MWM v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 10649 (KLR) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E002 OF 2023

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

MWM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. F.M. Muguongo (SRM) at the Nyeri Law Court Sexual Offence Case No. E012 of 2021 delivered on 20th June 2023)

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. He seeks that his conviction be quashed and the life imprisonment sentence set aside.

2. The appeal is premised on the following grounds, that:-

    a. The trial court erred in both law and fact by failing to consider that the prosecution tendered single evidence to prove their case.

    b. The trial magistrate erred in law and fact while overlooking that the case was just framed up as there was a disagreement between parents in law.

    c. The trial magistrate erred in law and in facts while failing to observe that the prosecution case was full of contradiction and inconsistencies hence failed to prove their case beyond any reasonable ground.

d. The trial court erred in law and fact in not considering that the medical evidence was not done as required by law.

e. The trial court erred in law and facts when rejecting the defence which was not challenged by the prosecution.

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(2) of the *Sexual Offences Act*. The particulars of the offence were that on 9th February 2021 on diverse day at [Particulars Withheld] in Kieni west sub county within Nyeri County, he intentionally caused his penis to penetrate the vagina of E.W. a child aged below 11 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 diverse dates of February 2021 at unknown times at [Particulars Withheld] in Kieni west sub county Nyeri County, he intentionally touched the vagina, breasts and buttocks of E.W, a child aged below 11 years.

4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 7 witnesses.

C. Prosecution case

5. The trial court undertook voire dire examination of the victim, E.W, and found her fit to provide sworn evidence. She testified as PW1. In her statement, she referred to the accused and stated that she knew the accused person, as RM. That she had seen the accused at his home. It was her testimony that her mother, M, took her to the accused person's house, where they began living together. That RM put a balloon in his penis, and the balloon was a condom, then he laid on top of her.

6. She further testified that on the day of the offense, she had returned home from school in the evening and found no one at home as her mum was away at work. That as she was removing uniform and getting into home clothes, the appellant arrived, he found her still in trousers. He then removed both her trousers and his own. He remained with his T-shirt and jacket. She saw his penis, it was at night but he lit the lamp.

7. She further stated that she was lying on the bed and the appellant was lying on top of her and were facing each other he held his penis and inserted it inside her vagina where she uses to urinate. That the appellant warned her not to tell anyone or else he would beat her. PW1 stated that she went and reported what the accused person had done to her to a "shosho" who was a neighbour to RM. PW1 further stated that what the accused person wore over his penis was called a condom.

8. PW2, DR. William Murikui, a medical doctor working at Nyeri Provincial General Hospital stated that he had filled the P3 form for E.W which was a referral from Nairutia Police Station with a complaint of defilement by a father. The child was first seen at Bellevue Health Centre where the observations were that the child was walking with her legs spread apart, the child gave a history of being defiled by her father who had used a condom. PW2 observed that PW1's hymen was broken and she had a swelling and inflammation on her vagina. PW2 also observed a broken hymen, swelling and inflammation of the vagina. As at 15th February 2021 the child still had injuries on her vagina. PEP and STI medication were administered, PRC Form filled on the same day (10th February 2021) by his colleague Samuel Gichuhi.

9. PW3, MW, the mother of PW1 stated that she was living with the appellant MM, who had married her and together they had a child E.W. That in February 2021, the appellant defiled E.W. She testified that on the day of the alleged offense, she was engaged in a casual job by one Mama Kihara, and

did not return home that night. She had left the appellant and the child. Upon her return, she was informed by one Mama Faith that her child, PW1, had been defiled the previous night by the appellant. Subsequently, PW3, together with Mama F, proceeded to Nairutia Police Station to report, where she was detained in the cells for child neglect.

10. She further testified that, they slept on the same bed with the child and the appellant and that the incident was not an isolated one. That previously, the appellant had severally defiled PW1 after which he would threaten PW3 against taking any action. PW3 stated that despite them having a double decker bed, the accused would insist that the child shares their bed, strategically sleeping in between the accused and PW3 so that the accused would have sex with PW1 at night. PW3 further testified that PW1 would complain to her but as a mother she kept that information to herself.

11. PW4, Christoper Wachira a village elder Kamiruri Sub-location/Mugunda location. He stated that the accused person hailed from his area of jurisdiction and he is well known to him. He recalled the events of 10/2/2021 at around 1000hrs when he received a phone call from one Margaret Ngendo, a resident of his area and his neighbor. Margaret, who testified as PW5 reported to him that there was a child who had informed her that she had been defiled by her father the previous night. PW4 testified that he asked PW5 to take the child to him which she did and upon interrogating the child, (PW1) narrated that she lives with her mother and father and that they normally sleep in the same bed. She further stated that her mother did not return home for the night and her father defiled her. He stated that together with PW5, they escorted the child to Nairutia Police station where they made a report and handed over the issue to the police officers.

12. PW5, Margaret Ngendo, testified that on 9th February 2021 at around 0080hrs, she saw PW1 coming through her gate while crying. That she claimed to be hungry and PW5 gave her food but the crying could not stop and was restless. She stated that upon enquiring from PW1 the whereabouts of her mother, she mentioned that the previous night, the mother had not returned home for the night and so PW1 spent the night with her father who did not give her food but did tabia mbaya with her. That she asked what tabia mbaya was and she pointed at her private part and said she was in pain.

13. She further testified that upon getting that information, she informed PW4 who advised her to take the child to him and he interrogated PW1 who repeated what she had told PW5. She stated that thereafter, PW4 and PW5 escorted her to Nairutia Police Station where they reported the incidence.

14. PW6, CPL Paul Ngima testified that on the evening of 10/2/2021, he was working at Nairutia Police Station when PW5 went to the police station with a young child approximately 7 years and reported that she had been defiled by her step father. He testified that he accompanied PW4 to the scene at [Particulars Withheld] where they met the appellant at his home. He stated that they entered the appellant bedroom where they discovered an inner wear of a small child, a female panty that was stained and pinkish in colour. He further stated that they recovered a trouser jean bluish in colour for a small female and a white bed sheet. He testified that he took the items to the police station and then PW1 to Bellevue hospital where she was examined and PRC form filed. That the doctor confirmed that PW1 was defiled and was then placed at Neema Rescue Centre. He stated that the next day, the appellant was taken for further medical processing. PW6 identified Moffat as the appellant who was in court.

15. PW7 PC Evalyn Chepkurui, the Investigating officer stated that on 10th February 2021 a lady in company of a child aged approximately 7 years reported that the child E.W had been defiled by the step-father. She immediately commenced investigation by recording statements, and then in the company of other officers proceeded to the home of the appellant MM who was the accused before court. The appellant was then arrested and they recovered some exhibits; a white pant of a juvenile, a dirty white bed sheet and a juvenile trouser bluish. She also stated that on the same day E.W was taken to Bellevue

Health Centre and upon examination it was concluded that she had been defiled. A PRC Form was filled and she was taken to a Rescue Centre.

16. It was her evidence that the following day PW1 together with the appellant were taken to PGH Nyeri for further examination where the doctors concluded that E.W had been defiled and filled the P3 Form. Further she ascertained the age of E.W from her birth notification which showed the date of birth as 12th July 2013 and produced the following exhibits birth notification -Pexhibit 3; a dirty whitish/ creamish bed sheet Pexhibit 4; a pinkish dirty juvenile panty Pexhibit 5; a bluish juvenile jean trouser Pexhibit 6. That Pexhibits 4-6 were recovered from the appellant's bed and E.W indicated that those were the clothes she wore before being defiled.

17. Upon the closure of the prosecution case, the court found that the prosecution had establish a prima facie case and the appellant was placed on his defence. He chose to give a sworn statement and did not call any witness.

D. Defence case

18. DW1, the appellant, in his defence, stated that he was from [Particulars Withheld] and that, prior to his arrest, he was a casual laborer. He testified that he was married to MWM, but before his arrest, they had separated. He confirmed that at the time of his arrest, he was married to MWG, who had three children of her own. He stated that he did not commit the offense. He further testified that PW5, MN, informed him that his wife M1 belonged to M2, who wanted her back. He confirmed that on the day in question, M2 had left for a casual job but did not return, and therefore, he spent the night with PW1 only. He stated that in the morning, he told PW1 that he could not prepare her for school and, since she was unable to do so herself, she should stay at home. He explained that on the alleged day of the offence, he went to look for work but was unsuccessful, he returned home but did not find PW1. While at home, he saw a police land cruiser stop, and two men alighted, after which he was arrested and taken to Nairutia Police Station. He was later taken to PGH and then to Bellevue Health Centre, where he saw PW1.

19. It was his evidence that probably the injuries on PW1 vagina were caused by a 'boil' and that PW1 was fond of saying 'tabia mbaya' an issue he had questioned PW3 why PW1 kept saying 'tabia mbaya'.

20. Upon cross-examination, DW1 stated that PW3 had been his wife for one and a half months and that PW1 was 8 years old and the daughter of PW3. That they used to share the same bed with PW1 and PW3, and on that Tuesday PW3 did not come back home so he slept with PW1 on the same bed. He alleged that M2, PW3's ex-husband, framed him in order to take PW3 back but did not have any evidence to support this.

21. In its judgment, the trial court determined whether the ingredients of the offence of defilement had been established as below: -

    a. On the issue of the age of the victim, the trial court stated that the same was sufficiently proved by the production of the birth notification form serial number O52266 and since the victim was born on 12th July, 2013, she was 8 years old on the material period of the offence.

    b. On the issue of penetration, the trial court observed that medical findings in the PRC and P3 forms showed that she had an altered walking style, broken hymen and hyperemic vagina mild oedema at the vaginal orifice which conclusion according to Dr. William Muriuki was that she was defiled. Further, that there is no other explanation for the injuries save for the overwhelming evidence proving penetration.

c. On the third ingredient of identity of the perpetrator, the trial court observed that the appellant rightly placed himself at the scene of the offence and that further, the accused's identity as the perpetrator was not in issue.

22. Ultimately, the appellant was convicted under section 215 of the Criminal Procedure Code on the first count of defilement. On sentencing the trial court considered all mitigating factors and noted that the direction of the law had in mind children like E. W who need lifetime protection from sexual predators, the accused was sentenced to life imprisonment.

E. The Appeal

23. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the life imprisonment sentence set aside. The appellant relies on his undated written submissions filed on 20th September 2023, while the respondent relies on its submissions dated 21st November 2023 and filed on the same date. The parties' submissions are as follows:

Appellant's Submissions

24. The Appellant submits first that the case before the court just like other sexual offences are used to settle scores and for extortion. To support this argument, he relies on the cases of Eliud Waweru v Republic [2019] eKLR and Sawe v Republic [2003] eKLR.

25. The Appellant then submits that the elements of the offence were not proved as follows: -

a. On penetration, he submits that it was not proved to the required standard as the type of weapon used to cause penetration was not indicated by PW2 when he was testifying.

b. On the proof of age, he submits that there was no birth certificate availed to prove the same and an age assessment was never done by PW2.

26. The Appellant submits that essential witnesses were not called to testify contravening Section 144 as read with section 150 of the Criminal Procedure Code. These witnesses are; Mama Faith, Mama Kihara who was with PW3, MN who called PW4, a doctor from Bellevue Health Centre. He submits that failing to call these witnesses is prejudicial as it left the court in a limbo. He sought that this court be guided by the findings in the case of Bukenya v Republic [1975] E.A 57.

27. The Appellant further submits that there were contradictions in the prosecution's case particularly on the testimony of PW3 and PW1. He relied on the case of Augustino Njoroge v Republic Criminal Appeal No. 99 of 1968 among others. He further submits that PW3's ex-husband framed him because of a disagreement between the two of them and further because he wants PW3 back.

28. The appellant submits that the court while making its determination did not consider his evidence which is contrary to Section 211 of the Criminal Procedure Code.

29. The appellant urged the court to allow the appeal and set aside the conviction and sentence.

Respondent's Submissions

30. The respondent opposed the appeal in its entirety on grounds that the prosecution established and proved its case beyond reasonable doubt. That the ingredients of defilement namely; age, penetration and identification of accused were all proven. On the ingredient of age, the respondent submits that although the charge sheet does not state the exact age of the minor, a birth notification was produced as PExh3 stating that PW1 was born on 12/7/2013. On the ingredient of penetration, the respondent

submits that during the complainant's examination in chief, she confirmed that there was penetration and further, the P3 form and PRC form produced by Dr. William Muriuki confirmed all that was stated by PW1.

31. On the ingredient of identification of the perpetrator, the Respondent submits that despite the complainant stating the accused name as "RM", she confirmed that it is the accused person that stay with her and mother in the same house. That further, the appellant confirmed that on the night that PW3 was at work, he slept with PW1 alone. In that regard, the prosecution proved the case beyond reasonable doubt that it is the appellant who committed the sexual act constituting the offence.

32. On whether the defence tendered by the Appellant dislodged the prosecution case, the Respondent submits that the evidence was to the effect that the Appellant confirmed that he slept with PW1 when the mother was away and the evidence that PW1 had a boil was not detected by PW2 who examined PW1. That this evidence was keenly scrutinized by the trial court and the same ought to be dismissed.

33. The Respondent submits that the seriousness and gravity of the offence warrants the appellant being subjected to life imprisonment and therefore the Respondent has invited this court to uphold the same. The Respondent relies on the cases of Shadrack Kipkoech Kago v Republic Eldoret Criminal Appeal No. 253 of 2003 (CA) and *Manyeso v Republic, Criminal Appeal 12 of 2021*.

34. In urging the court to dismiss this appeal, the respondent urged this court to find that the grounds of appeal and submission devoid of merit.

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 submissions by parties, I discern the following issues for determination:

    a. Whether the offence of defilement was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh and excessive

Whether the offence of defilement was proved

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 8(2) states: a person who

commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

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 prosecution relied on the evidence produced as PExhib3, birth notification which showed the date of birth as 12th July 2013. The Appellant has in this appeal objected to the same and claiming that there was no birth certificate and/or age assessment was not done to prove the victim's age. The importance of proving the age of a victim in a defilement case cannot be gainsaid, it has been restated in several authorities and is well settled.

40. It is now an established principle that the age of a victim can be proven in several ways such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, or by observation and common sense among other credible forms of proof. These was well explained by the Court of Appeal in Malindi in *Mwalengo Chichoro Mwajembe vs. Republic, Msa. App. No. 24 of 2015* (UR)

41. In this case, a birth notification was produced as Pexhibit 3. The Birth Notification indicated that E.W (PW1) was born on 12th July 2013. The authenticity of the Birth Notification or its production was not challenged during the trial. I find the Birth Notification admissible and based on its contents, it is my further finding that at the time of the commission of the alleged offence, E.W was aged 7 years. She was thus a child below the age of eleven years as proscribed in section 8(2) of the Act.

42. On penetration, PW1 testified that on the fateful day she was alone with the appellant, that she was lying on the bed and the appellant was lying on "top of her " and were facing each other he held his penis and inserted it inside her vagina where she uses to urinate. PW2, Dr. William Muriuki testified that he examined the child on 15/2/2021 and found that her hymen was broken and there was swelling and inflammation of the vagina. PW2 further testified that the child was walking with her legs spread apart due to the injury on her private part-vagina. Further PW3 testified that, she saw the child crying and restless and upon inquiring, PW1 told her that her mother had not returned home for the night and so she spent the night with her father who did not give her food but did tabia mbaya with her and her private part was in pain.

43. This court finds that the foregoing corroborates the child's testimony and confirmed that the victim was penetrated. Notably, the trial court found that PW1 was a credible witness. It was convinced that she was telling the truth and that there was no reason for her to frame the accused noting that he was her step father and the one she was with on that night. I find her witness sufficient to prove penetration in accordance with section 124 of the *Evidence Act*, Cap. 80 Laws of Kenya.

44. Further, in the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus;

> "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."

45. Consequently, guided by the above, I find that the evidence of the victim and PW2, the Doctor, was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

46. The appellant in his submissions submitted that essential witnesses were not called to testify contravening Section 144 as read with section 150 of the Criminal Procedure Code. These witnesses are; Mama Faith, Mama Kihara who was with PW3, MN who called PW4, a doctor from Bellevue Health Centre all of whom were mentioned in the prosecution case. Perusing the record, indeed, the medical reports were produced by Dr. William Muriuki, a doctor at Nyeri County Referral hospital who also examined and confirmed the assessment of Samule Gichohi, the doctor at Bellevue Health Centre who first examined the child.

47. In Joseph Kiptum Keter v Republic [2007] eKLR the Court of Appeal held that:

> "... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

48. I am guided by the above authority, and take judicial notice that perpetuation of defilement cases are committed mostly in secrecy away from third parties, thus the rationale behind the proviso of section 124 of the *Evidence Act*. This section allows a court to convict on the evidence of a single witness, who in most cases is the victim, where the evidence is credible and admissible. The prosecution case will be impugned if a witness that was not called was crucial that his failure to be called was meant to steal a match on the accused. However, in this case, the mentioned persons were not crucial witnesses. They are not stated to have been eye witnesses to the matter. It has not been demonstrated that failure to call them meant that some evidence was not placed before court, which would have exonerated the appellant.

49. Consequently, I find that, although the mentioned witnesses were not called to testify, there is nothing further that they would have provided that was not already presented to the court by those who testified. I find that there is no obligation on the prosecution to call all the witnesses named to testified, as long as the evidence adduced sufficiently established the elements of the charge against the appellant.

50. Turning to identification of the perpetrator, PW1 testified that RM was the one who did bad manners to him. Further, the PW1 identified the said RM as was the accused person before court. She further testified that they lived in the same house and the offence was committed when the mother was not at home. This was further supported by PW3 M W, the child's mother who confirmed that she was not at home but she left the child and the accused at home. Further, the appellant by his own admission during the defence hearing stated that he had spent the night with PW1 only and that PW3 had been his wife for one and a half months and that PW1 was 8 years old and the daughter of PW3. That they used to share the same bed with PW1 and PW3.

51. From the above set of facts, the appellant having lived with PW3 and PW1 was well known to the child. The appellant was well identified as the person who defiled the child and the trial court found that his evidence was not credible and dismissed it. The child was found to be credible and the court also found no ground for her to maliciously implicate the appellant. I hasten to add that the appellant does not dispute the fact that he was known to the victim.

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 fails.

Whether there were contradictions and inconsistencies in the prosecution case

53. 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 M Mwangi vs. Republic Criminal Appeal No. 73 of 1993, that:
>
> "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..."

54. 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.

55. The appellant alleges that the contradictions arise in that the minor stated that the person who defiled her was Mwangi which is not the accused name. I have looked at the evidence and despite that averment, it did not prevent the child from positively, identifying and pointing out that it is the accused as the person who defiled her.

56. The appellant also submitted that the evidence of PW3's contradicted that of PW1. I note that the evidence of PW1 was on the events of what transpired on the fateful day whereby she also stated that PW3 was not at home. PW3 evidence infact corroborated that of PW1 when she stated that she was not at home when the alleged offence occurred. I do not see any contradiction relating to this offence.

57. I take cognizance of the fact that, given that the trial court observed and found the victim to be believable and credible, I find no reason to disturb this finding.

58. Notably, I also note that the appellant by his own admission told court that PW3 did not return, and therefore, he spent the night with PW1 only. He stated that in the morning, PW1 could not prepare for school and, since she was unable to do so herself, she stayed at home. This too goes to corroborate PW3 evidence that indeed the appellant was the only person with the victim.

59. As to the appellant's evidence that probably the injuries on PW1 vagina were caused by a 'boil' and that PW1 was fond of saying 'tabia mbaya', this was discredited by the doctor PW2 who informed court that upon examining the victim he did not see a boil. Hence the evidence of the appellant did not discredit that of the prosecution.

60. Therefore, I find that the appellant has failed to demonstrate the existence of any contradictions or inconsistencies in the testimonies of the witnesses, or that any such inconsistencies and contradictions were of a degree that prejudiced the appellant. Consequently, this ground of appeal also fails.

Whether the sentence was harsh and excessive

61. Section 8(2) of the *Sexual Offences Act* which provides for sentencing that:

> "(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

62. The offence of defiling a child aged eleven years or less, with which the Appellant was charged with, prescribes a mandatory sentence of life imprisonment. The appellant urges this court to find that the life imprisonment sentence was harsh and excessive although he has not provided any submissions on this matter. I take judicial notice that sentencing falls within the discretion of the trial court, and this court may only interfere with that discretion under very exceptional circumstances.

63. I also note that during mitigation, the appellant, pleaded for the court's leniency, citing his need for cerebral malaria medication and explaining that he is the only one who tends to their farm in Mugachi, leaving no one else to care for it. In sentencing the appellant, the trial court noted the provision of section 8(2) of the *Sexual Offences Act* which prescribes a life sentence when the victim is below the age of 11. Consequently, I find that the trial Court did not err in passing the sentence as it was adequately guided by the clear provisions of section 20(1) of the *Sexual Offences Act*.

64. This notwithstanding, the Court of Appeal in the case of *Akhonya v Republic (Criminal Appeal 269 of 2019)* (2024) KECA 327 (KLR) (15 March 2024) at Kisumu (Unreported) allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement. In so doing, the Appellate Court had this to say: -

> "8. Our most recent jurisprudence has similarly declared life imprisonment as unconstitutional due to the indeterminate nature of the sentence. See Frank *Turo v Republic- Kisumu Criminal Appeal No. 157 of 2017* and Evans Nyamari *Ayako v Republic- Kisumu Criminal Appeal No. 22 of 2018*.
>
> 9. In the Evan Nyamari Ayako case, this court in applying Articles 27 and 28 of *the Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.
>
> 10. Consequently, we must allow the Appellant's appeal herein to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of Section 8 (2) of the *Sexual Offences Act*, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.
>
> 11. In the specific circumstances of this case, however, we would agree with the Respondent that the objective seriousness of the case and the aggravating circumstances make the life sentence a commensurate sentence: the survivor of the ordeal was a girl of extreme tender years at 8 years old; and the atrocity committed on her resulted in extensive damage and impact to her. The offence called for a stiffly deterrent sentence; one that signals the society's opprobrium to the conduct of the appellant as it reflects the inherent seriousness of the offence."

65. I have considered the above superior court's decision, which I am duly bound by. Consequently, I do set aside the indeterminate life imprisonment sentence herein and replace it with a life sentence of 30 years in prison.

66. Ultimately, this court makes the following orders;

    i. The Appeal on conviction is dismissed and the trial court decision on the same upheld.

    ii. The Appeal on sentence partly succeeds to the extent that the indeterminate life imprisonment sentence is set aside and substituted with a life sentence of thirty years imprisonment.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024.

RHODA RUTTO

JUDGE

For Appellants:

For Respondent:

Court Assistant: