MNW v Republic (Criminal Appeal E019 of 2024)
[2024] KEHC 12982 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12982 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E019 OF 2024

DKN MAGARE, J

OCTOBER 24, 2024

BETWEEN

MNW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. E. Kanyiri, (PM) in Karatina PMCSO No. E028 of 2021.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars of the offence were that the Appellant, on 11th October, 2021 at , Ruthagati Sub-location within Mathira West Sub-county of Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of CWM, a child aged 16 years.

4. The accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded. The trial court heard a total of 6 prosecution witnesses and the Appellant. The court considered the evidence and rendered judgment. The court found the Appellant guilty and sentenced him to life imprisonment. The Appellant, aggrieved, lodged this appeal. the Petition of Appeal raised the following grounds:

    a. The learned trial magistrate erred in failing to establish that the evidence of the minor was doubtful and incredible.

    b. The learned trial magistrate erred in law and fact in failing to establish that the ingredients of defilement were not proved.

c. The learned trial magistrate erred in law in failing to appreciate material discrepancies in the evidence of the prosecution.

d. The learned trial magistrate erred in law and fact in failing to appreciate the Appellant's defence.

e. The learned trial magistrate erred in law in failing to find that the prosecution did not prove its case to the required standard.

Evidence

5. At trial, the minor PW1 testified that someone, her father did something bad to her. That her father slept on her. She was on the bed. She had her clothes. When he slept on her she felt pain. That he lifted her clothes and put his susu in her susu. Her mother was bathing. According to her it was the first time he put his susu in her susu. He did it again three more times. She told her mum that someone had slept on her, that her father had slept on her. On cross examination, it was her case that it was at night and she was wearing her clothes. That the children she played with never slept on her.

6. The complainant's mother also testified as PW2. It was her case that she came to the house and found the Appellant naked on bed. That he covered himself with a blanket and took a torch from PW2. The flash light was on. It was her evidence that the child was also on bed. Her panties had been removed. He threw the flash light to the wall. She took the minor, dressed her and stepped out and the Appellant also stepped out and went to his grandmother.

7. The Appellant then called PW2 to the kitchen and asked for food but she refused to serve him and he slapped her. That after some days, the Appellant sent PW2 to bring some pepper and salt. When she came back, she found the Appellant on bed with the minor. He had removed the child's panties and the child was asleep. That the child was on the floor and the Appellant on bed. That on the material day, PW2 went to take a bath.

8. The witness testified that she went to bed after the child was asleep on the floor and the Appellant was on bed. The child asked to be taken for short call and PW2 took her. They came back and the child told PW2 that she was in pain in her genitalia. That the child had gone for long call and there were sperms on the stool and no blood. PW2 knew that the Appellant had slept with the minor. The child was taken to hospital on 18/10/2021.

9. On cross examination, it was the case of PW2 that she took the minor to the hospital later because the minor was in pain. That the neighbor did not tell her to insert her fingers in the minor's genitalia.

10. PW3 was Jane Wakarura. It was her testimony that the minor came with her mum and had stayed with the Appellant for about 2 months. She was informed on 12/10/2021 that the incident had happened. She did not take any action until 18/10/2021. They took the minor to hospital and filled the P3 form and the child was given medication.

11. On cross examination, it was her case that it is the doctor who concluded defilement and not herself. That she catered for treatment costs. Further, she stated that she did not advice PW2 to put fingers in the child's genitalia.

12. PW4 was PC Gladys Nzilani. She was the investigating officer. It was her case that preliminary findings from the medical documents inferred that the child had been defiled. These were P3 and PRC forms. That the minor said the Appellant defiled her and PW2 said the Appellant had previously attempted to defile the minor. She did not go to the scene because the defilement had occurred days before. That they took long to report because the Appellant threatened them. This evidence was not from any other

witness. On cross examination, PW4 continued that PW2 was not mad but was not confident. It was her case that she had no clothes as exhibits. She relied on the P3 and PRC form.

13. PW5 was the medical doctor who produced the PRC and P3 form. He testified that Dr. Nguru Maina examined the minor and found out that there was a claim that the child was defiled by the stepfather. His evidence was that the incident was not reported as the mother was very unstable mentally.

14. It was his case that the hymen was broken on examination. That there were also injuries on the vagina. She was 3½ years old. He relied on the P3 and PRC forms produced in evidence. He testified that the minor was defiled on 6/10/2021 and was medically examined on 18/10/2021 after about 12 days, and lacerations were seen 12 days later.

15. On cross examination, it was his evidence that he did not know if the hymen broke as a result of playing. The case had not been reported earlier as the mother was mentally unstable.

16. The court issued a warrant for the next witness, who was brought under warrant and testified as PW6 stating that her name was Frecia Njeri Wanyika, a neighbor and wife of the Appellant's brother. It was her case that she was part of the crew that took the minor to the police station and to the hospital.

17. On his part, the Appellant also testified in court as DW1. It was his case that he was called to Kiamachimbi Police Station on 18/10/2021 and was referred to the charges facing him on 19/10/2021. That the child was taken to hospital after two weeks of the alleged defilement. That he had had issues with PW3 who threatened him with undisclosed action.

18. Further, that he had a previous wife called Doreen and she left before he married PW2. That he warned PW2 from mingling with the neighbors whom he thought were not good. The witness had fallen out with the family of the Appellant. On cross examination, he stated that PW2 did not tell him about the defilement. There were 3 houses in the compound but it was not known if PW2 told anyone.

Submissions

19. The Appellant filed submissions on 1st March, 2024 and submitted that the critical elements of the crime were not proved beyond reasonable doubt; that is penetration. He cited among others the case of Charles Wamukoya Karani v Republic Criminal Appeal No. 72 of 2013.

20. On the basis of the above case, the Appellant submitted that it was not proved that he penetrated the minor with his penis on the material day. He further submitted that the medical doctor's report and testimony was not conclusive that the injuries noted on the genitalia as well as the absence of the hymen was consistent with sexual penetration. He relied on the case of PWK vs. Republic (2012) eKLR.

21. The Appellant also submitted that there were discrepancies and inconsistencies in the evidence by the prosecution. He questioned the evidence of PW3 that the child's panties were dirty and the evidence of PW2 that the stool had sperms. Also, that the report was made two weeks after the alleged defilement which was suspicious. He submitted that PW2's testimony that the child was defiled while PW2 was asleep in the bathroom was questionable.

22. Therefore, it was submitted that the testimony and evidence of the prosecution witnesses lacked credibility. Reliance was placed on the case of Ndungu Kimani vs. Republic (1979) KLR 282 to submit that evidence of a witness should not create an impression on the part of the court that he is not straightforward and is of doubtful integrity.

23. On sentencing, he relied on Francis Karioko Muruatetu vs Republic (2017) eKLR to submit that the sentence of life was not constitutional and should be interfered with.

24. The Respondent did not file submissions, which was unusual. Nevertheless, I considered the evidence on record and the law to reach a just decision.

Analysis

25. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

26. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

27. The issue in this case is whether the prosecution proved its case to the required standard. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

28. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

29. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

30. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

31. Section 5(1)(a) (1) and (2) of the *Sexual Offences Act* under which the Appellant was convicted provides as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

32. On my reevaluation, courts in criminal cases ought to consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was to serve life imprisonment upon conviction. This must be a serious offence which requires the clearest view of evidence to justify keeping the Appellant behind bars for life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences whose punishment went beyond the effect on the individual but to the state at large. Conviction and sentence as a sexual offender was a badge that a convict could only deserve based on undoubted evidence.

33. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others. The court will thus evaluate evidence for fidelity to the truth, having regard to the limitations related to demeanor. The minor's evidence needs to be corroborated in material particulars by other crucial evidence from the witnesses that presented the case of the Respondent in the court below. In the case of Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

> " Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

34. Proof beyond reasonable doubt is not to be based on certainty or proof beyond a shadow of doubt. However, it should derive from evidence that is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable. This was the finding of the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
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> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

35. The Appellant alleged inconsistences and contradictions in the evidence proffered by the prosecution case and argued that the trial court failed in convicting him when the evidence tendered did not prove the offence against him to the required standard. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

36. I have scrupulously perused the record of the trial court. I note that PW2 presented evidence that the defilement of the minor herein was done on various occasions. She traced the defilements to September 2021 without stating actual dates. She kept the acts of defilement to herself. She even testified that the Appellant had defiled the minor when herself (PW2) was asleep or in the bathroom or toilet. In her testimony, it was her case that she suspected that the Appellant has defiled the minor because the minor had no pants and her (the minor's) stool had sperm.

37. Whereas the minor testified that the Appellant defiled her while she had her pants, it was the case of PW2 that the Appellant removed the minor's pants and PW2 dressed up the minor on the material day. She did not see or witness the act of defilement. She did absolutely nothing. She picked the child and went to the grandmother. They quarreled and fought, not over the child but over cups of tea.

38. There was no testimony that the minor informed PW2 that the Appellant had defiled her on all the alleged unspecified occasions. PW2 does not similarly state anywhere that she inquired from the minor about the defilement. PW2's view that she saw the minor's stool had sperm and no blood was not any reliable evidence as it did not point to defilement by inserting a penis to the vagina as alleged. The first story line for defilement is heard from third parties who stated that they learnt of the defilement after the medical examination was done. This was 2 weeks after the alleged defilement.

39. For instance, it is PW3 and PW6 who testified that they established that the minor had been defiled after taking the minor to the hospital. It was not their testimony that they enquired from the minor themselves and the minor said the words recorded in the trial court that the Appellant inserted his susu in her susu. Even PW4, the investigating officer and PW5, the medical doctor were brought in the picture after about 2 weeks of the alleged incidence and appear to base their conclusion on what they were told. The lacerations 12 days later do not appear to relate to acts done 12 days earlier. PW2 could not even remember the crucial dates. Where did this idea of defilement come from?

40. It was surprising that the investigation officer did not note that PW2 had mental problems. They thus needed to remove counts that the evidence was part of hallucinations or mental issues that were confirmed. The evidence of the minor does not appear natural for a 3½ child. She seemed to be aware that the mother was bathing, and did not even scream. Not necessarily call for help but from the excruciating pain expected of an adult penis into a vagina of a 3½ year old.

41. The child was sleeping on the floor and the Appellant was sleeping in bed. He was not expected to sleep fully dressed in his house. No alarm was raised. How did sperms find themselves in the stool? Was this a case of having worms? The witnesses did not suspect defilement. How come nothing was raised for all the period? The evidence is simply not credible.

42. PW6 was brought in by warrant. She admitted there were issues with the Appellant's brother, who was an ex-husband. It is not known, when she left the Appellant's home. She never gave any date. It

is my considered finding that there were glaring inconsistencies in the evidence presented by PW1, PW2, PW3 and PW6 in asserting that the Appellant in fact unlawfully caused his penis to penetrate the vagina of the minor herein. Those, in my view were not minor contradiction. They went to the root of the commission of the offence. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

43. In the totality, I find difficulty in finding the basis for which the trial court drew an inference that PW2 found the Appellant in a compromising position with the minor. Whereas the compromising position was described to be that the Appellant was naked on his bed and the minor was also on the floor, this does not point to the guilt of the Appellant. The Appellant, PW2 and the minor were all sleeping in the same room. There was no step the Appellant did that changed the sleeping arrangement.

44. The court notes that the minor was the Appellant's child and the Appellant could not be said to be committing an offence merely by being naked on his own bed and the minor sleeping on the floor where he was supposed to be sleeping. It was their house and that appears to be the modus operandi.

45. The Appellant's bedroom and bed were the places the Appellant could most freely be naked and it was not proper for the trial court to make a finding that PW2 found the Appellant in a compromising position with the minor on several occasions. The several occasions and the compromising positions were never part of the case. The trial date related to 11/10/2021.

46. I am surprised that given lack of corroboration for the minor's evidence, the court did not find it prudent to analyze the effect of section 124 of the *Evidence Act* on the case. The said section provides as follows: -

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

47. On the perusal of the medical evidence, I equally do not find that the Respondent proved their case beyond reasonable doubt that the Appellant penetrated the minor with his penis as was the case of the prosecution and the finding of the trial court. Besides finding that the hymen was broken, the medical report and testimony indicated that the minor had lacerations to the labia and bruises to the vagina.

48. In my view, medical evidence is empirical and must be based on scientific findings that support a given conclusion in relation to the offence. It was not enough to the medical doctor to suggest defilement but fail to link the nature of the injuries sustained by the minor to defilement. It appears that the trial court based the conviction of the Appellant on the absence of the hymen and vaginal injuries but without nexus with the offence of defilement that the Appellant faced.

49. The broken hymen and vaginal injuries must be linked to penetration by the Appellant to sustain a conviction. This is because 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. As appreciated by the Court of Appeal in P.K.W v Republic [2012] eKLR:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They 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"
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> 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 the 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 natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.
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> 17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.
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> 18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."

50. Therefore, in sexual offences in my view, whereas it is settled that age of the minor, penetration of the minor and recognition of the offender are ingredients that must be proved beyond reasonable doubt to warrant a conviction, penetration in my view, must, with emphasis, be proved to have been committed by the accused person. I say so because in our justice system, victims of sexual offences would allege that the accused person defiled them and the court on easily establishing that the offence was committed and the victim clearly recognized the accused person, proceed to convict the accused person when the offence was committed by a different, and often unnamed person.

51. In this case for instance, there was no nexus between the offence and the accused person. The prosecution attempted to base the nexus on the revelation by PW2 and the evidence of the minor which as has been established were not congruent and correlative.

52. I find that the inconsistencies and contradictions that existed in the witnesses' testimonies of the prosecution did not signify veracity and honesty, but pointed to an attempt to proffer unusual uniformity and signified fabrication and coaching of witnesses. I say so particularly because the first time the minor mentioned that the Appellant inserted his susu (penis) in her susu (vagina) was in court during the testimony and PW2, the minor's mother is said to have gone to buy pepper and salt but came back without taking time and found the minor asleep, without panties on the floor where she normally slept, and the Appellant was on his bed at that time. The minor on the other hand testified that she had her kasuruali (pants) at the time she was defiled. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

> "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. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

53. Consequently, it was the primary duty of the trial court, which it failed, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In Erick Onyango Ondeng' vs. Republic [2014] eKLR, the Court of Appeal held that:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is

demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

54. The trial court failed in not holding that such magnitude of contractions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

55. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that that prosecution proved penetration of the minor's vagina by Appellant's penis beyond reasonable doubt. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond reasonable doubt and the trial court erred in convicting the Appellant.

56. Having found that the conviction was not proper, I do not think it will serve any purpose to delve into the issues on sentence. I set the conviction and sentence aside.

Determination

57. In the circumstances, I make the following orders: -

    a. The Appeal is allowed. The conviction and sentence in Karatina PMCSO No. E028 of 2021 is set aside.

    b. The Appellant is set free unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

Judgment delivered physically in court.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mwakio for the State

Appellant in person

Court Assistant – Jedidah