Majimbo v Republic (Criminal Appeal E057 of 2023)
[2024] KEHC 15773 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15773 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E057 OF 2023

AC BETT, J

DECEMBER 2, 2024

BETWEEN

PATRICK EMALI MAJIMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgement, conviction, and sentence of Hon. E. Wasike, Principal Magistrate, delivered on 1st November 2023 in Butere SO No. E029 of 2020)

JUDGMENT

1. The Appellant herein, Patrick Emali Majimbo was convicted after trial for defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006. The Appellant was consequently sentenced to 20 years imprisonment.

2. The particulars of the offence were that on the 4th day of July 2020 at about 10:00 p.m. at [particulars withheld] within Kakamega County the Appellant intentionally caused his penis to penetrate the vagina of GA, a girl aged 13 years old.

3. The Appellant was aggrieved with the said conviction and sentence and filed a petition of appeal dated November 6, 2023 on the following grounds: -

    a. That the learned trial magistrate grossly erred in law and facts convicting the appellant without considering that the main ingredients of defilement was not proven beyond reasonable doubt.

    b. That the learned trial magistrate grossly erred in law and facts by erroneously basing the appellant's conviction on evidence that did not meet the required standard.

    c. That the learned trial magistrate grossly erred in law and facts by erroneously basing the appellant's conviction on evidence that was contradictory, erroneous, inconsistent, uncorroborated, fabricated, afterthought and malicious in nature.

d. That the learned trial magistrate grossly erred in law and facts by not appreciating and evaluating the appellant's plausible defence.

e. That the learned trial magistrate grossly erred in law and facts by failing to consider that the medical evidence adduced was inadequate and was not enough to prove the said offence.

f. That the learned trial magistrate grossly erred in law and facts by failing to consider that the appellant was a layman who deserved to be represented by an advocate, therefore offending Article 50(2) (g) (h) of the *Constitution* of Kenya 2010.

4. The Appellant further filed the following supplementary grounds of appeal:-

g. That the trial court erred in law and fact in convicting the appellant without weighing the conflicting evidence in the prosecution witnesses (PW1, PW2 and PW3) that were inconsequential to conviction.

h. That the trial court erred in law and fact in not making a finding that penetration by the appellant was not proven beyond reasonable doubt.

i. That the trial court erred in law and fact in not making a finding that the minimum mandatory sentence under Section 8(3) of the *Sexual Offences Act* is Unconstitutional and not warranted on plea.

j. That the trial court erred in law and fact in not making a finding that the appellant was delayed in the police cell for 8 days without a reason, hence acquittal.

k. That the trial court erred in law and fact in not appreciating the Appellant's defence that overwhelmed the prosecution's case.

Submissions

5. The appeal was canvassed by way of written submissions pursuant to directions issued by the court.

6. The Appellant submitted that the trial court erred in law and fact in convicting him without weighing the conflicting evidence in the prosecution case. The Appellant relied on the case of *Ndungu Kimanyi Vs Republic* (1979) KLR 283 where the court held that: -

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

7. The Appellant contended that there were sharp contradictions in the prosecution's case. He submitted that there were contradictions on whether there was light when he entered the kitchen or not since the evidence of PW1 and PW2 were contradicting on that. He also submitted that there was contradiction on whether PW2 was awake or asleep when he went into the kitchen since the testimony of PW1 and PW2 were contradicting. He submitted that PW3 claimed that it took him 3 minutes before he reached the kitchen, but the said time was not enough for him to do all that PW1 and PW2 testified he did. He submitted that there were questions arising from the testimony of PW1 and PW2 on whether it was the Appellant's first or second time he had gone in the kitchen to have sex with the complainant. The Appellant further submitted that there was a contention on whether he gave money to PW1 and PW2 or not, and if he did, there was a controversy as to the amount of money he gave the two minors from

the testimony of PW2 and PW3. The Appellant submitted that it was not clear whether he fled away immediately he was found in the kitchen or if he was locked inside the kitchen before, he fled since the testimony of PW1, PW2 and PW3 contradicted on the same. The Appellant also submitted that there was a contradiction on whether PW3 sold napier grass to him or not. He further submitted that there was a controversy on whether or not the complainant fled from home after the incident.

8. The Appellant submitted that the trial court erred in law and fact in not making a finding that penetration was not proven beyond reasonable doubt. He submitted that PW3 testified that he found the appellant half-dressed but did not find him on top of the girl. He submitted that the duration of 3 minutes could not have permitted him to have given out chips, communicate to PW1 and PW2 about not reporting him, give them money and penetrate the complainant. He submitted that if PW2 stood at the door to watch out for the appellant, PW3 could not have caught them in the act.

9. The Appellant submitted that the evidence of a broken hymen was not conclusive proof of penetration since PW1 had other boyfriends and she did not assert to the court that it was her first time to have sex. The Appellant further submitted that the trial court did not point out the instances of demeanour which was relied upon to accept the contradicted evidence of penetration of PW1. The Appellant further submitted that the trial court failed to appreciate that the case was framed against him due to grudges arising from an unpaid debt of napier grass owed to PW3.

10. The Appellant submitted that the mandatory nature of the sentence in Section 8(3) of the *Sexual Offences Act* is unconstitutional. He relied on the case of *Yawa Nyale Vs Republic* [2018] eKLR where the court stated that: -

> "In order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question."

11. The Appellant submitted that in case of the dismissal of his appeal on conviction, the court should consider a least prescribed sentence to run from the time of his arrest.

12. The Respondent submitted on 5 issues. On the first issue of whether the prosecution had proven its case beyond reasonable doubt, the respondent submitted that their case was proven beyond reasonable doubt. The Respondent submitted that the elements needed to prove a case of defilement are; - the age of the victim, penetration and identification of the accused as the perpetrator. They submitted that age of the minor was proven by the age assessment report produced by PW 5. On whether the trial court was well guided to rely on the age assessment report as proof of age, the Respondent relied on the case of *Edwin Nyambaso Onsonga Vs Republic* [2016] eKLR where the court cited the case of *Mwalongo Chichoro Mwanyembe -vs- Republic*, Mombasa Criminal Application No. 24 of 2015 (UR) where the court stated:-

> "The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

13. The Respondent further submitted that the age assessment report was not challenged by the appellant in any way. They submitted that the report fits the test of credible and reliable evidence of proof of the age of a victim.

14. The Respondent submitted that penetration was proven by the testimony of the complainant where she stated that the appellant had sex with her. The Respondent further submitted that the complainant's evidence was corroborated by the evidence of PW2 who used to sleep with the complainant in the kitchen. The Respondent submitted that the evidence of the complainant on penetration was further corroborated by the evidence of the clinical officer, PW6, who indicated that the complainant was examined, and it was found that her hymen was absent.

15. On identification, the Respondent submitted that identification was by recognition since the appellant was well known to PW1, PW2 and PW3 because he was their neighbour and would come to collect napier grass from their home. The Respondent submitted that PW2 saw the accused because there was a lamp that was on in the kitchen that night and PW3 had a torch that aided him to see that it was the Appellant who was in that kitchen.

16. On whether the medical evidence was inadequate to prove penetration, the Respondent relied on the case of *Arthur Mshilla Manga Vs Republic* [2016] eKLR where the court stated that:

> " From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM herself. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone."

17. The Respondent also highlighted the case of *Eric Onyango Ondeng Vs Republic* [2014] eKLR where the Court of Appeal held that: "In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

18. The Respondent further relied on the case of *Mark Oiruri Mose V Republic* [2013]eKLR where the Court of Appeal held that: -

> " So long as there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

19. The Respondent submitted that examination of the victim was done three days after the incident and despite the fact that there were no bruises and no discharge, the doctor still formed an opinion that the victim had been defiled. The Respondent further submitted that reliance can be placed solely on the evidence of the complainant by invoking Section 124 of the *Evidence Act*.

20. On whether the defence was considered, the Respondent submitted that the finding of the trial court that the defence was a mere denial which did not dislodge the prosecution's case was correct.

21. On whether the Appellant's right to legal representation was infringed, the Respondent submitted that the Appellant had an advocate on record and it was only during the defence hearing that the Appellant appeared on his own but he indicated that he was ready to proceed. The Respondent submitted that this ground was not substantiated.

22. On whether the sentence of 20 years was well within the law, the Respondent submitted that the sentence was well within the law. The Respondent submitted that the appeal lacks merit and should consequently be dismissed.

Analysis

23. Bearing in mind the duty of a first appellate court, it is imperative that this court renders itself on the evidence that was placed before the trial court in order to come up with its own conclusion, while being cautious of the fact that it did not have the privilege of seeing or hearing from the witnesses firsthand and observing their demeanour. This principle was well enunciated in *Okeno v. R* [1972] EA. 32 where the court stated that:-

> " 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 must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

24. I have perused the record and considered the judgement of the trial court, the rival submissions by both parties and the various authorities that were relied upon. From the Petition of Appeal and Supplementary grounds of Appeal, I have deduced that the two main issues of contention are as follows:-

a. Whether the prosecution proved all the ingredients of defilement beyond reasonable doubt

25. Section 8(1) and (3) of the *Sexual Offences Act* provides that: -

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) .....
>
> (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."

26. Thus the key ingredients for the offence of defilement are therefore, age of the victim, the fact of the penetration and whether the Appellant herein was properly and positively identified as the culprit. See the case of *Dominic Kibet Mwareng V Republic* (2013) eKLR in which the above ingredients were highlighted.

Proof of age of the complainant.

27. On the issue of age, it was the prosecution's case that the complainant was 13 years at the time of the offence. The P3 form was adduced, and it showed that the minor was 13 years old. The treatment book produced as part of the exhibits also captured the age of the complainant as 13 years. An age assessment report produced by PW5 also confirmed the minor's age to be 13 years. The Appellant did not contest the aforesaid evidence. In the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, while citing

the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal no.24 of 2015 (UR) the Court of Appeal stated:-

> " .... the question of proof of age has finally been settled by recent decisions of the court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent or the evidence of parents or guardian or medical evidence, among other credible proof...."

28. Similarly, the Court of Appeal in the case of *Kaingu Elias Kasomo Vs Republic* (Cr. App. No 504 of 2010) stated that: -

> " The age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.....Documents such as baptism cards, school leaving certificates in my view would also be useful in these regard. Since the passage of the *Sexual Offences Act*, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age was given by the minor and her mother. The trial court hears the minor's evidence and saw her. The court was convinced that she spoke the truth."

29. I find the medical evidence that was tendered to be credible and hold that the age of the minor was proven to the required standard.

Whether the Appellant was positively identified as the perpetrator.

30. On identification, the Appellant was well known to the complainant and the other eyewitnesses and thus identification was through recognition.

31. It is trite that recognition is the best mode of identification of a person. The Court of Appeal in the case of *Anjononi & Others v Republic* [1989] KLR held the evidence of recognition to be "more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other."

32. The Court of Appeal in the case of *Karanja & another vs Republic* [2004] KLR 140 also pronounced itself on the exercise of caution in admitting evidence of identification as follows:-

> " Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction, *R - V – Eria Sebwato* [1960] EA. 174 .....a witness may be honest but mistaken. *Roria – v – Republic* [1967] EA 583 and a number of witnesses could all be mistaken. *R – v – Turnbull & Others* [1976].....3AER 549."

33. I have considered the evidence pertaining to identification in this matter and warned myself of the possibility of mistaken identity leading to a conviction. In this case, I note that the Appellant was a neighbour to the complainant, and this meant he was well known to her. Apart from the complainant, PW2 testified that she witnessed the offence and identified the Appellant since she was sleeping in the same room as the complainant. Further, PW3 who is the complainant's father testified that he saw and recognised the Appellant.

34. Since the complainant, PW2, and PW3 sufficiently demonstrated that the Appellant was well known to them, an allegation that was not denied by the Appellant, I find that this ingredient was sufficiently proved.

Proof of penetration

35. On the issue of penetration, PW6 produced a P3 form which showed that the complainant had an absent hymen, but no bruises on the vaginal wall and no discharge from the vagina. The clinical officer stated on cross-examination that absence of bruises does not necessarily mean that defilement did not happen. However, it is trite knowledge that a broken hymen per se, is not evidence of sexual intercourse. The Court of Appeal in the case of *P.K.W v Republic* [2012] KECA 103 (KLR) held as follows: -

> " In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse? Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of *The Queen Vs Manual Vincent Quintanilla*, 1999 ABQB 769.
>
> In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor."

36. I am further persuaded by the finding in the case of *Olukuru v Republic* [2024] eKLR where the court stated that: -

> " When AAO was examined on the alleged offence date, her *labia minora* and *labia majora* were normal. There was a white discharge, and no *spermatozoa* were seen. The only positive finding was a broken hymen, which was not recent. A broken hymen alone cannot be used as proof of penetration."

37. Where medical evidence fails to corroborate the issue of penetration, courts can solely consider the testimony of the complainant by invoking Section 124 of the *Evidence Act* which provides that:-

> " 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."

38. In the present appeal, the complainant was not the sole witness. The court can therefore invoke Section 124 of the *Evidence Act* but must weigh her evidence against the evidence of other prosecution witnesses to determine the credibility thereof. I have carefully analysed the evidence of the complainant and that of her sister and her father as well as the other prosecution witnesses. I find the prosecution's case to be fraught with material contradictions and inconsistencies.

39. The court in the case of *Olukuru v Republic* [2024] eKLR stated that:-

> " The evidence of PW2 and PW3 contradicted the complainant's claim about how she was arrested. Her evidence is that she went home at about 7 p.m. and was traced to the appellant's house. Her father and the village elder's evidence was that the two were found in the appellant's house. If she could lie about a simple thing as her arrest, can she be trusted to tell the truth about the alleged defilement? Is there a possibility for her to claim defilement to appease her father?"

40. Relying on the foregoing authorities, it would be dangerous to rely on the evidence of the complainant regarding penetration since there are inconsistencies that have been noted in her evidence, which have created doubts as to the veracity of the claim of defilement.

41. I therefore find that the ingredient of penetration was not proven by the prosecution to the required standard.

b. Whether the trial magistrate erred in law and facts by erroneously basing the appellant's conviction on evidence that was contradictory, inconsistent, uncorroborated, fabricated and malicious in nature

42. The Court of Appeal in the case of *Richard Munene v Republic* [2018] KECA 186 (KLR) stated that:-

> " 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."

43. The court in the case of *Philip Nzaka Watu v Republic* [2016] KECA 696 (KLR), the Court of Appeal 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."

44. I am also guided 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."

45. I am further persuaded by the definition of contradictions rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria* {2014} LPELR-22555(CA) Where the court 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."

46. Additionally, The Court of Appeal in the case of the case of *Ndungu Kimanyi vs Republic* [1979] KLR 1442 (Madan, Miller and Potter JJA) held that:

> "The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

47. There are many contradictions in the instant case. The complainant, PW1, stated that when the Appellant had gone to 'visit' her during the night of the incident, her sister was asleep. Her sister, PW2, on the other hand claimed that she was awake when the Appellant went into the kitchen that night. PW1 claimed that it was dark when the Appellant went into the kitchen and during his whole stay there. On the other hand, PW2 stated that they lit a hurricane lamp which enabled her to recognize that it was the Appellant who was in their kitchen. PW1 stated that it was the Appellant's first time to go to their kitchen but PW2 stated that it was the Appellant's second time. In her testimony, PW1 stated that when the Appellant noticed that their father had seen him, he got up and fled. PW2 testified that when their father noticed that there was someone inside the kitchen, he locked the door from outside, leaving the Appellant inside the house before he forced his way out of the door. PW1 in her testimony denied being given any money by the Appellant but PW2 stated that the appellant gave PW1 Kshs. 50/= and gave her Kshs. 20/= as an inducement for them not to report him. PW1 denied ever running away from home after the incident but PW2 stated that PW1 ran away when their father arrived at the scene of the incident. Both PW1 and PW2 stated that they knew the Appellant since he used to buy napier grass from their father but PW3, who is the father of the two minors, denied ever selling napier grass to the Appellant or having any transactions with him. PW1 testified that they went to the police station the morning after the incident but PW5, who was the investigating officer, stated that the matter was reported to the police station three (3) days later since the complainant had fled from home.

48. Based on the aforesaid, it is clear that the cited contradictions do not amount to mere discrepancies in details between the testimonies of the witnesses. Each witness, including the complainant, seems to have a different account of the same event that they all witnessed. This court has noted material contradictions in material facts, such as the date that the incident was reported, the manner in which the appellant escaped and the number of times the complainant has been defiled. The testimonies of these witnesses have left the court with more questions than answers. The contradictions were further confounded by the absence of conclusive evidence of penetration in the P3 form that was produced in support of the prosecution's case.

49. The Appellant alleged that he was being framed since he had altercations with the complainant's father regarding a debt he owed him from the sale of napier grass. Although both PW1 and PW2 attest to the fact that their father would sell napier grass to the appellant, their father vehemently denied ever selling napier grass to the Appellant. Such contradictions point to some deliberate untruthfulness of the witness. Why would PW3 lie about not having any transactions with the Appellant if indeed he sold napier grass to him.

50. At the end of the prosecution's case, the said contradictions had not in any way been satisfactorily explained in a manner that would clear the doubts that they raised.

51. The Court of Appeal in the case of *Paul Kanja Gitari v Republic* [2016] KECA 741 (KLR) stated as follows:-

> "We also note the contradiction between PW2's claim that the appellant habitually had sex with JMK and JMK's own evidence on oath that it was the first incident and that the appellant "had never joked with her before". There is also the contradiction that contrary to what PW2 herself said, the investigating officer PC Nixon Tallam (PW4) provided a different picture that the report he received was that PW2 went to the appellant's home during the incident and "found the complainant on accused's bed without pants." That variance is not a minor one."

52. Based on the aforesaid, I find that the contradictions in the prosecution's case are too grave to be discarded as trivial discrepancies and thus the court is forced to interpret them in favour of the appellant.

53. Having said all this, I also find it important to address the issue of the constitutionality of the minimum mandatory sentence that was brought up by the appellant. The Supreme Court issued directions on this matter in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) and stated as follows:-

> "In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the *Penal Code*, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision."

54. It is important to note that the decision of the Supreme Court in the *Muruatetu case* only applied to the constitutionality of the mandatory nature of the death sentence as provided for in Section 204 of the *Penal Code*. The decision of the Supreme Court did not extend the minimum mandatory sentence

contemplated in the *Sexual Offences Act*. The minimum mandatory sentence as provided for in the *Sexual Offences act* is therefore well within the ambits of the *constitution*, unless the Supreme Court makes a decision to the contrary.

Determination

55. The appeal is allowed, the conviction quashed, and the sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 2ND DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:-

No appearance for the Appellant

Ms. Chala for the Prosecution

Court Assistant: Polycap