant's Submissions

11. The appellant submitted that the charge sheet was defective because the evidence adduced was at variance with the charges. That the evidence of the complainant and the doctor was that he was the complainant's boyfriend hence his contention that boyfriends do not threaten their girlfriends with death.

12. He submitted that the evidence of the prosecution witnesses was contradictory with regard to the time and place of the offence. That the evidence by the I.O was not conclusive and the investigation was shallow.

13. He submitted that the lack of specific dates in the charge sheet made it difficult for him to defend himself. That both the prosecution and court had ample opportunity to amend the charge sheet but they failed to use section 214 of the CPC. he contended that the errors are not curable under section 382 of the CPC because he was prejudiced. He relied on Zahira Habibullah Sheikh & Anor -vs- State of Quajarat & Others AIR 2006 SC 1367 where the Supreme Court of India stated;

> " .... The fair trial for a criminal offence consists not only the technological observance of the frame and forms of law but also in recognition and just application of its principles in substance, to find the truth and prevent miscarriage of justice."

14. He submitted that the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. That the right is non-derogable especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.

15. Relying on Isaac Omambia -vs- R [1995] eKLR, he submitted that the particulars of the charge and the statement of the offence are an integral part of the charge. He contended that the particulars in his case were not specific on the issue of the date and the charge sheet was not reflecting the evidence on record nor was it framed as provided in our statutes.

16. He submitted that the test for determining whether a charge sheet is fatally defective has been established in; Willie (William) Slaney -vs- State of Madhya Phradesh (A.I.R) 1956 Madras Weekly Notes 391 where the Supreme Court of India held that;

> " Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that he must seek, courts have to administer justice and justice includes the punishment of the guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of unsubstantial technicalities."

17. The appellant submitted that the trial magistrate erred when he shifted the burden of proof to him. He relied on Dorcas Jemutai Sang -vs- R [2018] eKLR where the Court of Appeal stated;

> " In the present case, we are satisfied that both the courts below appeared or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant 'did not call

witnesses to support her defence' and the learned judge remarked that 'it was a significant fact that the appellant did not call any witness at that trial.' By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

18. He submitted that both the victim and perpetrator should be taken for medical examination before 72 hours are over. That the complainant was sent to the hospital on 12/05/2021 while the date of report was 05/05/2021 and the medical officer testified that PW1 was treated on 05/05/2021. He contended that the case had contradictions, inconsistencies and inefficiencies.

19. He submitted that if the trial magistrate had not attached undue and underserved weight on the state of PW1's hymen, he would have been less confident about the strength of the prosecution case. He relied on PKW-vs- Republic [2012] eKLR where the Judges stated;

> " [15]. In their analysis of the evidence on record, the two courts below...appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?
>
> [16]. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

20 He submitted that the trial magistrate did not apply section 124 of the *Evidence Act* when he failed to observe that the complainant was a minor and was supposed to be taken through voire dire examination. He submitted that the voire dire examination was short and not conclusive. That the evidence of PW1 had numerous contradictions and should not have been accepted.

21. He submitted that the prosecution did not prove its case as required by the rule of law of this country. He relied on Thomas Patrick Colbert Cholmondeley; Nairobi Criminal Appeal No. 116 of 2007 where the court held that the duty of a prosecutor, acting on behalf of the republic, is not to secure conviction at all costs but to be a minister of justice i.e., help the court to arrive at a just and fair decision in the circumstances of each case.

22. He submitted that there was no attempt by the trial magistrate to reconcile the apparent material discrepancies on the prosecution case which fatally affected the case by creating a lot of doubt as to the truthfulness of their witnesses. That this omission on the part of the trial court is a benefit of doubt

for him and the more reason why the trial magistrate should not have dismissed his defence. He relied on the South African case of Ricky Ganda -vs- The State where the court held that;

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict, there must be no reasonable doubt that the evidence implicating him is true. The correct approach is to consider the alibi in light of the totality of the evidence in the case and courts impression of the witnesses, probabilities and improbabilities on both sides and having done so decide whether the balance weighs so heavily in favor of the state as to exclude any reasonable doubt about the accused's guilt."

23. He submitted that the burden of proving the falsity of an accused's defence of alibi lies on the prosecution. He relied on Karanja -Vs-R where the court held that in a proper case, a trial court may, in testing a defence alibi and in weighing it with all other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought. An alibi must be raised at the earliest opportunity in answer to the charge and once a defence of alibi is promptly and properly put up, the burden shifts to the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt.

24. He submitted that he narrated his ordeal but his explanations fell on deaf ears. That it was not shown that the police did any investigations to disprove his story hence his explanation cannot have been said to be an afterthought. He relied on the case of A.O.G -vs- R [2021] eKLR where the court stated;

> " The court however is quick to note the seriousness of the offence herein and the impact on the victim. There is evidence that, though prohibited, the appellant and the victim were in some sought of romantic relation. The sentence of 20 years that the applicant is serving is inappropriate in the circumstances and is set aside and substituted by a sentence of this court committing the custodial sentences of the applicant to the period served."

Submissions by the Respondent

25. The State, through Prosecution Counsel Nyakibia Mburu, opposed the appeal in its entirety and submitted that; the birth certificate produced proved the complainant's age to be 12 years and 5-6 months. That penetration was proved by the evidence of the complainant which was corroborated by the medical evidence. She submitted that the appellant was fully identified by the complainant by his full names hence was a person well known to her.

26. Relying on the proviso to section 124 of the *Evidence Act*, she submitted that corroboration is not a requirement per se in defilement cases but there was sufficient corroboration in this case.

27. She submitted that a proper voire dire was conducted in this case and the record is clear. That the complainant was questioned by the court and found to understand the meaning of an oath. That the trial court complied with the holding in Samuel Warui Karimi -vs- R [2016] eKLR where requirement of voire dire was held to be for minors aged below 14 years.

28. She submitted that the charge sheet was well drafted and in case of any ambiguity, the same would not in any way amount to a miscarriage of justice as Article 159 of *the Constitution* would cure such defect.

29. She submitted that the prosecution was able to prove all the elements of the offence as required under the law. That the trial court considered the defence and noted as much in the judgment.

30. She submitted that the sentence is proper and should be upheld

31. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

32. I have carefully considered the grounds of appeal, the rival submissions and the entire record. The issues that present for determination as follows;

    1. Whether the charge sheet was defective

    2. Whether there was compliance with the requirement of voire dire.

    3. Whether the offence of defilement was proved to the required standard.

Whether the charge sheet was defective

33. The appellant complained that the charge sheet was defective for lack of specific dates and that the evidence adduced was at variance with the charges.

34. The appellant was charged with defilement c/s 8(1) as read with 8(3) of the *Sexual Offences Act*. The particular were that on diverse dates between 20/2/2021 and 5/3/2021 at [Particulars Withheld], Twaandu Location in Makindu Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.N.M a child aged 12 years.

35. The substantive law on charge sheets is in section 134 of the *Criminal Procedure Code* (CPC) 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 the offence charged."

36. In Peter Ngure Mwangi -vs- Republic [2014] eKLR the Court of Appeal stated;

> " On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.... A charge can also be defective if it is in variance with the evidence adduced in its support..... In the instant appeal, we find that the defect in the charge sheet of stating the complainant's name to read "Mongare" instead of "Mungai" did not prejudice the appellant in any way..... By indicating his name to read "Mongare" instead of "Mungai" was merely a typographical error. The type of errors normally curable under Section 382 of the Civil Procedure Code."

37. And in Benard Ombuna -vs- R [2019] eKLR the Court of Appeal) addressed the same issue as follows;

> " In a nutshell, the test of 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 the charges preferred against him and as a result, he was not able to put up an appropriate defence."

38 In our case, the appellant was convicted on the main charge of defilement and the charge as drawn contains a statement of a specific offence, namely defilement. The particulars given informed the appellant that he was being accused of causing his penis to penetrate the vagina of a child aged 12 years on diverse dates within a given period. From the quoted charge sheet the law is cited, there are sufficient particulars of time, place and acts to make the appellant understand the nature of offence that he was charged with. Evidently the offence was said to have been committed over a period of time and there is nothing wrong with the manner of presentation.

39. To that extent the charge sheet was not defective.

40. As to whether the evidence was at variance with the charges,

PW1 told the court that the accused proposed to marry her in 2021. She could not recall the month. She said also on a date and month she could not recall, they had sexual intercourse. She stated "I was at school. We had sexual intercourse once. I was grazing in the bush...he grabbed my chest breasts ... pushed me down.... lay on top of me...removed my panty, skirt he lifted up, lay on top of me ...remove his penis ...put it inside my vagina...had sexual intercourse with me...it was my first time...I felt pain"

41. She testified that when she got home about 1:00pm she did not tell her grandmother, she stated" I did not tell her in December. I informed my brother...he defiled me around November 2021...who informed my grandmother who informed my teacher".

42. On cross examination, she said testified that they met for 5 days; that on 5/3/2021 she was at the posho mill on at 1.00pm for 2 minutes and the accused is the one who was at the posho mill. In the same breath she stated that she was defiled on 5/3/2021 at 1:00pm while she was grazing and that it was the same accused person who had defiled her. That he found her grazing, grabbed her and had sexual intercourse with her at a place where there were houses and a road nearby.

43. The complainant's grandmother was PW2 did. Her testimony was that she was told by the older brother of the complainant that the complainant had sex with the accused person. That she told the accused's father to leave J NN alone or he would be jailed. She also sent a younger brother of JNN to warn the accused. On a Sunday, (no date given) she said she saw the accused talking with JNN. She ordered JNN to go home and the next day reported the matter to her teacher. And Kavete Police Station. It was her testimony that JNN was crying telling her that the accused used to touch her breasts and had intercourse with her. That the medical examination revealed that she had been defiled.

44. On cross examination she said she had beaten JNN and told her to stop having the affair with the accused.

45. PW3 was the clinical officer. She filled the P3 on 12th May 2021. She found broken hymen, old scar. She testified that the complainant told her that she was living with the accused as her boyfriend, that she was sexually active since 2021

46. PW4 was the I.O. He told the court that the report was that defilement had been ongoing from January 2021 to May 2021, That the accused had eloped with the complainant and they had sexual intercourse. That the complainant told her that the accused had threatened her not to tell anyone.

47. On cross examination she told the court that she did not make any recoveries, she did not speak to ant neighbors, yet it was her position that she conducted proper investigations.

48. It is evident from the evidence that there is no relation between the evidence and the 20th February 2021. The Police Officer spoke about an ant of elopement of January 2021. Of sexual intercourse between then and 5th May 2021. The complainant did not mention any of these dates. He spoke about

November and December in her evidence in chief. So where did the I.O get these specific dates? How did the DPP arrive at those two specific dates in the Charge Sheet?

49. The 5/3/2021 was mentioned by the complainant in her evidence in in cross. She was at the Posho Mill at 1:00pm for 2 minutes and it was the accused who was at the posho mill. At the same time, she was in the bush grazing and it was the same accused person who found her, and had sexual intercourse with her. She says nothing about eloping with the accused, her grandmother says nothing about her having eloped with the accused person. There is no mention of multiple sexual acts between her and the accused person. So what happened here? 5/3/2021 appears to be a random date. The accused could not have been at two different places at the same time. It was upon the prosecution to lay out the cogent circumstances of the offence and evidently from this analysis they did not,

50. To the extent that this evidence is at variance with the charge sheet then it was defective. To the extent that the evidence did not bring out the particulars as set out on the charge sheet there was prejudice.

51. The Complainant was taken though a voire dire exercise by the court. The record does not state what language was used for the voire dire or for her testimony. The record shows that she used the terms penis and vagina in her testimony. In what language? Children will not ordinarily use these terms and the trial court needed to indicate the language. Kikamba and Kiswahili would be difficult as it is difficult for many people to state these in these languages as it is considered obscene.

52. In addition, in finding the accused guilty the trial court stated that the complainant informed the court that the accused was her boyfriend from 2021. That was not the case. That the accused defiled her on 5th March 2021 and in November 2021 she informed her brother who informed the grandmother about it in December 2021. The accused person was arrested on 5th May 2021. The court found that the old hymen scar was proof of defilement.

53. I have carefully considered this evidence. First the broken hymen per se is not proof of defilement. It must be accompanied by other evidence. The testimony of the complainant herself does not support the charge. These dates do not make sense. In November and December 2021 the appellant was in custody. The evidence that the appellant was both at the posho mill and in the bush where the prosecution claim the complainant was defiled is not humanly possible without further evidence on the part of the prosecution as to how this was possible.

54. The I.O presented a scenario that was not presented by the complainant or her grandmother. That there had been an elopement.

55. Neither her brother nor her teachers testified. The I.O did not investigate the matter but simply took the statements and left them hanging. It was necessary to speak to the brother as he was the one to who the first report is said to have been made, in December and the learned trial court did not analyse the import of the same.

Whether there was compliance with the requirement of voire dire.

56. The appellant complained that voire dire examination was short and inconclusive.

57. In our jurisdiction, it is now settled that voire dire examination must be conducted on children of 14 years and below. In the case of Patrick Kathurima-vs- Republic, [2015] eKLR; the Court of Appeal held:

> "We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a

> reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

58. The birth certificate shows that the complainant was born on 15/10/2008. She was therefore 12 years and 5 months at the time of the offence and voire dire was a requirement for her.

59. The record of 06/01/2022 shows that;

Voire dire examination PW1 states: Minor

> I am JNN. I live at Kalii. I am at school K... Primary School class 6. I am 14 years old. I understand the importance of an oath is to tell the truth and liar will go to hell and satan will burn them. I will tell the truth.
>
> Court: I am satisfied the minor understands importance of an oath. She is sworn.

60. It is evident that voire dire examination was conducted. Section 19 of The *Oaths and Statutory Declarations Act* Chapter 15 provide for Evidence of children of tender years and mandates the courts to test the capacity of children to understand the nature of an oath, and whether they are possessed of sufficient intelligence to testify. The trial court carried the voire dire and made the requisite determination before receiving the evidence.

61. There was compliance with the requirement of voire dire hence that ground of appeal lacks merit.

Whether the offence of defilement was proved to the required standard

63. The ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.

63. The age of the complainant was sufficiently proved to be 12 years and 5 months at the time of the offence.

64. With regard to identification, the complainant did not expressly say that the appellant was known to her but in her testimony, she stated that; "I can see the accused person on the screen. He is called David Mutunga." Her grandmother, PW2, testified that there was a particular Sunday when she saw Mutunga going to the place where the complainant was grazing in the bush, she followed and found him talking with the complainant. On being cross examined by the appellant, she stated; "I found both of you in the bush. You had no gallon. I beat Jane and told her to stop having an affair with you."

65. Further, the evidence of the I.O was that the complainant and her grandmother reported the incident on 05/05/2021 at around 10.00am and the appellant in his testimony stated that he was arrested on that same day at around 11.00am. This means that it was the complainant and her grandmother who mentioned the appellant to the police and even directed them to the appellant's home.

66. With regard to penetration, the doctor, PW3, testified that she examined the complainant and saw that the hymen was broken with an old scar. The P3 form describes the hymen as broken with old scar and the PRC form indicates that; 'There is evidence of serial penetration with hymen broken-old scar.'

67. As to whether the appellant was the culprit, the complainant testified that sometimes in 2021, the appellant found her at the posho mill and asked her to marry him. She refused and never did anything with him. That she had intercourse with him in 2021 in a month she could not recall. That it happened

when the appellant found her grazing in the bush, pushed her to the ground, lay on top of her, removed his penis and put it inside her vagina. She proceeded to testify that;

> "I felt pain and he rose up and went. He had removed his trouser half way and I wore my clothes and I went home. I got home at around 1.00pm. I found my grandmother Agnes Kavuli Tilela. I did not tell her in December I informed my brother Boniface Nzoki he had defiled me around November 2021. I informed my brother Boniface who informed my grandmother who informed my teacher and it was reported at Kavete police post."

68. Although the narrative in the totality of the prosecution case is that the appellant and complainant were in a sexual relationship, the complainant's evidence does not portray her as a truthful witness. In her evidence in chief, she said that the sexual intercourse did not happen on the day she was at the posho mill but on cross examination, she said the opposite. She could not recall the date and time of offence in her evidence in chief but said that it was 5/3/2021 during cross examination. Further, her evidence in cross examination shows that she was at the posho mill at the same time and date that she was being defiled which is practically impossible. She also talked of being defiled in November 2021 yet the report was made in May 2021.

69. PW2 may have found the complainant and appellant in the bush but she did not catch them in the act and that means that the only evidence guiding the court is that of the complainant. Section 124 of the *Evidence Act* allows courts to base a conviction on the solo evidence of a victim upon being satisfied that the victim is telling the truth. In our case however, the inconsistent evidence of the complainant does not inspire confidence of being truthful and considering the fact that the offence was reported two months later, this court cannot confidently say that the appellant was the culprit.

70. In the persuasive case of Philip Nzaka Watu –vs- Republic (2016) CR APP 29 OF 2015, the court had this to say about inconsistencies;

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

71. The learned trial magistrate relied on hearsay evidence from PW2 and concluded that evidence of the I.O, PW4, was corroborative yet it does not show that the I.O conducted any independent investigations. The I.O' s evidence was simply a reproduction of what she had been told by PW1 and 2.

72. From the totality of the foregoing analysis it evident that the prosecution failed to prove the charge beyond a reasonable doubt.

73. The conviction was unsafe. The same is quashed and the sentence is set aside.

74. The appeal succeeds. The appellant be set at liberty forthwith unless otherwise legally held.

DATED SIGNED AND DELIVERED IN OPEN COURT ON 18TH SEPTEMBER 2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

Court Assistant: Ms Nelima /Ms Elizabeth Court Prosecutor: Ms Nyakibia

Appellant Present

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-09-23 08:28:40