Wangui v Republic (Criminal Appeal 48 of 2020)
[2023] KEHC 17832 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 48 OF 2020

FR OLEL, J

MAY 18, 2023

BETWEEN

PETER KARIMI WANGUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the conviction and sentence handed down on the appellant in Nanyuki Criminal Cares (S.O) No. 43 of 2018, where vide the judgment of Hon. L.Mutai (CM) the appellant was jailed for eight (8) years imprisonment on each count. The conviction and sentence were to run concurrently.

Brief Facts

2. PW1 I.W testified that she stayed at [Particulars Withheld] village 3 and went to school at [Particulars Withheld] Secondary School. One Sunday on 17/6/2018, she left home and met her friend JW (PW2), who told her that she had spoken to her friend 'Mwangi' from Nanyuki and PW2 requested her to accompany her to meet 'Mwangi'in Nanyuki town. She learnt that the said 'Mwangi had sent fare of ksh.300 to PW2 and they used it to board a Senta to Nanyuki town. When they arrived in Nanyuki town PW2 borrowed a phone and called 'Mwangi. Initially he did not answer, but later picked their call and joined them at about 6.00pm. 'Mwangi' called his friend who was senior to PW1 to keep her company and they went to sit at Kanu gorunds. Meanwhile PW1 saw PW2 and 'Mwangi go into a lodging to do their business.

3. Later when PW2 and 'Mwangi' returned he gave them Ksh.300 and took them to the stage to board Narumoro bound matatu. They entered a matatu, were she identified the appellant as the driver. The matatu also had its conductor and few other passengers. The matatu took too long to fill up so they demanded back their money from the driver who had been paid, but he declined to return the

same. Other conductors too joined them in demanding that their fare be returned but the driver and conductor refused to hear to their plea. Later the conductor gave them Ksh.200 but it was already late at around 9.30pm. The appellant called PW1 and PW2 aside and told them he knew a safe place where they could spend the night. They got back into the motor vehicle, which by now did not have any other passengers and were taken to a lodging.

4. PW1 further testified that at the lodging the appellant and his conductor bought them soda and mixed it with alcoholic drinks. Later the appellant booked room 16 where they were to spend the night. While in the room the conductor came and dragged PW2 out of the room, while PW1 remained with the appellant. By then PW1 testified that she was already drunk from the effects of the alcoholic drink and soda they had taken. The appellant removed her belt and went for her jeans trouser. She asked him to stop , but he proceeded and removed all her clothes, removed his clothes too and joined PW1 in bed. It was PW1 testimony that the appellant tried to sleep with her but she refused, but eventually she succumbed and he managed to have sex with her but forcefully. The appellant used condom which he removed from his trousers.

5. When the appellant was done, he dressed up and went to room 6 while the conductor came into her room. She stated that she could not scream as had been warned of dire consequences against doing so. She resisted the conductor advances but he forcefully undressed her and also had sex with her. At this point PW1 stated that they both slept and woke up in the morning as there as nowhere they could go. When she woke up she realized that the conductor had already woken up and left. She went to room 6 and found PW2 and they left for the stage. They met a person who had seem them the previous night and he was concerned why they had not travelled. The good samaritan gave them Ksh.100/-. They also bumped into the conductor who had defiled them and he also gave them Ksh.100. By this time PW2 had messed up her clothes as she was on her 'menses'.

6. PW1 and PW2 boarded a Senta and alighted at Narumoru and decided to walk home, but changed their mind midway and decided to sleep on a muzungu farm. The following day they went back to Nanyuki town and met the appellant. Later they met Dickson Mwiti and Jamlick Muriuki who decided to escort them home on 24.6.2018. Her mum came and they were escorted to Narumoru police station and later to Nanyuki police station. They were interrogated and taken to hospital. PW1 identified the P3 form and PRC form. She stated that she was 15 years old and was born on 29th March 2003. She also identified her birth certificate. She stated that she had not known Dickson and Jamlick before and did not know the whereabouts of the conductor but they were with the appellant for a long time and the places they went too were well lit and thus could properly identify him.

7. In cross examination PW1 confirmed that the appellant slept with her, though she could not tell how long he took on top of her. They had sex in room 16 not room 7. The appellant slept with her first and later conductor came and slept with her. It was not true that she slept with 'Wagitunguru" and it was the appellant who had bought them alcoholic drinks and got them drunk. The witness also denied that he appellant left her with two other men in the room and again reiterated that it is the appellant that she slept with on 18/6/2018 in room 16. In re-examination she stated that she was in room 16 and PW2 was in room 6, though investigations confirmed that it was room 7.

8. PW2 JWW also stated that she stays at [Particulars Withheld] village and was class 8 pupil at [particulars withheld] primary school. On 17.06.2018, they travelled to Nanyuki town to meet a friend. She was with PW1. Her friend 'Mwangi' had sent fare for them to travel. While in Nanyuki town she spent time with Mwangi in a guest room, while PW1 was with Mwangi friend at Kanu grounds waiting for them. When done Mwangi escorted them to the stage. They had only Ksh.300 which they paid. The matatu took long to fill and they demanded back their fare, which the driver and conductor were reluctant to refund. After a while both the driver and the conductor told them they could assist them. They got

back into the matatu and were taken to a place where they were bought soda. Later they were taken to a lodging and booked into room 16, later they were separated and she was led to room 7.

9. The conductor forcefully had sex with her. He inserted his penis in her vagina and she could not scream as her mouth was blocked. Later the conductor left and the appellant (who was the driver) came to her room and also forcefully had sex with her. During intercourse her periods started. In the morning they went to the stage and met the conductor and another man who had seen them the previous night. He was concerned why they had not travelled and the said man and conductor gave them fare to travel back to Narumoru. While enroute they decided not to go home and returned to Nanyuki town, where they whiled away time until 24.06.2018. Some boys Jamlick and Dickson gave them fare to return home. PW2 testified that when she returned home her mother escorted her to Nanyuki police station and later they were taken to hospital she identified the P3 and PRC form and also her birth certificate. She confirmed that she saw the appellant well as they were together for a long period and all the places they went were lit she could not confuse him for another person.

10. In cross examination, PW2 confirmed that it was the appellant who defiled her for 45 minutes. He had first gone to room 16 where PW1 was and later came to her room no.7. She stated that she did not know who paid for the rooms, but the appellant had parked his motor vehicle and joined them in room 16. Further the conductor had refunded Ksh.200 been part of the fare earlier paid.

11. PW3 Harmon Ndirangu testified that he as the care taker of [Particulars Withheld] lodging in Nanyuki town near popular bar - Lumumba Street. Part of his duty included selling rooms to customers between 5.00pm to 5.00am. On 17.6.2018 at about 9.49pm, he received a customer who wanted rooms. He sold two rooms to James Kariuki Wanja. He stated that he got the details from his national identity card and he booked room 7 and 16 and paid Ksh.800 for the two tooms. At about midnight James Kariuki returned while accompanied by two female and one male and they all got into room 16. At around 2.00am he saw one male leave room 16 and went to room 7 and them he saw James and the two women proceed to room 7. At some point during the night each of the male ended up with a female in each room. In the morning at about 5.45am, James and the other male client left. The two female left at 6.20am. The witness identified the counter book for 31.03.2018 to 03.07.2018 therein showed the details of James Kariuki Wanya ID No.247xxxxxx and mobile no.0722xxxxxx. The witness stated that he did not know the appellant.

12. PW4 John Mathenge testified that previously he worked as a supervisor at Nyeno Sacco but had moved to Ukunda. On 17.06.2018 PW1 and PW2 arrived at the stage and wanted to travel to Wahine. The 1st motor vehicle had only space for one and he directed that they be booked into the next matatu KCH xxxE. He left for the supermarket and came back later only to find that the girls still with the driver and the conductor Mr.Kariuki. They later boarded the matatu and left. The two girls appeared really young and reckless hence his concern. The next day while at work he heard a commotion outside his office and went to check what was happening. He found the young girls surrounded by many people. He asked them why they were still around and noticed that one of them had a stained trouser. They entered the next matatu and left. Before they left he had inquired about their parents contacts but was not successful.

13. On 18.06.2018 one Mr Ngere came and inquired about the girls and he explained what he knew, he was later summoned by DCIO and recorded his statement. Later he learnt that the two girls had been defiled by the appellant and James Kariuki and it was the DCIO who informed him about the said allegations, the two girls did not disclose the defilement incident to him. Later he did his own investigations and established that the defilement allegations were true. He also testified that he had not differed with the appellant before and the appellant was a driver doing Nyeri- Nanyuki route while James Kariuki was his conductor. In cross examination he stated that he left the matatu stage after

ensuring that the (2) girls were already inside a matatu. When he later met them he did not hear their discussion and did not know where the girls were from. It was the police who arrested the appellant and one of the girls has stained her trouser due to her 'menses'.

14. PW5 Steve Mugo testified that he was a clinical officer attached to Nanyuki Teaching and Referral hospital and held a diploma in clinical medicine . He had the P3 form and PRC form for PW2 who was examined on 27.06.2018. She presented a history of being defiled between 17th - 24th June 2018. Her external genitallia was normal and hymen was broken. The scar was old and she was on her menses thus bleeding. She underwent HIV test, STI test which were all negative. No spermatozoa was seen. The medical evidence was inconclusive due to her 'menses' the P3 and PRC form were introduced as exhibit 1&2.

15. The witness also had the P3form and PRC form for PW1. She presented a history for being defiled on 17 – 24th June 2018. On examination the external genetilla was normal, hymen broken but it was an old scar. She had a foul smell from her vagina which was a sign of infection. Pregnancy and STI tests all turned negative and no spermatozoa was seen. He produced both the P3 and PRC form as exhibit 3 & 4. The appellant was not known to him. In cross examination the witness stated that he was not aware of the appellant being presented for examination at the hospital and that hymen of PW1 and PW2 were broken way before.

16. PW6 Sargent Regina Mbithi testified that she was the investigating office. On 20.6.2018, the DCI and County Commander called her and assigned her to investigate a case of 2 missing girls. They had gone missing from Solio on 17th June 2018. She called one of the complainant mother and recorded her statement. On 24.6.2018 the girls returned home and PW2 mother alerted Solio police station. PW1 and PW2 were arrested and she escorted them to Nanyuki Teaching and Referral Hospital for examination. She also detained them as children in need and care and protection. She interrogated them and told her how they were defiled at a lodging Mukui guest house within Nanyuki town. After establishing the facts she arrested the appellant based on the positive identification of both PW1 and PW2. She also went to the guest house and established that John Kariuki who was the conductor had booked two rooms 7 and 16 on the 17.06.2018 at 9.59pm. She detained the said records and produced them into evidence as exhibit 7.

17. Later she escorted the accused to be examined at Nanyuki Teaching and Referral hospital and once the investigation were complete, she charged him with the offence before court. The witnesses also produced the birth certificate of both PW1 and PW2 as exhibits. In cross examination the witness testified that the appellant was positively identified by the complainants. He had bought them food and led them to the guest room where he slept with them,

18. The appellant was placed on his defence and testified under oath. The stated that on 1.7.2018 he was at work and on highway to Nyeri he was stopped by the police who escorted him to the police station. On 3.07.2018 he was examined at the hospital and later charged with the offence before court. He continued to deny any wrong doing. In cross examination he stated that he was arrested by policemen in plain clothes, who were not known to him.

19. The trial court in his considered judgment convicted the appellant on both the alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offence Act* no. 3 of 2016 and proceeded to sentence him to eight (8) years imprisonment on each count. The conviction and sentence was to run concurrently.

20. The appellant being aggrieved by the conviction raised the following grounds of appeal;

a. That the learned trail magistrate erred in matters of law and fact by failing to note that the prosecution failed in their duty to prove their case beyond reasonable doubt.

b. That the prosecution evidence was full of contradiction, inconsistences and uncollaborated.

c. That learned trial magistrate erred in matters of law and fact by failing to note that the evidence tendered by the prosecution was insufficient to sustain and secure conviction.

d. That the learned trial magistrate erred in matters of law and facts by failing to note that there was not any independent evidence from any independent body brought before the court to clear doubts about the allegations.

e. That the learned trial magistrate erred in matters law and fact by failing to note that there was not any medical evidence to prove the said allegations.

f. That the learned trial magistrate erred in matters of law and fact by rejecting the appellant defence without any convincing reason.

Submissions

21. When the appellant appeared before this court on 26/1/2023, he did state that he would not file any submissions an asked the court to review the entire file.

22. The state filed their submissions on 23.01.2023 and stated that the conviction was safe as the evidence adduced proved beyond reasonable doubt that the appellant committed the offence. Further the evidence adduced was corroborated, consistent and reliable. The trial magistrate thus could not be faulted on his findings and the conviction was safe. As regards sentence, the state submitted that the sentence was unlawful, but the magistrate was probably guided by recent jurisprudence from the supreme court of Kenya regarding statutory mandatory sentence. The sentence melted was thus lenient and not manifestly excessive in the circumstances.

Analysis and Determination:

23. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno v Republic* [1972]EA 32 & *Pandya v Republic* (1975) EA 366.

24. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court 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 made the advantage of hearing and seeing the witnesses.

25. Also in *Peter's v Sunday Post*(1958) EA 424 it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion. The court must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

26. The appellant raised Six grounds of appeal which could be crystalized into the following issues;

a. Whether the prosecution case was proved beyond reasonable doubt (Ground 1, 3, 4, 5 and 6)

b. Whether the Evidence adduced was full of contradiction, inconsistencies and was uncorroborated.(Ground 2)

c. Whether this court should interfere with the sentence as passed.

A. Whether the prosecution case was proved beyond reasonable doubt and whether the trial magistrate failed to appreciate that appellant had a statutory defense pursuant to provision of section 8(1) as read with section 8(5)&(6) of the sexual offences Act No 3 of 2006 , which the trial court did not consider.

24. Section 8(1) of the *Sexual Offences Act* No 3 of 2006 provides as follows;

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

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

1. The ingredients for the offence of defilement can be summarized as follows;

a. Age of the victim (must be a minor),

b. penetration and

c. Proper identification of the perpetrator.

(see *Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga v Republic* [2016] eKLR)

Age of Minor

2. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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." (emphasis added).

3. In the case of *Francis omuroni v Uganda,* court of Appeal criminal Appeal No 2 of 2000, it was held thus

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense

4. PW1 stated that her names were IWN and was aged 15 years. she was born on 17.02.2004 and was a student form 1 student at [Particulars Withhheld] secondary school. PW2 JWW also testified that she

was 14 years old and she too was a student at [Particulars Withheld] primary school in class 8. She was born on 20.03.2003. Both PW1 and PW2 had their birth certificate produced by investigating officer Sergeant Regina Mbithi as Exhibits 3 (Birth certificate No 619xxxx) and Exhibit 6 (Birth certificate No 816xxxx). The age of both minors was thus sufficiently proved by production of the birth certificates.

Penetration

5. The second element is penetration. Section 2 of the *sexual offences Act* defines penetration as;

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

6. The complainant, PW1 did testify that she accompanied PW2 to Nanyuki town, where PW2 was to meet her boyfriend one "Mwangi". They boarded a matatu quite late in the evening to take them back to Narumoru .The matatu took long to fill thus they demanded that their fair already paid be refunded, and which action caused friction between PW1, PW2 and the appellant who was the driver of the said matatu and his conductor. Eventually since it was already late the appellant offered to show them where they could spend the night and told them that they were like his daughters. The appellant and his conductor took PW1 and PW2 to an hotel where they bought PW1 and PW2 soda and Alcohol. PW1 evidence was that

> " The two went and bought alcoholic drinks. They mixed with our sodas, we were taken to a lodging room 16. The driver and conductor entered room 6. The accused entered our room. The conductor followed and dragged Jane out. He had blocked her mouth then. By then I was really drunk from the soda which to me tasted normal. The room was locked from inside. I was warned to remain quiet
>
> ... He removed all my cloths. He removed his trousers. I threatened to shout and he dared me. He joined me in bed. He tried to sleep with me but u resisted- finally he managed to have sex with me but forcefully. He entered his penis in my vagina. I know penis well. The accused wore a condom, which he removed from his trouser .....He finished and dressed up. He asked me to dress up as well. That was not the first time to have sex."

7. PW2 JWW evidence also corroborated the evidence of PW1. They came to Nanyuki town where she was to meet a friend and by the time, they went to the matatu stage to travel back to Narumoru it was already late. The matatu they boarded did not fill up and they demanded the fair they had paid to be refunded to them. The conductor refunded Ksh.200/=, and the appellant who was the driver of the Matatu and the conductor offered to help them find a safe place where they could spend the night.

8. The appellant and the conductor took them to a place where they bought for them sodas. Later they were taken to a lodging where the appellant and the conductor forcefully had sex with them. The conductor was the first to force himself on her and later PW2 testified that;

> " the accused identified by pointing at him. He also penetrated me sexually and forcefully. When he raped me my period started."

9. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be

liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

10. The only evidence of penetration was that of PW1 and PW2 as the medical evidence presented did not prove that the complainant's hymen were broken as a result of having sex with the appellant. It is trite law that if the trial court is convinced and for reasons to be recorded, the court can convict an accused person based on the evidence of a single witness. In this appeal the magistrate in his judgment noted that,

11. With respect to PW1 the court did find that;

> " The medical evidence as contained in the P3 form dated 27.06.2018 revealed that the external genitalia were normal and that her hymen was having a scar which was found to be old. The medical evidence further revealed that the medical prognosis was not conclusive.
>
> The medical evidence as contained in the P3 form dated 27.06.2018 revealed that the external genitalia were normal and that her hymen was having a scar which was found to be old. The medical evidence further revealed that the medical prognosis was not conclusive."

12. With respect to PW 2 the trial court noted as follows;

> " It should be not be forgotten that the complainant had been examined way after lapse of 10 days from the material date hence possibility of crucial evidence having been erased or interfered with. In the foregoing, the medical evidence produced in further of the 2nd compliant fails to prove penetration. I saw the complainant testify and I am satisfied that she spoke the truth. Her evidence was clear and consistent and the accused did not challenge the same."

13. The trial court further having considered the evidence produced did find as a fact that the appellant penis did touch and/or came into contact with the vagina of PW1 and PW2. The trial magistrate stated that:

> " Having found the evidence of the prosecution was overwhelmingly credible, which evidence was not poked holes by the defence evidence. I proceed to find that the prosecution has proved beyond any shadow of doubt that the accused had indecent act with the complainant, whereby he felt her vagina with his penis and that he had indecent act with the 2nd complainant, whereby he felt her vagina with is penis."

14. The evidence presented on a proper review does indeed proved that that appellant did deliberately intoxicate the minors and proceeded to defiled them at [Particulars Withheld] lodging within Nanyuki town on the night of 17th June 2018 into 18th June 2018. He should therefore have been convicted of defilement contrary to section 8(3) of the *sexual offences Act* No 3 of 2006, but since the state did not cross appeal, the finding of guilt on the alternative count of committing an indecent act will not be interfered with on this appeal.

Identification of the perpetrator

15. The final issue to be proved by the prosecution was that of identification of the perpetrator. From the evidence adduced, PW1 and PW2 provide ample evidence that they were with the appellant for a long period of time and were able to properly identify him without any possibility of error.PW1 and PW2 both testified that they saw the appellant in the matatu and he was the driver of the said matatu. When they demanded their fair back, the appellant refused to heed to their demand, though the conductor refunded Ksh.200/=. The appellant then lured PW1 and PW2 by telling them that they were like his daughters and would get them a safe place to sleep.

16. The appellant while accompanied by his college (the conductor), PW1 and PW2 went and booked a lodging at 9.49pm before proceeding to eat, and finally went to the rooms at about midnight. This was confirmed by PW3 Harmon Ndirangu. The witnesses were thus with the appellant for over four hours considering the time they boarded his matatu at about 7.30pm to midnight. They therefore had ample time to see the appellant and recognise his features. PW4 John Mathenge also confirmed that as the supervisor of Nyeno sacco and on 17.06.2018 he was on duty and assigned the minors to board the appellants motor vehicle. Later when he came back from the supermarket they were still with the appellant arguing over their fair to be returned . Given the above facts identification was by way of recognition and was free from the possibility of any error. See *Wamunga v Republic* (1989) KLR at 426. His identification was thus properly established. The trial court cannot be faulted for arriving at that conclusion.

Whether the evidence adduced was full of contradiction, inconsistencies and was uncorroborated.

17. The appellant in his grounds of appeal did raise this issue but did not make any specific reference to where the evidence presented was contradictory, inconsistent or uncorroborated.

18. In *Philip Nzaka Water v Republic* CA Criminal Appeal No. 29 of 2015 while relying in the decision of *Dickson Elia Nsamba shapwater & Anor v Republic* CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

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

19. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated that;

> "Now, contradictions 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."

20. Further in *Joseph Maina Mwangi v Republi*c (2000) eKLR it was held that;

> "In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording 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."

21. The appellant failed to identify the inconsistencies and contradictory evidence which was not considered by the trial court and on an independent review of the evidence presented, this court does not find any contradictory evidence. The evidence of PW1 and PW2 was amply corroborated by PW3 and PW4 and there was proper basis to convict the appellant. This ground of appeal does fail.

Whether this court should interfere with the sentence as passed.

22. The appellant faulted the sentence melted out. The respondent on the other hand urged the court not to interfere with the same and find that the sentence passed was lenient.

23. As regards the sentence and whether it should be reduced, this Court is guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

24. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of *Athanus Lijodi v Republic* [2021] eKLR

> " On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases, *Muruatetu's case* (*supra)* notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic* [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

25. The statutory sentence of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No 3 of 2006 is 10 years. The trial court considered the mitigation of the appellant and found that though the appellant was a first offender, the offence he committed was very serious. He chose to take advantage of young girls to satisfy his sexual needs instead of protecting them. His action called for a deterrent sentence. The trial court considered the period the appellant had spent in custody and proceeded to sentence his to eight (8) years imprisonment on each count. The sentence was to run concurrently.

26. This trial court correctly looked at all parameters of the offence and passed the appropriate sentence. The period the appellant had spent in custody was also considered. I am unable to find any fault in the sentence as passed and therefore cannot interfere with the same.

Disposition

27. Having considered all evidence presented in this appeal I do find that this appeal both as against conviction and sentence lack merit and the same is dismissed.

28. Right of appeal 14 days

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 18th day of May 2023

In the presence of;

Appellant

..... For O.D.P.P

..... Court Assistant