Muli v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 20868 (KLR) (24 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E043 OF 2022

MW MUIGAI, J

JULY 24, 2023

BETWEEN

JOSPHAT MUNYAO MULI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence judgment delivered and dated 4th August,2022 by Hon. Ann Nyoike (PM) Machakos)

JUDGMENT

Background

1. The Appellant Josphat Munyao Muli was charged with the offence of defilement contrary to Section 8 (1) read with Section 8 (2) of *Sexual Offences Act* No. 3 of 2006.

2. Particulars as per the charge sheet were that the Appellant on 23rd March,2018 in Mwala Sub-county within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of S.M.K a child of 8 years old.

3. On the Alternative count, 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.

4. Particulars of the alternative were that the Appellant on 23rd March,2018 in Mwala Sub-county within Machakos County, intentionally and unlawfully touched the vagina of S. M. K a child of 8 years old using his penis.

5. The Appellant pleaded not guilty on both charges and the matter proceeded to full trial.

Trial Court

Prosecution Case

6. The prosecution case relied on the evidence of six (6) witnesses.PW1, RKS gave her sworn evidence that the subject victim is her child and was aged 8 years old at the time having been born on 21st November,2010 and that she was in the process of obtaining subject victim's birth certificate. She testified that the child was defiled by the Appellant, an employee of her sister, M . She testified further that the subject minor was living with the said sister and that sometimes in March she was at work and had travelled to Kisii for a funeral where her whole family met. Her brother, Sebastian asked how the subject minor was faring and she responded in the affirmative and that the brother informed her the child had been defiled by her sister's employee (Appellant herein), that the matter had been reported to the Police and subject minor taken to the hospital by her sister whom the child was living with.

7. PW1 testified that her sister informed her that one day the subject minor woke up and refused to go to school which was not normal and that the child told her sister that the Appellant had chased the subject minor, took her to the toilet and defiled her. She gave her evidence further that she travelled with her sister to her sister's home and met the Appellant who had a small room within the home and asked the Appellant what had transpired between him and the subject minor, that the Appellant acted shocked and started shouting and denied; testifying that the subject minor told her what had happened and asked not to be left there fearing that the devil would kill her while pointing at the Appellant.

8. PW1 testified that upon interrogating the subject minor, the minor indicated that one day while from school with the cousins the Appellant called the subject minor to his room, removed her knickers and inserted his fingers in the subject minor's private parts which the minor normally referred to as 'chulichuli'. That the subject minor told her that the Appellant removed his trouser and put his penis which the child referred to as 'dudu' which the Minor said was big; she testified that the subject minor indicated to her that she (minor) tried to scream but the Appellant threatened to kill her; that the subject minor did not tell anyone because she feared the Appellant would kill her and that the Appellant would do this to the minor anytime the grandmother was away.

9. PW1 stated that the subject minor's cousin one S witnessed the last incident and that when he tried to save the subject minor the Appellant took a cane and threatened to beat him and took the subject minor forcefully to his house. She testified that she had no issue with the Appellant and that she believed what the child had told her.

10. PW2 SMK aged 8 years, the Trial Court conducted voire dire proceedings and found the child was of enough intelligence as she was able to answer questions put to her the subject minor was found suitable to give unsworn statement. PW2 testified that she attended [Particulars Withheld] School in Makutano where she went with the school bus. Testifying that she lived with D, her aunt M , the grandmother who would be with them at times while her mother lives in town where she works but visits her. The subject minor testified that she had not lived with her aunt for long and that before that she lived with her aunt M who is also her mum's sister. PW2 said that they lived with the Appellant whom she identified.

11. PW2 testified further that she understood why she was in court and that the Appellant put her on his bed, removed his clothes and lay on her. She gave her evidence that the incident took place when she lived with her aunt M in the year 2018 and that the Appellant had his house where he took her; she went on to say that the accused person removed her skirt and panty and that he did not have his trouser on, testifying that he then inserted his fingers in her vagina which she described as 'chulichuli'

and touched between her legs. She added that the Appellant also inserted his 'chulichuli' which she described as being between his legs, in her vagina. She testified further that S who was older than her had heard Appellant calling him and asked the Appellant why he was calling her; she said that S then told the Appellant to leave her alone whereby the Appellant held her forcefully causing S to bite him on his hand. She testified that she was taken to the Appellant's house and when she left the Appellant's house she went to watch cartoons while in pain but did not tell her aunt M that very day but told her about the incident when she woke up and was taken to the hospital by her aunt M and S's uncle. She testified further that they went to police station where she narrated to the police what the Appellant had done to her and added that the Appellant used to beat her.

12. In cross-examination, the subject minor testified that she knew the Appellant and also knew the Appellant's name as Munyao and that the Appellant had been employed by her aunt M, testifying that in the morning she told her aunt what the Appellant had done to her.

13. In re-examination, she testified that she also told her mother about the incident while her aunt M informed the grandmother about the incident.

14. PW3 MK gave sworn evidence and testified that she is a business lady at Mutula, Mwala where she has been since 2013 and that PW2 is her sister's daughter and that PW2 lived in her home; that she has children S aged 10 years and D aged 5.5 years old. She testified further that she lived with the Appellant as well and that she is married in the area. Testifying that she knew the Appellant's mother and that they had taken Appellant in as their son and that the Appellant performed household and farm chores with his house separate but in the same compound. It was her testimony that they had lived with the Appellant for close to one year and they had a good relationship to the extent that children used to call the Appellant uncle.

15. It was further her testimony that on 26th March,2018 at 5:00Am she went to wake the children to prepare for school but PW2 refused to wake up saying she was in pain and she (subject minor) has something to tell her as long as she will not beat her (minor). That the subject minor told her that the Appellant placed the minor on his bed, removed her panty and done 'tabia mbaya'. Testifying that she dressed the subject minor and took her to Kalawa hospital where she was examined and penetration confirmed, blood and urine samples were taken and after the results, drugs were prescribed. Testifying further that upon examination, she was found to have an infection and that her genitalia was reddish and was put on post exposure prophylaxis to prevent HIV. PW3 testified that the child's mother had not been appraised with the happenings because her phone had been off and that treatment notes and that the post rape care form indicated that the hymen was broken.

16. In cross-examination, she testified that the Appellant had stayed with them for less than one year after her brother in law asked her to look for an employee and that the complainant is her sister's child whom she had lived with for 2 years. It was further her testimony that the Appellant did not sleep in the same room offered and for most nights she found padlock and that she did witness the incident neither did she ask how many times the defilement had taken place.

17. PW4 No.81467 Police Constable Francis Korir gave his sworn evidence and testified that PW1, PW3 & PW2 went to the station and reported a case of defilement of the minor which was said to have taken place on 23rd March,2018 and that PRC Form had been filled at Kalawa on 26th March,2018. It was his testimony that the child indicated that she was with her cousin S under a mango tree at about 2pm on 23rd March,2018 when the Appellant called the subject minor but S told her not to go and the Appellant chased and caught her taking her to his room which was within the compound.

18. PW4 told the Court, that he visited the scene and established that there were three houses within the compound and also saw the mango tree within the compound. He said that S was about 10 years

and that his witness statement was not recorded since he was in school and that he established that the child's grandmother, Margaret and her children stayed in the home but the grandmother did not witness the incident.

19. He testified that the subject minor had earlier been to Kilala Dispensary and the Post Rape Care Form was filled in and child referred to the Police Station. PW 4 visited the scene, home where the minor and Appellant and others lived, confirmed the mango tree and where the Appellant lived. He investigated the matter and charged the Appellant. The child was later was taken to Machakos Level 5 Hospital where the P3 Form was filled and degree of injury classified as harm and that at the point he was transferred to another station hence did not have the form rectified.

20. It was his testimony that the Appellant was a servant in that home and that after the incident he disappeared from the home and the subject minor feared to report because the Appellant had threatened her; that the accused salary would be paid in good time.

21. On 12/3/2019, the Accused person /Appellant walked out of Court and told the Court that he did not want to proceed with the hearing and doctor's evidence.

22. PW5 Dr. Mativo Mwikali of Machakos Level 5 Hospital gave her sworn evidence and testified that when a patient presents himself/herself, they take the history, examine them, treat them and then fill the medico-legal documents. She presented a P3 Form pertaining the minor filled on 26th April,2018. It was her testimony that the minor had indicated that she ran away from the perpetrator but he chased and caught up with her then defiled her and that the PRC Form was filled on 26th March,2018 at Kalawa Health Centre and was presented at the time of filling the P3 Form.

23. PW5 testified that the PRC Form produced as exhibit gave graphic representations of the injured parts where there were complaints of smelly vaginal discharge and that the circumstances are that the Appellant inserted fingers and penis in the minor's vagina. PW5 testified further that the hymen was torn, the vaginal discharge was creamy which is not normal for an 8-year-old and that there were no lacerations on the outer genitalia and the hymen was broken indicating sexual assault.

24. It was her testimony that upon enquiry from the guardian it was indicated that a whitish discharge had been noted on the clothes, no bruises were noted, approximately age of injury was 3 days, the probable weapon used a penile shaft and penetration was vaginal. PW 5 conducted examination and findings concurred with the PCR form. PW5 produced P3 Form and Age Assessment Form duly stamped as evidence that the subject minor was 8 years old at the time.

25. On 23/5/2019, the new Trial Court applied Section 200 *CPC* and sought from the Accused recall of any witnesses or hearing de-novo. The Appellant sought recall of PW4 Investigation Officer and PW5 the doctor.

26. PW4 testified again and in cross examination he stated that he did not know the Appellant and was to arrest the Appellant but was transferred and that the subject minor knew the Appellant since worked for the child's grandmother. He testified he was the one who accompanied the minor and her family to Machakos Level 5 Hospital for filling the P3 Form and it was recorded in the OB.

27. PW5 recalled and testified again on 15/3/2022 and relied on her earlier testimony. The Appellant was provided with the Witness Statement before- hand. In cross -examination PW5 reiterated that the child had been examined at Kalawa and was found to have smelly discharge. The hymen was torn and the child stated she knew who defiled her. PW5 filled PRC & P3 Form.

28. PW6 Boniface Mutinda Kiswili, Assistant Chief Kalala Sub-location gave his sworn evidence and testified that he received a call on 6th August,2018 at night informing him that a store had been set

ablaze and that the villagers were in search for the culprits. It was his testimony that the next day he went to Kivalani Market where he found four (4) men who had been apprehended by members of the public, the Appellant was among them. This witness testified that he called the police from Kilala who came and arrested the four (4) and he informed the police that there was an earlier report of defilement against the Appellant whom he positively identified.

29. On cross-examination, he testified that he was informed that the four (4) men had set the store on fire and that he did not have evidence on the defilement but that on 20th April,2018 two (2) women (PW1 & PW3) reported to him that the Appellant had defiled their child. Testifying that he referred the two to the police and a man hunt for the Appellant commenced and that he did not visit the scene of crime but the police visited the Appellant's work place where he (Appellant) escaped from.

30. Prosecution closed their case.

31. Vide a ruling dated 31st March,2022, the learned Principle Magistrate found that a prima facie case had been established by the prosecution and the Appellant placed on his defence.

Defence Case At The Trial Court

32. DWI Josphat Munyao Muli, gave his sworn evidence with no witnesses and in his defence, he testified that at about 3:00pm on 6th August,2018 while asleep he heard a knock on the door and found his mother, sister and neighbor who told him that they had heard screams and that they all proceeded to see what was happening and found that a store had been set ablaze. Testifying that some suspects had been apprehended and that the store had been set ablaze by the brother to the complainant's husband and was later charged with the offences herein which he testified he had no knowledge about. It was his testimony that PW1 & PW2 fabricated lies since the complainant is too young for him to have carried out the alleged act. He stated that the doctor's evidence should not be adopted as it indicated that the child was not defiled, maintaining that he did not defile the child.

33. On cross-examination, he testified that he worked for PW3 in March,2018 and that her husband's grandmother is related to his mother. He testified further that the complainant lived with her aunt and that he had not been given a place to sleep, as he would work, eat but not sleep there. It was his testimony that PW3 had children and that they were okay until they fell out when PW3 withheld his salary. Testifying that he was owed the October, November and December pay and that he tried to get money from her because his mother needed money for school fees. He further testified that he left PW3's home in January and that by 28th March,2018 he had already left PW3's home and moved to Mlolongo hence it would erroneous if said that he was at PW3's home in March.

34. Vide judgment dated 4th August,2022 the Appellant was convicted under Section 2015 of the *Criminal Procedure Code* for the offence of defilement contrary to Section 8 (2) of the *Sexual Offences Act* No.3 of 2006 which carries a mandatory sentence of life imprisonment.

The Appeal

35. Dissatisfied by the judgment on the conviction and sentence, the Appellant vide Notice Motion and supporting affidavit filed on 7th September,2022 sought leave to appeal out of time as pauper and that the grounds of appeal be considered reason being that he was confused and sickly at the time he was sentenced hence did not file the appeal within time contemplated by law. His application was granted as prayed.

36. Vide amended grounds of appeal filed on 13th January,2023, the Appellant relied on the following grounds:

a. That the learned Magistrate of the Trial Court erred in law and fact by failing to find that the elements of the offence (i.e. age and penetration) were not conclusively proved to warrant a conviction as provided by law.

b. That the learned Magistrate erred in law and fact by failing to find that the complainant's evidence was incredible to cause a conviction.

c. That the learned Magistrate of the Trial Court erred in law and fact by not finding that the whole evidence adduced by the prosecution witnesses was full of contradictions and inconsistencies that cannot cured under Section 382 of the *Criminal Procedure Code*.

d. That the learned Magistrate erred in law and fact by not putting into consideration the alibi defence of the Appellant.

e. That in default of any acquittal, this honorable court will exercise its discretion in giving another sentence after considering the mitigation that will be rendered by the Appellant herein.

37. The matter was canvassed by way of written submissions.

Submissions

Appellant's Submissions

38. The Appellant vide his brief Submissions filed on 13th January,2023 submitted that the elements of defilement are set out in the cases of *Fappyton Mutuku Ngui vs Republic* Cr Appeal 296 of 2010 and *Charles Wamukoya vs Republic* Cr. Appeal No. 72 of 2013 in which it was held:

> " The ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant."

39. As regards the Age of the complainant the Appellant alleged it was not proved as required by the law, it was the Appellant's submission that the age assessment done was not proved. Reliance was placed on the case of *Kaingu Elais Kasomo vs Republic* (Malindi) Cr. App. No. 504 of 2010, where the court of Appeal stated that

> " the age of a minor is an element of a charge of defilement which ought to be proved by medical or birth certificate or baptism card would be more useful"

40. It was the Appellant's case that the Trial Court in its judgment did resolve issue of age though in the proceedings the court had indicated the girl was 8 years old and did not explain how it settled on that. Urging that age assessment indicated that she was 8 years old and that PW5 did not disclose how the age was assessed. Submitting that the age given of the complainant by those who would know it was contradictory. Age assessment did not disclose how it was carried out and ascertained that she was 8 years old hence she could have been an adult or a child.

41. On the ground of penetration, the Appellant stated it was not proved beyond reasonable doubt, it was submitted by the Appellant that the prosecution did not conclusively prove that there was penetration of the genital organ of PW2. Urging that the charge sheet states that the defilement was on 23 March,2018, but testimony of PW1 during cross examination on page 8 line 2 is that "she said that the accused would do this to her every time grandmother was not there." This evidence points several incidents in which the victim had been defiled. Contending that this evidence points to several

complete sexual intercourses. Reliance was made on the cases of *Sekitoliko vs Uganda* (1967) EA 53 and *Daniel Kiplimo Cherono vs Republic* (2014) eKLR, in which it was observed that

> " ...where a complainant was emphatic that the penetration took the form of complete sexual intercourse like in the present case, the prosecution bears the burden of proving beyond doubt that indeed the victim had engaged in sexual intercourse on the date alleged."

42. Submitting that the medical record by PW5 on page 30 lines 3 of typed proceedings indicated that "on the outer genitalia there were no lacerations, hymen was broken. She had no bruises noted. The approximate age of injury is 3 days" opining that no other evidence was tendered to show why the genitalia was normal despite several defilement incidents, hence the only logical conclusion is that no such incidents occurred.

43. Contending that PW2 was taken to Kalawa hospital and examined 3 days after the alleged incident and the results indicated that the outer genitalia was normal, vagina had no lacerations, hymen was torn and anus was normal. Urging that this PRC examination relied on by PW5 in P3 Form dated 26th April, 2018 indicated that external genitalia on presentation had no abnormalities, hymen torn except for vaginal creamish discharge, foul smell. Such findings are not proof of penetration.

44. The Appellant submitted that PW5 the vaginal swab was fine meaning no seminal fluid or spermatozoa had been found and that PW5 relied heavily on the narration of PW1 to find that she was sexually assaulted. Reference was made on page 30 lines 3-4 of the Trial Court's judgment. The Appellant averred that the evidence on record shows that the Court highly relied on the torn hymen to conclude that the nature of the offence was defilement. Reliance was placed on the case of *David Mwingirwa vs Republic* (2017) eKLR, the Court of Appeal observed:

> " From that reasoning of the learned judge, it would seem that the certainty or confidence with which the [Court]asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor were there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen."

45. The appellant similarly quoted the case of *David Ochieng Aketch vs Republic* (2015) eKLR, and contended that without further evidence to prove that the victim had been defiled on the material date would be highly hypothetical to conclude that the child was defiled based on the fact that she had a torn hymen. Urging that PW2 allegation that she had been defiled was not corroborated by the medical examination with PW5 alleging that she formed the opinion that there was sexual assault.

46. As to the ground of contradictions, discrepancies and inconsistencies in the prosecution case/ incredible prosecution witnesses, it was the Appellant's case that the prosecution's case was riddled with material contradictions, discrepancies and inconsistencies that goes to the core root of this matter

as they concern material facts relating to the case. Averring that contradictions and discrepancies are that:

a. PW2 never reported anywhere any of the previous alleged incidents that ever occurred (vide page 8 lines 1)

b. The complainant was in company of S (10 years old) as she testified on page 12 lines 3-5 that "S had heard Munyao calling me then asked him why he was calling me. S told accused to leave me alone"

c. Accused held me by force after S bite him on his hand. That is when accused took me to his house. S and D are eye witnesses who saw the Appellant defile the complainant (vide page 11 lines 17-20).

d. During the drama why did S and D keep silent and not report or raise alarm to seek assistance?

e. Failure to call the two witnesses to testify rendered the evidence less watertight to convict. They were to give concrete reason why S had to bite the Appellant on his hand.

f. PW 2 was defiled on 23rd March 2018 as per the charge sheet. On 30th March, 2018 is when PW1 got the news from her brother one Sebastian who had been silent for over 7 days.

g. Sebastian was not called to testify so was S and D. These witnesses could give the evidence of PWI, PW2 & PW3 more weight to conclude that the Appellant was the perpetrator.

47. As regards the ground of not taking into account the alibi defence, it was the position of the Appellant that the learned Magistrate shifted the burden of proof to the accused person. Reliance was made on the case of *Eliud Kamau Njuguna vs Republic* CR. APP. No. 82 of 2010, the court of Appeal held that:

> " the High Court failed to appreciate that the trial magistrate had shifted the burden of proof by requiring the appellant to explain why the witnesses who had no grudge with him should implicate him in the offence."

48. Similarly, reliance was placed on the case of *Uganda vs Sebyala & others*, in which the learned judge citing relevant precedents had this to say: -

> " The High Court does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"

49. It was submitted that the Trial Magistrate in the judgment went against the provisions of Section 169 (1) of the *Criminal Procedure Code* and therefore the conviction cannot be sustained.

50. On the ground of lenient sentence to the Appellant, it was the position of the Appellant that at the time of the sentencing of the appellant, the court sentenced the accused person to life imprisonment as stipulated under the minimum mandatory sentence of the *Sexual Offences Act*. The Appellant took the view that the Court enjoys unfettered discretion on what sentence to give. He quoted the case of *Evans Wanjala Wanyonyi vs Republic* (2019) eKLR, where the court held: -

> " In this appeal, guided by the merits of the Supreme Court decision in *Francis Karioko Muruatetu & another – v- Republic* (supra) and persuaded by the decisions of this Court in *Christopher Ochieng – v- R* (supra) and *Jared Koita Injiri – v- R*, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that

> the enhanced mandatory 20-year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20-year term of imprisonment meted upon the appellant. We substitute the 20-year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015."

51. Consequently, reliance was placed on the case of *George Kuria Mwaura vs Republic* (2019) eKLR, in which the Court of Appeal had exercised its discretion in awarding an Appellant a (15) year sentence from a conviction of life imprisonment on a defilement case.

52. Contending that this court exercises its unfettered discretion in this Appeal by considering giving more lenient sentence, opining that the Appellant greatly regrets what happened and asks for pardon from this court so that he can demonstrate that he has learnt from his incarceration and he is now a role model to others in the community.

53. It was the contention of the Appellant that the good book talks of a son who requested the father to bequeath him his share of inheritance for which the son went and squandered away in a far country. When he came to his senses, he decided to go back home and ask for forgiveness from his parents and the father with all humility forgave him and prepared a banquet in his favor. The appellant is pleading with humility for this court to exercise its discretion and mercy in awarding more lenient sentence which will afford the Appellant to rehabilitate and be integrated back into the society.

54. In concluding his submissions, the Appellant quoted a number of cases which majorly touched on the evidence adduced that is produced before court in which court is called upon to make decisions on inferences on some set of circumstances on the basis of the available evidence as adduced before court before it and be slow in making assumptions not supported by facts as tendered before it. The following cases were quoted: *Salim Juma vs Republic* Criminal Appeal No. 114 of 2004, *J.O.O vs Republic* (2015) eKLR, *R vs Gagnon (*L) 2006 SCC 17 (2006) 1 S.C.R 621 among others.

55. It was finally averred that the evidence adduced fell short of the standard required in a Trial of this magnitude and the circumstantial aspects relied upon were disjointed and incapable of sustaining a conviction. Urging that this appeal be allowed, the conviction be quashed; the sentence be set aside and the Appellant be set free in the interest of justice.

Respondent's Submissions

56. Respondent vide a written submissions dated 28th February,2023 and filed on 29th March,2023, opposed the appeal and sequentially raised the following grounds:

57. Regarding the ground that the elements of the offence were not proved appropriately, reliance was placed on Section 8 (1) and 8 (2) of the *Sexual Offences Act* which provides:

    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.

58. Submitting that the *Sexual Offenses Act* No.3 of 2006 defines 'penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Reliance was made on the case of *FOD vs Republic* (2014) eKLR, Majanja J expressed himself as follows:

> "In order to secure a conviction for the offence of defilement under the *Sexual Offences Act*, the prosecution must establish that the person has committed an act which causes penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

59. It was the Respondent's submission that the testimony of PW2 was beyond a shadow of doubt, that the Appellant defiled her which evidence was corroborated by the testimony of PW5 who testified that hymen was torn, the vaginal discharge was creamy which was not normal for an 8 years old, there were no lacerations on the outer genitalia and the hymen was broken which findings were indicative of sexual assault.

60. It was contended by the Respondent that medical evidence availed by P3 Form, truly indicated that the victim was defiled beyond reasonable doubt. The main ingredient for defilement, penetration was proved appropriately by the prosecution. The age of the minor was proved by the age assessment report indicating that the minor was 8 years old. In *George Opndo Olunga vs Republic* (2016) eKLR, court stated that the ingredients of an offence of the defilement are; identification or recognition of the offender, penetration and the age of the victim.

61. As to the ground that the Trial Court failed to observe that no independent witness was called to corroborate the evidence, it was urged by the Respondent that the testimony of PW2 clearly identified the Appellant as the perpetrator of the heinous act and that the Trial Court in its wisdom clearly ascertained that the victim was telling the truth. Reliance was made on Section 124 of the *Evidence Act* provides that:

> 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.

62. On the ground that court failed to observe the contradictions and inconsistencies of the prosecution case, it was argued by the Respondent that the prosecution availed direct and documentary evidence. The testimony of PW2 was well corroborated by the testimony of PW1, PW3, PW4, PW5, and PW6. Urging that there were no inconsistencies or contradictions in the prosecution case and that the ingredients of the offence were well canvassed in the Trial. Respondent premised the argument in the case of *Richard Munene vs Republic* (2018) eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

> Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.

> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

63. Submitting that the prosecution relied on the evidence that is cogent, which the Appellant through his evidence could not shake. Urging that the trial court was right in determining that indeed the Appellant was guilty of the offence of defilement.

64. Regarding the ground that the Trial Magistrate erred in law and facts in failing to consider the Appellant's defence, it was the Respondent's case that the Trial Court considered the evidence of the Appellant during the defence hearing. Urging that the Appellant offered an alibi defence during cross examination that he had left Margaret's home in January 2018 and moved to Mlolongo and that the Trial Court was right in scrutinizing the Appellant's alibi as an afterthought coming too late in the day. To buttress this position, the Respondent relied on the case of *Victor Mwendwa Mulinge vs R* (2014) eKLR, the Court of Appeal rendered itself on the issue of alibi:

> "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja v Republic* [1983] KLR 501.
>
> ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

65. Contending that none of the witnesses was called by the Appellant to corroborate his evidence. Hence, the cogent prosecution case went unchallenged by the Appellant's defence.

66. Pertaining to the ground of proof beyond reasonable doubt, it was the argument of the Respondent that the Appellant was properly identified by the victim as the perpetrator of the ill fateful ordeal. PW2 identified the Appellant since he was somebody she knew very well, since they stayed together. In *Peter Musau Mwanzia v Republic* (2008) eKLR, the Court of Appeal expressed itself as follows:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition"

67. Similarly, reliance was made in the case of *Wamunga v Republic* (1989) KLR 424. It was urged that the conviction life imprisonment sentence against the appellant is sufficient and appropriate, and that the Court upholds the conviction and the sentence imposed by the Trial Court.

Determination

68. The Court considered the appeal, evidence adduced before the Trial Court and submissions filed on behalf of respective parties in this appeal.

69. This being the first appellate court, The Court is required to re-evaluate and subject the evidence before the Trial Court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the Trial Court. The Court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed by the EA Court of Appeal in *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 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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."

70. Further, in *M'Riungu vs. Republic* [1983] KLR 455 the court held:

> " Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.."

71. The issues that arises for determination in this appeal are:

    a. Was the age of the complainant proved?

    b. Was there penetration?

    c. Was there contradictions or inconsistencies in the prosecution case?

    d. Was the Appellant properly identified?

    e. Was the defence of alibi viable?

    f. Was the sentence properly meted?

Was the age of the complainant proved?

72. Section 8(1) and (2) of the *Sexual Offences Act* provides as follows:

    (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.

73. The ingredients of defilement are well highlighted in the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 where the court stated that:

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

74. Similarly, in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR, where Joel Ngugi J. held that: -

> " conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

75. In this case, and as regards the age of the victim child, PW1 the mother of the said child testified that the child was 8 years old at the time having been born on 21/11/2010 and that she was in the process of obtaining a birth certificate. Further, PW 4 a police constable testified that the defilement of the 8-year-old child was ascertained by one Dr. Mativo. PW 5 Dr. Mativo presented a P3 Form and an Age Assessment Report filed on 5/10/2018 confirmed the minor SMK was 8 years old.

76. I find that the first issue of the age of the victim child was properly discharged by the prosecution beyond reasonable doubt based on the evidence of the witnesses. I therefore find no merit on the Counsel for the Appellant submissions that the age assessment of the complainant done was not proved and that the Trial Magistrate did not explain how the age was arrived at. Age was conclusively proved medically and the Age Assessment Report was produced by PW5 who was subjected to cross examination by the Appellant upon being recalled to the stand.

Was there penetration?

77. This is defined under Section 2 of the *Sexual Offences Act* to mean,

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

78. In *George Kioji -v- Republic* Criminal Appeal No.270/2012 the Court of Appeal held that-

> " where available, medical evidence arising from examination of an accused linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused."

79. Similarly, in the case *DS v Republic* [2022] eKLR, this court observed at paragraph 19 that:

> " 19. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

80. 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." (emphasis mine).

81. In the present case, the victim child gave her unsworn statement having been found suitable to testify stated that she understood why she was in court and that Munyao put her on his bed removed her clothes and lay on her. She testified that he inserted his fingers in her vagina which she described as 'chulichuli' and touched her between her legs. She also testified that he also inserted his 'chulichuli' which she described as being between his legs in her vagina.

82. The Medical evidence was provided by (PW5) who was a Dr. at Machakos Level 5 Hospital. The doctor testified that PRC Form produced as an exhibit gave graphic representations of the injured parts. there were complaints of abnormal and smelly vaginal discharge. The direct evidence of PW2 is/was that the accused person inserted fingers and penis in the minor's vagina. The doctor who also filled P3Form further testified that the hymen was torn, the vaginal discharge was creamy which is not normal for an 8-year-old there were no lacerations on the outer genitalia and the hymen was broken which findings were indicative of sexual assault.

83. Counsel for the Appellant submitted that the prosecution did not conclusively prove that there was penetration of the genitalia organ of PW2.

84. PW2 was taken through voire dire examination and the Trial Court found her to be of enough intelligence. PW2 gave unsworn testimony, that she lived with Auntie M, her mother's sister, her children S and M and the Appellant who worked at the home and lived there. These circumstances depicted the Appellant as the person PW2 knew well enough having lived in the same compound and in fact it was recognition and not identification of the Appellant as one who defiled her.

85. PW 2 gave graphic details of the ordeal, that one day, in 2018, the appellant took her to his bed, removed her clothes, her skirt and panty and lay on her, the appellant did not have trousers. He inserted his fingers in her 'chulichuli' and then his thing in her 'chulichuli' S and D were there, S told him to leave her and he bit him on his hand. S and D were younger than her.

86. That explains why D & S could not be called as witnesses as they were children of tender years too. This evidence by PW2 of sexual intercourse coupled by examination few days later of smelly and abnormal creamy discharge and broken hymen cumulatively discloses penetration which connotes not only complete insertion of one's sexual organ into the other sexual organ but partial insertion too and that is why in this case the victim's genitalia was not torn but intact.

87. In this case, I find based on the evidence of the victim corroborated by medical evidence that there was penetration as stated by the court in *Evans Wanjala Wanyonyi vs. Republic* [2019] eKLR, the court held that,

> " An essential ingredient in the offence of defilement is penetration and not impregnation."

88. I therefore conclude that the second ingredient of penetration was adequately proven based on the evidence of the victim child as corroborated by the medical evidence.

Were there contradictions or inconsistencies in the prosecution case?

89. In *MW v Republic* [2019] eKLR, the court stated that:

> " The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

90. Similarly, in the case of *Philip Nzaka Watu v Republic* (2016) CR APP 29 of 2015, the stated as follows:

> " 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 recognized 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."

91. Again the Court, in *Joseph Maina Mwangi versus Republic* Criminal Appeal No. 73 of 1993, held, inter alia, that: -

> " In any trial there are bound to be discrepancies. An appellate court in considering those 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 sentences"

92. I am also persuaded by the Court of Appeal decision in *Erick Onyango Odeng' v. Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

> " 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 case."

93. The role of this court is to be in the shoes of the Trial Court in evaluating, assessing and reconciling the evidence and to determine whether the said contradictions, discrepancies and/ or inconsistencies are prejudicial to the Appellant.

94. According to *Black's Law Dictionary* 2nd Edition, contradiction means: In practice. To disprove. To prove a fact contrary to what has been asserted by a witness.

95. In the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria* {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. Where the court 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."

96. Pursuant to the above decisions this Court shall consider and determine on the above issue. The Counsel for the Appellant submitted that the prosecution case was riddled with material contradictions, discrepancies and inconsistencies that go to the core and root of this case as they concern material facts relating to the case. Counsel poked holes on the absence of the siblings of the victim child as witnesses made the evidence less watertight to convict. It was submitted that Sebastian was not called to testify and so was S and D, according to the Counsel these witnesses could give the evidence of PW1, PW2 and PW3 more weight to conclude that the Appellant was perpetrator in this case.

97. The Counsel went further to submit that the tests done on 26/3/2018 which was less than 72 hours after the incident at Kalawa Hospital showed that the complainant had an infection. According to the Counsel this creates a lot of concern to the scientific period on the incubation about sexually transmitted diseases.

98. Having looked at the testimonies tendered by the witnesses including but not limited to the testimony of the victim child PW2 on what had transpired on that material day, I find the testimonies were watertight. The inconsistencies and contradictions alluded to were the fact that PW 3 stated 'there were no male adults in the home apart from the Accused person' and S & D were there and could have penetrated the victim. S & D were there but from the evidence of PW2 they were young like her and therefore not adults as stated. The next issue is that Sebastian, D & S were not called to testify to corroborate the evidence on record. The Prosecution is not cannot be directed which witness to call to testify and/or what evidence to adduce. It is for the Prosecution to present their case and discharge the burden and standard of proof required by law and the Court to determine if a prima facie case is made out or not based on evidence on record. The date of arrest of the Appellant was stated as 6/8/2018 as per Charge Sheet yet PW6 testified that on the same date he received a call a store belonging to Monica Ndeti was burnt down. The following day 7/8/2019, the villagers apprehended 4 men. The Appellant was one of the 4 men arrested .On 7/8/2018, the Appellant was arraigned in Court. How many Josephat Munyao Mulli are in this case?

99. The evidence by PW6 as per Court record is as follows;

> 'I do recall on 6/8/2018 in the night. I received a call from Monica Ndeti who informed me that her store was burnt down and villagers were in search for the culprit. The following Day on 7th I went to Kivalani market where I found 4 men had been apprehended by members of the public...'

100. PW6 found the 4 men (the Appellant among them) had been apprehended when he went to the scene the next day. Clearly, he was not there when the 4 men were apprehended and he did not apprehend them they were already apprehended by the time he came the next day. There is no contradiction or inconsistency there was the Appellant was among the 4 men apprehended on 6/8/2018 and arraigned on 7/8/2018.

101. Further, in view and in light of the above cases the contradictions, discrepancies and the inconsistencies alluded to in this case are not prejudicial to the Appellant.

d.Was the Appellant properly identified?

102. In the case of *Peter Musau Mwanzia V R* (2008) eKLR in the Court of Appeal, the Court stated:

> " In the well-known case of *R vs Turnbull* (1976) 3 ALL ER 549 at page 552, it was stated: "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger.....
>
> Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."

103. Similarly, in the Court of Appeal for Eastern Africa in the case of *Abdallah Bin Wendo v R* 20 EACA 166 at page 168 thus:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

104. In this case the issue of identity is not contested, however, it is one of the essential ingredients that has to be proved beyond reasonable doubt by the prosecution before court can reach a determination that indeed there was an offence committed and that the perpetrator was identified or recognized by the victim or someone else at the scene of crime.

105. The testimony of PW2 the victim child is that she knew the Appellant and also knew his name as Munyao and that he had been employed by her aunt M. I need not belabor this point, the Appellant

was known to the victim child. She told her aunt what the Appellant had done to her. I find that the Appellant was identified by the Victim child.

Was the defence of alibi viable?

106. The Appellant during cross examination stated that he worked for M. He was working for her in March 2018, and that he was arrested for arson which was later changed to defilement. On 28/3/2018 he had already left M's home and went to Mlolongo and that it would be a lie if one said he was in 's home in March.

107. In *Erick Otieno Meda v Republic* [2019] eKLR, the court of Appeal stated that:

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

108. Similarly, in the case of *Victor Mwendwa Mulinge –v- R*, [2014] eKLR the Court of appeal rendered itself thus on the issue of alibi:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

109. Comparatively, in the South African case of *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the Court set out five principles with respect to the assessment of alibi evidence:

(a) There is no burden of proof on the accused to prove his alibi.

(b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

(c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."

(d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").

(e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

110. Bearing in mind the above authorities and in light of the evidence presented in this case, the alibi must be so cogent that any jury addressing its mind to it is left with no doubt but to accept it as the gospel truth.

111. In this case, the testimonies of various witnesses placed the Appellant at the scene on crime PW2 testified that the Appellant held her forcefully causing S to bite him on his hand. She testified that she was taken to the Appellant's house and she left the Appellant's house she went to watch cartoons and that she was in pain. PW4 testified that the victim child indicated that she was with her cousin S under a mango tree at about 2pm on 23rd March 2018 when the Appellant beckoned the victim child but S told her not to go but the Appellant chased after her and caught her and took her to his room

which was within the compound. PW4 testified that they further visited the scene and established that there were three houses within the compound he also saw the mango tree which was also within the compound. The Appellant testified that he was working for Margaret in March, 2018 and again says that it would be a lie if one said he in Margate's home in March, 2018.

112. It is therefore my considered view that the alibi is contradictory and it does not cast doubt to the Prosecution case where PW2 recognized the Appellant and PW6 who testified that the Appellant had ran off after the incident was reported. Accordingly, the alibi cannot be true as the Appellant was placed at the scene of crime based on the testimonies of the witnesses.

Was the sentence properly meted?

113. The Trial Court in its judgment found that the prosecution provided evidence beyond reasonable doubt proved all the elements of defilement against the Appellant who was convicted under Section 215 of the *Criminal Procedure Code* for the offence of defilement Contrary to Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 which carries mandatory sentence of life imprisonment.

114. In the Court of Appeal case of *Bernard Kimani Gacheru vs. 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."

115. I am guided by the recent Court of Appeal holding in *Julius Kitsao Manyeso vs Republic* Criminal Appeal No 12 of 2021, (unreported) in which Nyamweya, Lesiit & Odunga JJA observed at paragraph 26 that:

> " 26. We are equally guided by this holding by the Supreme Court of Kenya and the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional we have the discretion to interfere with the said sentence..."

116. In the present case the Court record shows mitigation was done prior to conviction. Similarly, there is no evidence to show that the Appellant was remorseful and/ or asked for forgiveness. I am alive to the fact that the Appellant was convicted for defiling a child of 8 years. In my view, the Appellant should be deterred by being given a deterrent sentence and have an opportunity for rehabilitation.

117. I therefore find that in the circumstances of this Appeal and in view of the authorities above, I uphold the Appellant's conviction of defilement, but allow his Appeal on sentence only, Accordingly, I set aside the sentence of life imprisonment imposed on the Appellant by the trial court and substitute therefor a sentence of 30 years in prison to run from the date of conviction is granted.

118. . It is so ordered

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24th DAY OF JULY 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence Of:

No Apearance - For The Appellant

Noappearance- For The Respondent

Patrick- Court Assistant