



REPUBLIC OF KENYA



**KENYA LAW**  
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**Indakwa v Republic (Criminal Appeal E025 of 2022)  
[2023] KEHC 22457 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22457 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E025 OF 2022  
SM MOHOCHI, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**BENSON AMOYI INDAKWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal originating from the judgement a sentence of Hon Y.I. Khatambi delivered on 14th March, 2022 in Nakuru Chief Magistrate's Court Criminal Case No 45 of 2020)*

**JUDGMENT**

1. The Appellant on 9<sup>th</sup> March, 2020 was charged with the offence of Defilement contrary to section 8(1) as read with Section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006. The Particulars of the charge are that-

On 29<sup>th</sup> February 2020 in Njoro sub-county within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (anus) of EK a child aged 12 years which caused penetration.

2. The Appellant also faced an alternative charge of Indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The Particulars are that:

On 29<sup>th</sup> February 2020 in Njoro sub county within Nakuru County, unlawfully and intentionally committed an indecent act to EK a child aged 12 years by touching her genital organ namely anus with your genital organ namely penis

3. The Appellant pleaded not guilty to all the charges and the case went to full trial. The prosecution called 5 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defense under Section 210 of the [Criminal Procedure Code](#). The



- Appellant gave sworn statement and did not call any witnesses. The Judgement was delivered and the Appellant was convicted on the main charge and sentenced to serve life imprisonment.
4. The Appellant being dissatisfied with the entire Judgement and sentence filed this Appeal seeking that this Court allows his Appeal, quashes the lower Court's conviction and set aside the life imprisonment sentence.
  5. The Appeal was argued based on the grounds in the supplemental grounds of appeal dated 21<sup>st</sup> October, 2022 reproduced in verbatim that:
    - i. The Honourable Judge erred in fact and in finding that the prosecution had proved their case beyond reasonable doubt yet failed to summon a crucial witness to tender their evidence.
    - ii. The Honourable trial Magistrate erred in fact and in law by failing to take judicial notice that the medical document relied upon to convict the Appellant were not filled and signed by the same doctor and that the P3 form was not signed.
    - iii. The Honourable trial Magistrate erred in fact and in law by failing to take judicial notice of the gaps between the time the Complainant claimed to have been allegedly defiled by the Appellant and the time the accused person was allegedly arrested.
    - iv. The Honourable trial Magistrate erred in fact and in law by failing to take judicial notice that the Complainant had been threatened and coaxed to give false evidence against the Appellant.
    - v. The Honourable trial Magistrate erred in fact and in law by convicting and sentencing the Appellant based on inconsistent, contradictory and incredible evidence.
    - vi. The Honourable trial Magistrate erred in fact in failing to consider and re-evaluate the materially contradicting evidence by the prosecution witness as to the nature of defilement whether anal or vaginal defiling.
    - vii. The Honourable trial Magistrate erred in fact and misdirected herself that the age of the Complainant was 10 years by placing reliance on the age assessment report yet the mother of the minor confirmed that the Complainant was 12 years old and there was a birth certificate in existence to conclusively determine the age of the Complainant.
    - viii. The Honourable trial Magistrate erred in fact and in law disregarding the evidence of the Appellant and treating the prosecution evidence in isolation yet the prosecution evidence was merely credible.
    - ix. The Honourable trial judge erred in law and misdirected himself by shifting the burden of proof upon the Appellant.

### **Appellant's Submissions**

6. The Appellant through his submissions dated 24<sup>th</sup> January, 2023 on record summarized five (5) lists of issues. He began by submitting that the Court failed to consider crucial witnesses and that PW2 spoke of a lady who had informed her that PW1 had gone to the Appellant's house. The said lady according to the Appellant was a crucial witness who ought to have been availed in Court. He added that the Complainant was under duress since she opened up about the incident upon being beaten by her father who was equally never called as a witness to shed more light.
7. Second issue the Appellant alluded that the Complainant's, a sole witness, evidence was only corroborated by the P3 form and PRC form documents that were never authored by the same doctor and that the P3 form was equally not signed. He also added that the testimony of PW1 and the evidence



of PW5 on where the Complainant was defiled was inconsistent which ought to have cast doubt to the prosecution's case. Reliance was placed on the case of *Chemengich Wache v Republic* HCCR Appeal No 69 of 2003.

8. The Appellant also submitted that the trial Court relied on evidence that was contradictory, the date of the offence was different in the testimony of PW1 during trial from her written statement. That there were inconsistencies in the content of the P3 form and the PRC form.
9. Fourth issue, the Appellant submitted that the age of the Complainant was not properly established and the trial Court basing reliance on the age assessment report which was different from what PW2 confirmed to be was unfounded and the sentencing based on the said age was not based on cogent evidence.
10. Finally, that the burden of proof was not discharged. Through his counsel, the Appellant argued that the prosecution never fully discharged the burden of proof and that the trial magistrate disregarded material facts in his defence.

### **Respondent's Submissions**

11. The Respondent in its submissions submitted on 6 issues. First that it proved material facts through the witnesses it called and that there was no legal requirement as to the number of witnesses presented in Court. Secondly that the Complainant was threatened with murder by the Appellant hence the hesitation in opening up.
12. The third issue the prosecution submitted that the PRC form as well as the P3 form were properly filled and in any event, the Appellant could have raised an issue during trial and thus an afterthought aimed at derailing justice. It was also added that in any event there was no legal provision that a PCR form should be filled by the same doctor. It was the Respondent's contention that PW1 knew she was defiled and the Court should consider her young age to the fact that she was not fully aware of the act whether it was vagina or anus and the consequences of the omission.
13. Fourth, that the offence took place on the 29<sup>th</sup> February, 2020 there was no contradicting evidence to suggest that the offence could have taken place on another day. Fifth the Appellant was convicted safely with the authentic age assessment and its authenticity was never questioned. Finally, the burden of proof never shifted to the Appellant as the Appellant's defence consisted of mere denials and there was nothing in his defence to dispel the overwhelming evidence.

### **Analysis and Determination.**

#### **Duty of the Court**

14. As a first Appellate Court, this Court is obliged to revisit and re-evaluate the evidence, assess the same and make its own conclusion bearing in mind the unique position the trial Court was in since it had the advantage of hearing the witnesses and also observing their demeanor during trial.
15. *Mohamud Omar Mohamed v Republic* [2020] eKLR in determining the appeal, considered principles account the laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not



the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."

### Issues For Determination

16. Upon consideration of the facts of this case, the evidence on record, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:
  - a. Whether the offence of defilement was proved to the required threshold;
  - b. Whether there was failure to call all crucial witnesses and was it fatal to the prosecution;
  - c. Whether there were contradictions to the prosecution's case;
  - d. Whether the medical documents presented were credible; and,
  - e. Whether the burden of proof shifted.
17. The offence of defilement is embedded on three ingredients namely; the age of the victim, proof of penetration and the positive identification of the perpetrator which are provided for under section 8(1) of the *Sexual Offences Act*.
18. Further, for a conviction to stand the test of time, those three ingredients have to be proven. This was espoused in *Opondo Olunga vs Republic* [2016] eKLR.

### Age

19. For starters, in order to establish age of the victim the Court in *Cosmas Koech v Republic* [2021] eKLR placed reliance in the case of *Francis Omuroni v Uganda* Court of Appeal; Criminal Appeal No. 2 of 2000, is explicit on proof of age of the sexual victim that:

"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 the 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..."
20. The age of the victim in sexual offences is very importance because it sets apart the offence of defilement and rape further it sets out the penalty based on the age. In this particular case the age of the victim determines the sentence.
21. Section 8 (1) of the *Sexual Offences Act* provides for the offence of defilement and 8 and (2) the penalty thereof where the victim is a child of 11 years or less 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.
22. Section 8 (3) of the *Act* provides for the penalty for defilement of a child aged between 12 years and 15 years as follows:



- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
23. Now therefore, what was the age of the Complainant, PW1 at the time of the offence? In the present case the Appellant has asked the question as to the age of the Complainant. PW1 testified that she was 11 years old but could not remember her date of birth. PW2, Dinah Ombaso the mother of PW1, (Pg 12 line 9) testified that the Complainant was 12 years of age born in January 2001 though she had lost the birth certificate. There was clearly a discrepancy as to the age of PW1 based on the testimony of PW1 and PW2.
24. The prosecution made an application for age assessment on 05/10/202. PW1 was then taken for an age assessment whereby PW4, Rupal Jesipher Gade a dentist at Provincial General Hospital Nakuru assessed the age of the Complainant at ten (10) years. She testified and also produced the age assessment dated 26/10/2020 (P Exhibit 4).
25. If this Court relies on what is on record, according to PW2 the Complainant was born in January 2001, it would place the age of the victim at Nineteen (19) years at the time of the offence on which common sense dictates to being an impossibility. Either there was an error by the magistrate in recording PW2’s testimony or PW2 was not sure. To infer what was meant by the magistrate would be tantamount to making assumptions. Be that as it may, all the witnesses and exhibits and witnesses produced in Court refer to PW1 as a child. PW3 identified her as an 11 year, the P3 form identified PW1 as an 11-year-old. The trial magistrate had the advantage of seeing and talking to PW1 and I believe concluded reasonably to PW1 not being a 19-year-old adult.
26. The Appellant insisted that a lost birth certificate could have been replaced and faulted the Court for not properly advising PW2 to avail a replacement before convicting and sentencing him. On this vein we rely on the case of where the Court stated in *PMG v Republic* [2022] eKLR:
- “Therefore, although production of a birth certificate is important to help the Court determine the correct sentence to impose, failure to produce one is not an automatic ground to acquit an accused person if age is established through other means including parents giving the age of their child. Where in doubt, a Court can order for medical examination in the course of the hearing to avoid a possible dilemma when sentencing in case of a conviction.”
27. In the absence of a birth certificate as was this case, in *PM v Republic* [2018] e KLR the Court had this to say when a birth certificate is not produced in Court;
- “What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother’s evidence of the Complainant’s age together with the combination of all other evidence available can be relied on to determine the age of the Complainant.”
28. Age of the victim in sexual offences can be proved by, the direct evidence of parents or guardians or by observation by the Court. In the alternative in the absence of a birth document, immunization cards or a parent or guardian to inform the Court on the age of the victim, the Courts are guided by medical documents which then guide the Court in sentencing In *Thomas Mwambu Wenyi v Republic* (2017)



eKLR cited Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 which held that:

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

29. In the instant case, proof of age of the Complainant was given by PW4 who produced an Age Assessment Form as P. Exhibit. 4. On proof of age of the victim, the Sexual Offence Rules of Court 2014 Rule 4 provides that: -

“When determining the age of a person, the Court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

30. In this case, the victim informed the Court that she was 11 years old while PW4 told the Court that the victim was 10 years, the trial Court was justified to rely on the age assessment report.

### **Proof of Penetration**

31. The prosecution had a duty to prove full or partial penetration by the Appellant and relied on Section 2 of the *Sexual Offences Act* of 2006 which defines penetration as:

‘The partial or complete insertion of the genital organ of a person in the genital organ of another person.’

32. In determining penetration, Courts often rely on the evidence of the victim which is then corroborated by medical evidence. However, regarding reliance on section 124 of the *Evidence Act*, the Court of Appeal in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say;

“As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

“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.”

33. PW1 narrated in detail what the Appellant did to her. The Appellant forcefully carried her to bed. He undressed her and after she undressed and the appellant did likewise, he laid her on the mattress face down and the Appellant did bad manners to her to her vagina from behind and she felt pain. She did not tell her mother since she testified that the Appellant had threatened to kill her. The incident occurred on 29<sup>th</sup> February, 2020 and the doctor examined her not until on 3<sup>rd</sup> March, 2020. PW5 Kipkurui Cheruiyot, a doctor testified that according to the P3 form the hymen was broken “old broken hymen” but there were no injuries to the genitalia. He, on cross-examination testified that there fecal matter discharged to show something foreign had been inserted in the anus. There was anal



penetration. The PCR forms notes fecal incontinence (sphincter loose), that is, not able to control feces.

34. A missing hymen is not necessarily evidence of penetration, from PW1's narration, there was penetration from behind and the lack of injuries to the genitalia may be due to the lapse of time from the date of the incident and the examination however the medical report show there was penetration of the anus of which the Appellant was charged with. Penetration as defined by Section 2 of the [Sexual Offences Act](#) encompasses both the vagina and anus.
35. The fact that PW1 stated the Appellant did bad manners to her vagina from behind and felt pain in the vagina when she urinates goes to show there being penetration in the anus and vagina with the probability of penetration in the vagina being partial. PW3 testified that she was present when the medical examination was conducted and the doctor confirmed she was sodomized.
36. The medical evidence, the PRC (Post Rape Care) form notes fecal incontinence and PW5 testified of an indication that something foreign had been inserted which establishes that the anus was penetrated. The prosecution thus established penetration to the required standard of proof,

#### **Identification of perpetrator.**

37. PW1 testified that she knew the Appellant, she positively identified him when asked during trial and at the police station according to the testimony of PW3. In her testimony, she referred to him as "Ben". She added that she had seen him several days before the incident. She further added to having met the Appellant on her way home from school. She also testified to being in the Appellant's house on several occasions and to being paid by the Appellant to wash his clothes Kshs. 20.00.
38. The Court of Appeal in [Francis Muchiri Joseph v Republic](#) (2014) eKLR held that:

"In Lesarau v R, 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".
39. The identification of the Appellant was based on recognition and by name. The above case shows that heavy reliance is based on recognition of a Perpetrator. In this case, the Appellant seemed well known to PW1 as PW1 testified of an acquaintance. The ingredient of identification therefore meets the test of time.

#### **Whether there was failure to call all crucial witnesses and was it fatal to the prosecution**

40. The Appellant faults the prosecution for failing to call PW1's father and the lady referred to by PW2 as the one who saw PW1 leaving to the Appellant's house as witnesses. The Appellant relied on the case of [Bukanya & others v Uganda](#) [1972] EA 549 where the Court addressed itself thus:-
  - (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
  - (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
  - (iii) Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.



41. The Prosecution on the other hand defended their choice of witness by espousing the provisions of Section 143 of Evidence Act (Cap 80) which provides:-

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

42. In the case of Keter v Republic [2007] 1 EA 135 the Court held *inter alia* thus:

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

43. In Julius Kalewa Mutunga vs Republic [2006] eKLR the Court of Appeal held that

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal Court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

44. The prosecution is required to prove their case and if their case is proved by the number of witnesses produced in Court then the Court cannot interfere. An accused person is at liberty to request the presentation of a witness.

45. In AHM v Republic (Criminal Appeal E043 of 2021) [2022] KEHC 12773 (KLR) the Court had this to say;

It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact. Further, it has not been shown that the evidence tendered had gaps which required to be filled.

46. The Appellant has not indicated that there may have been an ulterior motive as to the absence of those witnesses. The Appellant did not also question the absence of the witnesses in question during trial. I agree that the neighbour lady who saw PW1 going into the Appellant’s house would have shed some light, however would the same change the material of the evidence?

47. In Allan Chebore Chemosit v Republic [2022] eKLR Justice W. Korir had this to say.

‘The witnesses that were called by the prosecutor were sufficient to establish the case against the Appellant. The witnesses that were not called by the prosecution were known to the Appellant and he could have asked for them to be summoned to testify if he thought they had evidence that may have been useful to his case. That is not the same as shifting the burden of proof to him since the prosecution had already discharged the onus placed on it by the law to prove its case beyond reasonable doubt.’

48. I have perused the record of appeal and I see no prejudice in the prosecution failing to call the father of PW1 and the neighbour as witnesses.

#### **Whether there were contradictions to the prosecution’s case**

49. The Appellant has advanced the argument that there were contradictions in the testimony of PW1 as to the date of defilement and the date the Appellant was arrested. He argued that PW1 went to wash clothes at the Appellant’s house on 28/02/2020 she stated that she went again on the next day which



would make it the 29/02/2020 where PW1 did not find the Appellant and went the next Saturday which would then make it the “next Saturday” 07/03/2020 which the Appellant stated to have been in custody by then. The Respondent submitted that the evidence was not contradictory.

50. This Court has a duty to examine the evidence and determine whether there were contradictions in the evidence tendered and if there were any, were the contradictions so material that the Court ought to have rejected the evidence? Were the contradictions so material that they may persuade this Court on them?
51. PW1 on re-examination admits to not remembering the exact date but remembers the day being a Saturday. The testimony of PW1, PW2 and PW3 align as to the dates of offence and the events that followed thereafter up to the arrest of the Appellant. The events of the two days where she washed clothes and went back are similar in the statements and testimony. PW3 testified to questioning the Appellant who admitted to knowing PW1 and being visited on the material date albeit denying defiling her.
52. The Court of Appeal in *Erick Onyango Ondeng’ v Republic* [2014] eKLR had this to say;
- We note that the trial Court, before accepting the evidence of PW2 on oath, conducted a *voire dire* examination and specifically noted that it was satisfied that PW2 understood the nature of the oath. PW2 was subjected to cross-examination after she gave her evidence. We may add that the proviso to section 124 of the *Evidence Act* as amended Act No. 5 of 2003 and Act No. 3 of 2006 allowed the trial Court to convict the appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the Court was satisfied that she was telling the truth. (See *Mohamed vs. Republic* (2006) 2 KLR 138 and *Geoffrey Kioji vs. Republic*, Crim. App. No. 270 of 2010 (Nyeri). The trial Court specifically noted in the judgement that it was impressed by PW2 as a witness of truth, who spoke nothing but the truth.
53. The Appellant through his counsel argues to have been in custody at the time of the offence the “next Saturday”. If the offence had taken place the next Saturday which would have been on 7<sup>th</sup> March, 2020, it would have been impractical as the medical examination conducted on 3<sup>rd</sup> March, 2020 had already pointed out defilement had taken place. PW3 testified that the Appellant at the station admitted to being visited by PW1 and to her washing clothes. The Court also takes judicial notice of the age of PW1 and recognizes the possibility of lapses in dates which was confirmed on re-examination.
54. The trial magistrate conducted the *voire dire* examination and observed the child was intelligent enough to testify and capable of telling the truth. In the judgement the magistrate noted that PW1
- “was consistent during examination in chief and cross examination. She gave a clear account to what transpired before and after.....I am inclined to believe the Complainant’s testimony. I find that the Complainant was truthful.”
55. There was contradiction as to the dates but the chronology of events the medical examinations and the testimony of the witnesses align. Defilement was also established. If there was contradiction it was not material and it did not point to untruthfulness from the victim and as such do not affect the substance of the case.



### **Whether the documents produced were credible**

56. On the issue of the medical documents: What has been argued by the Appellant's counsel is the P3 form and the PRC were never authored by the same doctor, the nature of defilement was not properly proven and that the author of those documents did not produce them.
57. The Appellant challenged the production of the P3 form by PW5. On 12<sup>th</sup> August, 2021 the prosecution sought to present PW5 as a witness and prayed he testifies on behalf of Dr. Mutahi Marundey who had resigned. The accused had no objection. The production of the documents cannot be challenged now since they were produced properly and admitted as evidence.
58. The Appellant expressed doubt as to the authenticity of the P3 form as it was not signed by anyone it only bore a stamp of the facility and date which was filled. He added that it and only noted "old broken hymen" which contradicts the charges and the narration of PW1 and the PRC form. He added that the author of the P3 form was different from the author of the PRC form. PW1 went to Njoro Sub County hospital, she was examined and PRC form filled for purposes of filling the P3 form. The two documents were authored on the same date.
59. The P3 form informs the nature of injuries while the PRC form is filled in detail and guides clinicians in detailing injuries sustained as a result of a sexual assault. The PRC form informs the details in the P3 form. The difference in handwriting does not discredit the document. The PRC form commented of old broken hymen which was reproduced in the P3 form. This Court's considered view is that there is no prejudice occasioned against the Appellant by the highlighted differences in signatures and handwriting. The medical findings leave no doubt that PW1 was defiled.

### **Whether the burden of proof shifted**

60. It is trite law that the burden of proof in criminal cases lies with the prosecution and once it has established a prima facie case then the accused is put on his defence to prove that he was not involved in omission or commission of an offence in question.
61. The Appellant contends that the burden of proof shifted when the Court disregarded the contradictions of date by the Appellant and that PW1's statement was obtained under duress, and that the trial Court relied on medical documents that were not properly authored, contradicted each other and further did not interrogate the Appellant's alibi.
62. The duty placed on this Court is to consider the evidence, re-evaluate, and satisfy itself that the chain of events, statements must be so well elaborated in order to rule out the Appellant's innocence.
63. The evidence presented by the prosecution on proof of defilement fulfilled the ingredients to the required legal standard therefore burden of proof had been met beyond reasonable doubt.
64. The Court having found the Appellant had a case to answer was put on his defense and was required to prove to Court that he was not the perpetrator. His defence comprised of not being at home on the date of the offence and further claimed to have been in a sexual relationship with PW2. He however did not adduce any evidence to support his allegations as noted by the trial Court's Judgement. An allegation does not in itself constitute a fact. An allegation has to be substantiated by evidence.
65. The Court has already addressed itself on the issue of medical documents and the contradicting dates and concludes burden of proof was not shifted.



66. On the Aspect of the Minimum Sentencing herein this Court asserts that sentencing is a discretion of the trial Court. In *Bernard Kimani Gacheru –Vs- Republic* (2002) eKLR, the Court of Appeal stated that:-

“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”.

67. This Court is alive to the prime objectives of the criminal law, which is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the peculiar facts and circumstances of each case and the Court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. (See *Charles Ndirangu Kibue v Republic* [2016] eKLR). Further, the Court ought to bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

68. In consideration of the decision of Supreme Court in the *Muruwatetu's* case and inconsideration of the minimum sentence set by the *Sexual Offences Act* and inconsideration of the appellant's mitigation before the trial Court, the sentence of 20 years being the minimum provided for, ousted the discretion of the Trial Magistrate, and is excessive, the accused ought to have at least benefited of being a first offender status..

69. From the foregoing I must now reach to the conclusion that the instant appeal partially has merit. Life sentence is hereby set aside and substituted with an imprisonment of 35 years.

70. The Sentence shall run from March 14, 2022.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 18<sup>th</sup> DAY OF SEPTEMBER, 2023**

**MOHOCHI S.M.**

**JUDGE OF THE HIGH COURT**

