T v Republic (Criminal Appeal E007 of 2020)
[2024] KEHC 10639 (KLR) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E007 OF 2020

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

SNT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the Judgment of Hon. V. S. Kosgei (R.M) at the Karatina Principal Magistrate Court Sexual Offence Case No 35 of 2019 delivered on 19th October 2020))

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 45 years imprisonment sentence set aside.

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

    a. He pleaded not guilty and still remains the same.

    b. The trial Magistrate erred in both law and facts in failing to notice that he was convicted and sentenced on a code that was inconsistent with the age of the minor.

    c. The lower court erred in both law and facts when convicting the Appellant to that extent and failed to notice that the C. O's testimony contradicted the whole testimony of the other witnesses.

d. The trial court continued to error both in law and in facts when convicting on the fabricated case without bearing in mind that already some of the witnesses had stated that disputes and grudges were prior to the instant matter.

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 28th December 2019 at Mathira East Sub- County within Nyeri county he unlawfully and intentionally caused his penis to penetrate the vagina of J.M a child aged 12 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 28th December 2019 at Mathira East Sub- County within Nyeri county he unlawfully and intentionally touched the vagina of J.M a child aged 12 years with his penis.

4. The appellant pleaded not guilty to both charges and to prove its case, the prosecution called 5 witnesses.

C. Prosecution case

5. The victim, PW1, J.M stated that on 28/12/2019 night, she was home and asleep on the bed. That their house is one roomed and they lived together with her mum and the Appellant. That someone came to her bed removed the blanket, then her clothes, a night dress and a pant, and told her that if she shouts, he would kill her. She stated that the person removed all his clothes and inserted his thing that he uses to urinate on her private part. She further stated that at the time her mother had gone to the toilet and when she returned, he jumped back to his bed. She stated that in the morning, they went to her grandmother's and when she was there, she felt a lot of pain when she went to the toilet and she could not walk well. She stated that she was afraid and could not tell anyone. That someone noticed that she was not walking well and called her aunt C who checked on her private parts and when she asked her what the problem was, she told her what happened. She stated that at that point, her mother was present and the matter was reported and she was taken to the hospital in Karatina (Murima). She stated that she knew the person who did that, it was him since there was no other person inside and he had talked to her that night. On cross examination, she stated that she knows that the accused does not agree with her Aunt CW but she did not tell her anything.

6. PW2, WW, mother to the victim, testified that the victim is 12 years old and relied on a notification of birth (marked PMFI1) showing that the victim was born on 10th March 2008. She testified that the appellant was her husband and on 28/12/2019, she was in her house with her daughter and the husband. That she went out to the toilet and when she came back, she slept and then in the morning, they left for Karatina Kayaba to her mother's place. That while at Kayaba, she stated that someone called G M, son to her cousin stated that W had informed her that the victim was walking badly and so together with W, they checked the victim. She testified that she saw white things in the victim's private part and when she asked the victim about it, she stated that it was her father who had defiled her.

7. She further testified that they went to Karatina police station and the victim was taken to Karatina Hospital. On cross examination, she stated that it is true the appellant had issues with her sister W because she said the appellant keep defiling the girl yet the appellant said it was not him.

8. PW3, CW testified that JM, the victim was the daughter to her sister and the Appellant was married to her sister. She stated that on 28.12.2019, the Appellant defiled JM. That she checked the child and confirmed that she had been defiled. That the Appellant and her sister had come home as they kept

fighting each other. She testified that someone informed her that the child was walking badly and she should check on her. She confirmed that the child was walking badly. Further that she asked the child who said that her father defiled her. That she saw water coming out of her private parts, it looked like watery substance from a man. The matter was then reported at Karatina Police Station and the girl was taken to hospital at Karatina hospital.

9. PW4 250140 PC Caroline Wanja, the investigating officer testified that on 29/12/2019, she was at the station and was called by the OCS saying that there was a defilement case. She stated that she found a child, her mother and Wahito and interrogated them. She testified that the mother of the victim informed her that the victim was defiled by her father and was taken to Karatina hospital where a P3 form and PRC form was filled. She further stated that after they recorded statements, she accompanied them to where they lived but could not access the house since the suspect had locked it. She further stated that she requested for reinforcement of PC Kemboi and they went to the school where the accused was working where he was identified by the headteacher and they arrested him. She produced the birth notification as PExhibit 1 which revealed that the victim she was born on 10/3/2008.

10. PW5 Dr. Stephen Nderitu a doctor at Karatina Sub-county produced as PExhibit 2 a P3 Form filled on 29/12/19 and PExhibit 3, a PRC Form filled in favour of the victim by his colleague, Dr. Mwangi who was on leave. He stated that the report indicated the nature of offence as defilement. He testified that the P3 form gave a history of the defilement on 28/12/2019. The victim's private parts showed no hymen and had injuries which were minor and there was dirt on her private parts. He testified that the PRC form showed that she was born in March 2008 and stated that the father inserted his hand on her private parts and defiled her. That the results showed broken hymen and mild hyrethenal and white discharge in the vagina. On cross examination, he stated that the hymen was absent, injuries fresh, white discharge was dirt and not normal. He further stated that the discharge does not come if there is no infection. He confirmed that from the documents, it revealed that there was defilement.

11. With these 5 witnesses, the prosecution rested its case. 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 an unsworn statement and did not call any witness.

D. Defence case

12. DW1, the appellant, stated that he is 37 years old and resides in Ruthagati and before his arrest, he was employed as a cook at Pan Africa Secondary School. DW1 testified that he had a disagreement with his wife (PW2), and on 29th December 2019, he took her to her home in Kayaba. He further testified that a friend of his wife asked her to take firewood to a coffee factory, and she overstayed. When his wife returned, they had an argument, and he admitted to slapping her twice. He stated that he was intoxicated at the time, and his wife screamed, attracting people who came to inquire why he was assaulting her at her home. He further testified that on 30th December 2019, he was at work when he was arrested. He claimed that the charges brought against him were fabricated by PW3, with whom he had an affair, but he ultimately chose to marry PW2. He added that PW3 is PW2's sister and was against his marriage to PW2 to the extent that she used the complainant to ensure his separation from PW2. He also stated that the victim is his stepchild.

13. After the close of the defence case the appellant chose not to file any submissions and ultimately, he was convicted under section 215 of the Criminal Procedure Code for defilement.

14. On sentencing the trial court considered all mitigating factors and took into account the mandatory sentence of life imprisonment having been revised after the reasoning of Muruatetu case, the

aggravating circumstances of the case and the fact that the accused never pleaded guilty, the accused was sentenced to serve 45 years imprisonment.

E. The Appeal

15. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the 45 years imprisonment sentence set aside. The appellant seeks to rely on his undated written submissions filed on 13th July 2022, while the respondent sought to rely on its submissions dated 7th November 2022. The parties' submissions are as follows:

a) Appellant's Submissions

16. The Appellant submits that the court erred in convicting him on a charge that is inconsistent with the age of the victim. He submits that the charge sheet indicated that the victim was 12 years yet the charge sheet stated that he is being charged with an offence as per Section 8 (2) of the *Sexual Offences Act* which gives a punishment of life imprisonment. The Appellant submits that the trial court erred in amending the charge sheet at Paragraph 17 of the judgment for a mistake done by the prosecution in indicating that the victim was 12 years old at the time of the incident yet she was not. The Appellant submits that the amendment by the trial court violated Section 214 of the *Criminal Procedure Code* since he was not allowed to or given an opportunity to take plea to the new charges. To buttress his argument he relied on the cases of *Yongo v Republic* Criminal Appeal No 1 of 1993.

17. The Appellant's submits that the Clinical Officer's evidence contradicted the other witnesses' evidence and that the trial court erred in failing to notice the same. The Appellant further submits that the evidence of a doctor is the most credible evidence and once it has failed, it calls for an acquittal of an accused.

18. The Appellant further submits that since the witnesses testified that there was a grudge, the court ought to consider that in looking into the circumstances of the case. The appellant urged the court to allow the appeal and set aside the conviction and sentence.

b)Respondent's Submissions

19. The respondent opposed the appeal in its entirety on grounds that the prosecution established and proved beyond reasonable doubt the ingredients of defilement namely; the act of penetration, that the perpetrator was identified and linked to the offence and the age of the victim.

20. On the ingredient of act of penetration, the Respondent submitted that the prosecution called PW1 who explained how the incident happened on 28/12/2019. That her testimony was clear as to what was done to her which was to the effect that she was defiled. The Respondent also submitted that the victim was examined at the hospital and the doctor testified that the injuries noted on the victim's genitalia were fresh and consistent with the offence of defilement. That based on the medical documents, there was evidence of defilement.

21. On the ingredient of identity of the perpetrator, the Respondent submitted that the Appellant was identified by way of voice recognition and basic recognition since this was a person well known to her. That the record confirms the victim spoke to the appellant during the ordeal and that he even threatened to kill her. Further, PW1 described the perpetrator as the person who used to live with her in their one roomed house. Further that PW2 confirmed that the appellant was her husband and that they used to stay with him and the victim at their house. PW3 also confirmed that the appellant was married to her sister PW2. Also, that in his defence the appellant conceded to the fact that he was

married to PW2 and that the victim was his stepchild. The Respondent therefore submitted that the Appellant was properly identified as the person who committed the sexual offence.

22. On the ingredient of age, the Respondent submits that the prosecution proved that the victim was 11 years old and 9 months old when she was defiled. That PW2 told the court that she was born on 10/3/2008 and she identified an acknowledgment of Birth Notification as proof of age. The Respondent submits that this ingredient was proved beyond reasonable doubt.

23. As to whether the discrepancy in age of the victim in particulars of the charge in comparison to the evidence tendered was fatal to the prosecution's case, the Respondent submits that PW4 found that the victim was 12 years at the time of the incident. However, to prove age, a birth notification indicated that she was born on 10/3/2008. The Respondent further submits that the trial court at Paragraph J4 found that the victim was a minor within the provisions of Section 8 (2) of the *Sexual Offences Act* which position was proper. The Respondent relies on the case of *Hadson Ali Mwachongo v Republic* [2016]eKLR which held that a victim whose days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. The Respondent also relies on the case of *Alfayo Gombe Okello v Republic* and *JMA v Republic* [2009] eKLR.

24. The Respondent further submits that the defect in the charge sheet is curable under Section 382 of the *Criminal Procedure Code.* Further, that the Appellant did not suffer any prejudice during trial as he fully participated throughout the proceedings by cross examining all witnesses when he was aware of the charges against him and evidence adduced to support the charges. The Respondent submits that the discrepancy on the age in the charge sheet does not go to the root of conviction and did not occasion a miscarriage of justice. To support this argument they rely on the case of *JMA v Republic* (2009)KLR 671.

25. On whether the trial court's finding that the victim was 11 years and 9 months amounted to amendment of charge sheet, the Respondent submits that the charge sheet did not bear a defect that warranted an amendment under Section 214 of the *Criminal Procedure Code*. That the discrepancy does not go to the root of the conviction and is therefore curable under Section 382 of the *Criminal Procedure Code* since the Appellant was not prejudiced during the trial. It was further submitted that the discrepancy on the age as contained in the charge sheet and as contained in the evidence adduced by the prosecution did not occasion a miscarriage of justice.

26. The Respondent further submits that the purpose of Sections 8(1) to 8(4) of the *Sexual Offences Act* is to aid in sentencing accused persons if found guilty. That Section 8(2) of the *Sexual Offences Act* deals with defilement of a child of 11 years or less which provides for life imprisonment and despite the foregoing, the trial court sentenced the appellant to serve 45 years imprisonment. That the Appellants argument that the sentence imposed was based on the wrong age of the victim and not within the law was wrong as Section 8 (3) of the *Act* covers the bracket of 12 to 15 years and provides for imprisonment of not less than 20 years does not hold. Besides, the Appellant benefited from the court's leniency by being sentenced to 45 years instead of life imprisonment.

27. On whether there were contradictions and inconsistencies in the prosecution's case, the Respondent submits that when the doctor was testifying, he did so as an expert witness and he included the word defiled in his findings which is taken to mean penetration into a genital organ by use of a genital organ. The Respondent further submits that the doctor's evidence was not that of a direct witness or as an investigating officer and so his evidence was not in any manner related to how the incident occurred or what was used during the ordeal. The Respondent further submits that the Appellant has not pointed out any material contradictions and inconsistencies and therefore none existed and if there were any, they were minor and do not go to the root of the prosecution case.

28. As to whether there was an existing grudge between the Appellant and PW3, the Respondent submits that the Appellant never raised the issue of an existing grudge during his cross examination to PW3 and only raised it substantially during his defence. He also gave unsworn evidence and therefore the issue was never tested in a cross examination. Therefore, the respondent urges that it was an afterthought and should be disregarded.

29. As to the appeal on sentence, the Respondent submits that the Appellant benefited from the courts leniency by being sentenced to 45 years instead of the prescribed sentence of life imprisonment which is sufficient and should not be interfered with.

30. In urging the court to dismiss this appeal, the respondent stated that the prosecution established all the requisite elements for the offence of defilement.

F. Analysis And Determination

31. 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."

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

    a. Whether the charge sheet was defective;

    b. Whether the offence of defilement was proved;

    c. Whether there were contradictions and inconsistencies; and

    d. Whether the sentence was harsh.

a. Whether the charge sheet was defective;

33. The appellant faults the trial court for amending the charge sheet, arguing that the trial court, upon being presented with evidence of the victim's age, concluded that at the time of the incident, the victim was 11 years and 9 months old, whereas the charge sheet stated that she was 12 years old.

34. He urges that this discrepancy rendered the charge sheet defective and hence the trial court erred in amending it, that he ought to have taken plea afresh.

35. On the other hand, the prosecution case was that, the incident happened on 28/12/2019. PW2, the mother of the victim, testified that the victim was 12 years old while a copy of the Acknowledgement of Birth Notification, PExhibit 1, which showed that the victim was born on 10/3/2008.

36. In addressing the issue the trial court stated as follows: -

> " 15. The accused has been charged under Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The Prosecution's case was that the complainant was born on 10.3.2008.
>
> 16. This means that the complainant at the time of defilement was aged 11 years and 9 months old thus not yet of age 12.
>
> 17. The accused never raised any issue to indicate that he was against the age already established by the prosecution. It is the finding of the court that the complainant was 11 years at the time of the offence thus below the age of 11 years anticipated by the *Sexual Offences Act* tat Section 8 (2). This court is therefore satisfied that it was proved beyond reasonable doubt that the complainant was below the age of 11 years at the time of the commission of the alleged offence."

37. It is trite that an accused person should be charged with an offence that is known in law. A charge should also specify or spell out all the relevant information in such a manner that would enable an accused person put up an appropriate defence. This principle is premised on Section 134 of the *Criminal Procedure Code* which stipulates the manner in which a charge should be drafted as follows: -

> " 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."

38. I have considered the evidence tendered and the parties' submissions and it is noteworthy that the charge sheet indicated that the victim was 12 years yet she had not attained that age as at the time of the alleged offence. Thus, the question for this Court's determination is whether the variance renders the charge defective.

39. In *Yongo v R* [1983] eKLR the Court of Appeal held that a charge can be defective if the evidence adduced in its support is at variance with the offence disclosed in the charge or its particulars. It stated thus: -

> " In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> i. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;
>
> ii. when for such reason it does not accord with the evidence given at the trial."

40. Also, in the Court of Appeal case of *Peter Ngure Mwangi v Republic* [2014] eKLR the court while addressing a defective charge held that: -

> " 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."

41. Further, Section 382 of the *Criminal Procedure Code* provides a remedy for defects in charges sheets. It states as follows: -

> 382; Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

42. Following this, the Court of Appeal gave guidance on determining whether a defect in a charge is fatal in *Benard Ombuna v Republic* [2019] eKLR 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."

43. Flowing from above, a charge can be defective but not fatal. The test for determining whether a charge sheet is fatally defective is a substantive rather than formal one. The key consideration is whether a defect in the charge sheet prejudiced the appellant to the extent that he was unaware of, or confused about, the nature of the charges against him, thereby hindering his ability to mount an appropriate defense. Was this the case here? I do not think so.

44. In this case, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. 8(2) 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.

45. Based on this it is therefore clear that the appellant was aware that he was being charged with the offence of defilement where the minor had not attained the age of twelve years, under section 8(2) of the *Act*. This is further buttressed by the occurrences during hearing whereby he had an opportunity to cross examine all witness and to present his case on the offence of defilement. The error did not prevent him from responding to the charges against him.

46. This court also takes note that the issue of the age of the victim at this moment does not in any way interfere with the ingredients of proving the offence of defilement, to wit, whether the victim was a minor (below 18 years), whether there was penetration, and identity of the perpetrator. However, the age of the victim herein is paramount in view of the sentence as prescribed under the *Sexual Offences*

Act. I thus find that the error regarding the age in the charge sheet is so remote that it does not render the charge sheet fatally defective or the conviction a nullity. Given the proved age of the victim, the appellant was charged under the correct legal provision. This defect is therefore curable under Section 382 of the Criminal Procedure Code, as it does not result in any miscarriage of justice.

b.Whether the offence of defilement was proved

47. 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.

48. On the issue of age, the prosecution case was supported by the PExhibit 1 a copy of the Acknowledgement of Birth Notification which showed that the victim was born on 10/3/2008. There was no objection to its production during trial hence it is evidence on record. This means that the victim was 11 years old and 9 months old when alleged incident if defilement occurred. Flowing from the foregoing I find that the prosecution proved the ingredients of age. She was eleven years old having not yet celebrated her 12th birthday.

49. On penetration, the victim testified that the appellant defiled her when the mother went to the toilet in the middle of the night. She explained that the appellant inserted the thing that he uses to urinate to her private organ. This evidence is collaborated by PW5 through the production of the medical forms produced as Exhibit 2 and 3. The report showed that she had a broken hymen and mild hyrethenal and a white discharge in the vagina. This evidence 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 considering that she stays with them. I find her testimony sufficient to prove penetration in accordance with section 124 of the *Evidence Act*, Cap. 80 Laws of Kenya. This was then, corroborated by the medical evidence.

50. 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."

51. Consequently, guided by the above, I find that the evidence of the victim and PW5, the Doctor, was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

52. Turning to identification of the perpetrator, PW1 testified that she lives together with the appellant and her mother. This was further supported by PW2 and DW1's testimony. All this goes to address the issue of identification of the appellant, by the victim. The appellant being a step father, was well known to the victim. The appellant was well identified as the person who defiled PW1 and the trial court found that his evidence does not raise any doubt to the evidence relied upon by the prosecution and dismissed it. I hasten to add that the appellant does not dispute the fact that the victim knew him.

53. 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 must fail as it surely does.

C.Whether there were contradictions and inconsistencies in the prosecution case

54. 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 v. 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..."

55. 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.

56. The appellant alleges that the contradictions arise in that the medical officer's evidence contradicted the victim's testimony. That the medical officer stated that the examination revealed that the father inserted his hand on her private parts and defiled. I have looked at the evidence and despite that averment, it did not prevent the child from identifying and pointing out that it is the accused who defiled her when he removed all his clothes and inserted his thing that he uses to urinate on her private part. Further, by the doctor's own admission the father inserted his hands into her private parts and defiled her. A reading of this statement they use of the conjunctive 'and' shows that both events (namely insertion of the hand and defilement) occurred.

57. Notably, the trial court having observed and found that the victim was persuasive and credible, I find no reason to disturb this finding. I also find that the appellant has failed to demonstrate the existence of any glaring contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant. Consequently, this ground also fails.

D. Whether the sentence was proper

58. The appellant was sentenced to 45 years imprisonment. In passing sentence, the trial court considered all the mitigating factors and noted that: "Taking into account that the mandatory sentence of life imprisonment was revised after the reasoning in Muruatetu case, looking into the case of David Esoku Samuel in which the court sentenced the accused to 25 years after 11 years in custody, the aggravating circumstances of this case and the fact that he never pleaded guilty. The court will sentence the accused to 45 years in jail....".

59. The Appellant did not submit much on this save to mention that the sentence be set aside as the appeal has merit. I however note that trial court did not peg the sentence to the mandatory nature of sentence as provided for under the *Sexual Offences Act*. The court gave a deterrence sentence having considered the jurisprudence as at that time. This court finds no reason to disturb the sentence.

The upshot is that the appeal on conviction fails for lack of merit. As regards sentence, the 45 years imprisonment sentence is also upheld save that in its computation, regard shall be borne to the period in remand custody during trial, from 31st December 2019.

60. Orders accordingly.

RHODA RUTTO

JUDGE

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

For Appellants:

For Respondent:

Court Assistant: