



**AS v Republic (Criminal Appeal E026 of 2022)
[2023] KEHC 653 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E026 OF 2022**

DK KEMEL, J

FEBRUARY 7, 2023

BETWEEN

AS APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable N. N Barasa-PM dated 14th February 2021 in Webuye Senior Principal Magistrate’s SO Criminal Case No. 8 of 2017)

JUDGMENT

1. The Appellant, ASW, was charged before the Webuye SPM’s Court in Sexual Offences Case No.8 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that the Appellant, on 19th January 2017 in Bungoma East Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of LS, a child aged Eight (8) years.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant, on 19th January 2017 in Bungoma East Sub-County within Bungoma County intentionally and unlawfully rubbed his penis on the vagina of LS, a child aged Eight (8) years.
3. The Appellant pleaded not guilty and the matter proceeded to full hearing. In support of its case the prosecution called five (5) witnesses.
4. PW1 was SNS who she testified that she is the wife of the Appellant and mother to the complainant respectively. She stated that on 19th January 2017 at 7.00pm she had a disagreement with her husband who had threatened to beat her. She fled away leaving behind her three children namely L, S and B who spent the night with their father, the Appellant herein. On returning the next day, she proceeded



with her day's work and that the complainant was not at home as she had already left for school. She saw the complainant on 20th January 2017 when she returned home for lunch. She instructed her to change her clothes and come then eat her food. It was then that the complainant informed her in Kiswahili "mama, baba alinilalia usiku na ninasikia uchungu nikikojoa." (Mum, father laid on me at night and iam feeling pain while urinating). She proceeded to undress the complainant and inspected her vagina and saw sperm like substance. She drew the attention of the complainant's grandmother and a neighbour one Carolyne. After failing to locate the village chief and elder, she rushed to the AP camp with the complainant where a female police examined the complainant and at 2.00pm she went to Bokoli hospital on the same day for the complainant's treatment. The matter was reported at Webuye Police Station where she was issued with a P3 form that was duly filled at Webuye District Hospital. She told the Court that the complainant was eight years old and was born on 28th August 2008. On cross examination, she told the Court that she saw discharge that was not dry but the doctor told her that there was nothing that had happened to the child.

5. After voire dire examination, the complainant was allowed to tender unsworn testimony. She testified as PW2 and told the Court that she was at home with her younger siblings and the Appellant who is her father. While sleeping at night, the Appellant removed her clothes and slept on top of her. She felt pain down her private parts which she pointed while in court and stated that he did it twice. She identified the Appellant in Court. On cross examination, she told the Court that she is eight years old and that that night she was not in her grandmother's house where she usually sleeps. The incident happened as she slept with S and B and that the Appellant threatened to slaughter her if she dared to cry. The next morning, she showered and went to school and told the Court that the Appellant had defiled her before many times. On re-examination, she told the Court that the Appellant laid on top of her that day and that he did it twice.
6. PW3 was Ken Echon, who testified that he is a clinical officer at Bokoli Hospital and was in Court to tender evidence on behalf of a colleague. He told the Court that the complainant appeared in their facility in the company of her mother with allegation of defilement by her father. The complainant gave a history that she had been raped by her father on 19th January 2017 at 11.00pm. The child reported to have been undressed by her father at night and who touched her private parts and inserted his penis into her private parts. He observed that the complainant was stable, wearing an inner wear that was light green with dry blood stains. Her genitalia had significant white discharge, labia majora and minora, and hymen were rugged and abnormally widened. No bleeding and tears were noted. The laboratory investigations on urinalysis revealed excessive pus cells and that a high vaginal swab was not done. History and physical examination suggested defilement. He filled the P3 form on 23rd January 2017 five days after the alleged incident. He produced the treatment notes as Pexhibit 1 and P3 form as Pexhibit 2. On cross examination, he told the Court that the presence of widened hymen, discharge and bruises on labia minora and majora was a pointer to penetration. He noted that a 2nd examination of the complainant was conducted at Webuye District Hospital that indicated the medical examination report by one Koinange indicated that the complainant's hymen was intact, no tear, no hymen and noted the same contradicts the report from their facility.
7. PW4 was No. 100589 PC Linet Ogero, who testified that she was the investigating officer from Webuye Police Station. On 21st January 2017 at 1100hrs while at her office PW1 in the company of the complainant reported a case of defilement. The Appellant was alleged to have defiled the complainant at night. She told the Court that the Appellant had a quarrel with PW1 who left the house at night. While the complainant was sleeping the Appellant defiled her. She sent them to Webuye sub-County Hospital. The complainant was initially examined at Bokoli Sub-County Hospital. They returned with the treatment notes indicating that there was no defilement. On forwarding the file to the DPP, they



- were advised to charge the Appellant. On cross examination, she told the Court that she received a report from Bokoli hospital which indicated that there were signs of defilement and that her pant had blood stains, whitish discharge, bruises around her labia minora and a widened hymen.
8. PW5 was No. 9603818 CPL Gilbert Kipkemei, who testified that he was attached at Webuye Police Station. On 24th January 2017 he was called on phone by his officer that a woman had report at the police post that her child had been defiled by her father. The child was examined at Bokoli Hospital where he also found the Appellant and he apprehended him. On cross examination, he stated that he was not the investigating officer in this case.
 9. Upon being placed on his defence, the appellant chose to make a sworn statement in which he denied any knowledge of the allegations made against him. He called one witness who was eventually stood down in order for the author of a document sought to be produced to be called but they never turned up to testify and that the appellant closed his case without calling them. He stated that he is the husband of PW1 and father of the complainant herein. He testified that he got a call asking him to go home quickly and on arrival he was accused of sleeping with his daughter. He quickly rushed to Bokoli Hospital to check what had happened to the complainant and he was arrested and charged with defilement. On cross examination, he told the Court that he was arrested at the hospital where he was told they had taken the complainant and that his wife (PW1) used to leave the children with him whenever they had disagreements.
 10. In his judgement, the learned trial magistrate held that all ingredients of defilement were proved beyond reasonable doubt and proceeded to convict the Appellant with the offence of defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#) pursuant to section 215 of the Criminal Procedure Code. On sentencing, he found that the sentence of thirty (30) years imprisonment was probable and proceeded to sentence him to serve the said period from the date of conviction namely 14th February 2022.
 11. Being aggrieved by the aforesaid decision the Appellant filed an appeal and set out seven grounds of appeal namely; -
 - i. That the trial magistrate erred in law and fact in conducting proceedings that violated the right of the Appellant as per the provision of law of Kenya.
 - ii. That the trial magistrate erred in law and fact by arriving at a decision basing on evidence that was full of contradictions and without analyzing the same.
 - iii. That the trial magistrate erred in law and in fact in considering extraneous factors in the decision making.
 - iv. That the trial magistrate erred in law and fact in convicting the appellant on a charge sheet that was defective.
 - v. That the trial magistrate erred in rejecting the defense alibi and ignoring the mitigations adduced by the Appellant during the Court hearing.
 - vi. That there was misinterpretation of the law by the trial Court.
 12. He prayed that this Honourable Court do quash the conviction, set aside the sentence and he be set at liberty and or any other measure the Court may deem fit.
 12. The appeal was canvassed by way of written submissions. Both parties filed and exchanged the same.



12. The Appellant submitted that there was contradiction between the evidence in the P3 form, treatment notes and the testimony of the clinician who filled the P3 form and that the clinician told the Court during cross examination that the second examination's report contradicted the report from Bokoli health facility. He noted that on record the police officer who testified denied to have carried out any investigations in this case and that PW2 testified that her father had done it many times and that she used to inform her mother. He submitted that the PW2's evidence was inconsistent with that of the mother (PW1) and the clinician (PW3).
12. He submitted that the failure of the prosecution to call crucial witnesses was fatal and the further the contradictory reports on the P3 forms created doubt on the prosecution's evidence which should have earned him the benefit of doubt and an acquittal.
13. In response, the Respondent submitted that it proved all the ingredients to establish a case of defilement. The respondent further submitted that there were no contradictions or inconsistencies while proving the issue of penetration as the same was well corroborated. On the aspect of PW3 no objections were rendered against the witness testifying on behalf of the colleague. The Respondent urged this Court to dismiss the appeal.
14. I have carefully considered the rival submissions filed in this matter and the cases relied upon by the parties. The only issue which arises for determination is whether the Prosecution proved his case beyond a reasonable doubt.
15. The question the Court must answer is whether these errors in the charge sheet, if any, entitle the Appellant to an acquittal. Differently put, are these errors merely technical and capable of being cured or did they occasion a miscarriage of justice?
16. The answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

.... 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.
17. The proviso to section 382 provides that in determining whether the 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.
18. The starting point for this analysis is our case law. Two cases are pertinent: the case of *Yosefa v. Uganda* [1969] E.A. 236 a decision of the Court of Appeal and a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence where it was held:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”
19. Hence, the test for whether a charge sheet is fatally defective is a substantive one: was the Appellant charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? In this case, the Appellant was charged under



section 8(1)(2) of the *Sexual Offences Act* instead of section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Did this prejudice the Appellant? To answer that question, one needs to ask if it can be reasonably said that the accused person understood the charges facing him including the specific ingredients of the offence charged so that he can properly direct his defences.

20. One approach to determining whether an otherwise defective charge sheet should be immunized under section 382 of the Criminal Procedure Code is to use a cumulative sliding scale. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error.
21. Applying this approach to the facts of the present case, the question then, is whether this contributed to a miscarriage of justice. I think it did not. My analysis of the trial Court judgement indicates that the same was premised on the proper proviso of law. In any event, this Court will get an opportunity to look at the record afresh and determine if, absent the error, a Court of law properly seized of the law and facts could have concluded that the Appellant was guilty as the learned magistrate did.
22. With respect to the trial Court conducting proceedings that violated his rights, the Appellant was not specific about which of his rights were violated and my perusal of the trial Court record indicate substantial compliance with respective articles of *the Constitution* and the mere mention of contravention does not suffice before this Honourable Court. The Appellant has not adduced any probable evidence to show that the same were contravened.
23. This being a first appellate Court and as is expected, is obliged to analyse and evaluate afresh all the evidence adduced before the trial Court and draw its conclusions while bearing in mind that it neither saw nor heard any of the witnesses. (See *Okeno vs. Republic* [1972] EA 32) where the Court of Appeal set out the duties of a first appellate Court as follows:

“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 vs. Republic* (1957) EA. (336) and the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”

24. Similarly, in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.



- 2) 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; 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."

25. Section 8 of the *Sexual Offences Act* provides as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if –

it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the Court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to the such child within the prohibited degrees of blood or affinity.

26. This being a case of defilement, what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

27. It is now trite that for the appellant to be convicted of the offence of defilement, certain ingredients must be proved. The first is; whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. (See the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013), where it was stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.”



28. The key evidence relied on by the Courts in rape cases and defilement to prove penetration is the complainant's testimony which is usually corroborated by the medical report presented by the medical officer. In this case, since the Complainant was a minor, the evidence of the victim's mother or guardian and the clinical officer are key to corroborating such testimonies. I have critically analyzed the evidence of the clinical officer (PW3) who testified herein. The evidence of the clinical officer seemed to have corroborated the evidence of PW2.
29. In the case of Hilary Nyongesa Vs Republic Eldoret Criminal Appeal, No. 123 of 2009 the Court stated that:
- “Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”
30. In the case of Kaingu Elias Kasomo -V- R Malindi Cr. App. No. 504 of 2010 the Court of Appeal stated that: -
- “the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence..... Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial Court heard the minor's evidence and saw her. The Court was convinced that she spoke the truth.”
31. In Musyoki Mwakavi –VS- Republic Machakos High Court Criminal Appeal No. 172 of 2012, the Court was of the view that: -
- “...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”
32. In the case of Edwin Nyambaso Onsongo Vs Republic (2016) eKLR, in which the Court cited the case of Mwolong Chichoro Mwanembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR) the Court of Appeal held that: -
- “... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
33. I subscribe to this school of thought. This is informed by the fact that in some rural areas and informal settlements in urban areas the importance of birth certificates has not been appreciated and insistence on the same may result in untold injustice. In the instance case, PW1 testified that the complainant was eight years old as she was born on 28th August 2008 and PW2 (the complainant) also told the Court that she was eight years old at the time of the ordeal. The P3 form and the treatment notes also indicated the age of the minor as eight years old.



34. On the element of penetration, it was the evidence of PW2 that she was at home with her younger siblings and that while sleeping at night, the Appellant removed her clothes and slept on top of her. She felt pain down her private parts. She pointed and told the Court that he did it twice. She identified the Appellant in Court. On cross examination, she told the Court that she was eight years old and that that night she was not in her grandmother's house where she usually sleeps. The incident happened as she slept with S and B and that the Appellant threatened to slaughter her if she dared to cry. The next morning, she showered and went to school and told the Court that the Appellant defiled her before many times. On re-examination, she told the Court that the Appellant lay on top of her that day and he did it twice.
35. On examination of the complainant, PW3 observed that the complainant was stable, wearing an inner wear that was light green with dry blood stains. Her genitalia had significant white discharge, labia majora and minora, and hymen were rugged and abnormally widened. No bleeding and tears were noted. The laboratory investigations of urinalysis revealed excessive pus cells, high vaginal swab was not done. History and physical examination suggested defilement. He filled the P3 form on 23rd January 2017, five days after the alleged incident. He availed the treatment notes as Pexhibit 1 and P3 form as Pexhibit 2. On cross examination, he told the Court that the presence of widened hymen, discharge and bruises on labia minora and majora was a pointer to penetration. He noted that a 2nd examination of the complainant was conducted at Webuye District Hospital that indicated the medical examination report by one Koinange indicated that the complainant's hymen was intact, no tear, no hymen and noted the same contradicts the report from their facility.
36. The Appellant denied having defiled the minor.
37. Section 2 of the *Sexual Offences Act* provides that: -
- “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
38. In *George Owiti Raya Vs Republic* [2013] eKLR it was held that: -
- “There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul-smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane.”
39. PW3 told the Court that on examination of the complainant, he observed that her genitalia had significant white discharge, labia majora and minora, and hymen were rugged and abnormally widened. No bleeding and tears were noted. The laboratory investigations of urinalysis revealed excessive pus cells and that a high vaginal swab was not done. History and physical examination suggested defilement.
40. It is clear that the examination of the complainant was done approximately five days after the incident. The sum effect of the above evidence is that it raises no doubts as to whether there was actual defilement. The complainant herself was categorical that it was none other than the appellant who had defiled her. She had no reason to frame her father with whom she and her other siblings lived in the same home. It is highly unlikely that the complainant's mother could use her young and vulnerable daughter as a victim of defilement so as to get at the appellant and settle scores over domestic spats.
41. On the element of identification, the complainant told the Court that the Appellant is her father and that the Appellant confirmed in his defence that the complainant was his daughter. This is clearly a



situation of recognition. The complainant further informed her mother that “mama, baba alinilalia usiku na ninasikia uchungu nikikojoa.”

42. In this case, there is evidence that corroborated the complainant’s evidence that the Appellant defiled her. While her evidence that the Appellant was known to her was not challenged, in this case the prosecution had the opportunity to present evidence from PW4 supporting her evidence that the Appellant defiled her. That crucial evidence was adduced.

43. As regards the failure to call the alleged vital witnesses, section 143 of the Evidence Act provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

44. I agree that the holding in the case of Paul Kanja Gitari vs. Republic [2016] eKLR restates the general legal position when the Court of Appeal expressly stated that:

“the state of the evidence tendered with all of its inconsistencies means that the appellant’s complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof of a fact. See Section 143 of the Evidence Act. However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See *BUKENYA & OTHERS VS> UGANDA* [1972] EA 549. Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”

45. However, that decision states that such inference is only to be made where the prosecution calls evidence that is barely adequate.

46. I am guided by the case of *Mwangi vs. R* [1984] KLR 595 where this court stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

47. The prosecution is not duty bound to call all persons involved in the transaction and its failure to call them is not necessarily fatal unless the evidence adduced is barely sufficient to sustain the charge. In *Keter vs. Republic* [2007] 1EA135 the Court was categorical that: -

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

48. As regards the contradictions in the prosecution’s case, I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs. Federal Republic of Nigeria* {2014} LPELR-22555(CA), where the court (Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA) stated as follows: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while



a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

49. Whereas i appreciate that there were minor discrepancies in the evidence of the witnesses, it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling.
50. I have subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision. In any event, such discrepancies were minor and did not prejudice the appellant as they are curable under section 382 of the Criminal Procedure Code. The Appellant's claim that the P3 form produced was not in tandem with the evidence of PW3, is not convincing in view of the fact that the Appellant did not specify before this Court the alleged inconsistencies. Having considered the evidence adduced, I find no reason to interfere with the conviction.
51. On mitigation, it is evident from the lower court records that mitigation was recorded and factored in the appellant's sentencing. The allegations of an unfair trial are thus unfounded and disregarded.
52. As regards the sentence, the learned trial magistrate imposed the appropriate sentence in that he duly considered the Appellant's mitigation, noted that the nature of the offence and the relationship of the offender and the victim. He was of the view that the same attracted a sentence of thirty (30) years' imprisonment. Therefore, the Appellant's sentence of thirty (30) years in prison was neither harsh nor excessive in the circumstances.
53. In the result, it is my finding that the appeal is devoid of any merit. The same is dismissed.
It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF FEBRUARY, 2023.

D. KEMEI

JUDGE

In the presence of:

Kapten for Appellant

Mukangu for Respondent

Kizito Court Assistant

