REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. E001 OF 2020

KELVIN MOTANYA ORANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon G Shikwe - SRM in the Senior Resident Magistrates Court at Kithimani delivered on the 18th day of May, 2020 in Criminal Case (S.O) No 21 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

KELVIN MOTANYA ORANGI.....ACCUSED

JUDGEMENT

1. The appellant, **Kelvin Motanya Orangi**, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the ***Sexual Offences Act***, Act No. 3 of 2006. The particulars of the charge were that on the 6th day of June, 2018 at [Particulars Withheld] Market, Muthesia Location, Masinga sub-county within Machakos county, he intentionally caused his penis to penetrate the vagina of EMM a child aged 13 years.

2. In the alternative, the appellant was charge with the offence of indecent act with a child contrary to Section 11(1) of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence were that on the 6th day of June, 2017 at [Particulars Withheld] market, Muthesia Location, Masinga sub-county within Machakos county intentionally touched the vagina of EMM a child aged 13 years.

3. Upon conviction, the appellant was sentenced to serve Twenty (20) years imprisonment.

4. The prosecution called 6 witness in support of its case.

5. After carrying out *voir dire* examination of PW1, the Complainant, the Court concluded found that the witness could testify on oath. According to PW1, on 6th June, 2018 she was with her sister M, PW2, at home when the appellant, with whom they were staying on the same plot, called them and poured *githeri* for them. After taking the same, the Appellant told PW2 to take a jerrycan and go to the river while she was left with the appellant alone since her grandmother, PW3, and her uncle and brother were away. The Appellant then grabbed the complainant, clasped her mouth, dragged her to his bed and started defiling her after removing her underpants and his trouser. According to the complainant, she did not scream since her mouth was covered.

6. After the incident, the complainant disclosed the incident to PW4 who in turn relayed the information to her grandmother, PW3, upon her return at 4pm. PW3 then interrogated the complainant and reported the incident to the police. Who arrested the appellant. The complainant was also interrogated and her statement recorded by the police at the police station after which she was taken to the Hospital.

7. It was the Complainant's evidence that she had known the appellant for a number of days though the appellant had just moved into the plot and used to live alone in a one roomed house. According to the Complainant the house was open during the ordeal which occurred at 1pm on a school day but the Complainant was home due to fees.

8. In cross-examination, the Complainant stated that that was the first time the appellant called her and that she was hungry. Though she did not scream out of fear and because her mouth was covered. She however, cried out. It was her evidence that she felt pain though she did not bleed though she was not injured. She was however unaware how long the ordeal lasted and it was after it was over that she met PW4 at her house. According to her the door was closed but not locked. She however denied that she had been cached to bear false testimony against the Appellant. After ordeal she informed the neighbour but was afraid to tell her grandmother. It was her evidence that her pants were torn in the process and she left the same at the Hospital. She however admitted that she was not a virgin and that was not her first time to engage in sex. According to her, she did not know why PW2 who had been sent to go and fetch water for washing the utensils did not return.

9. In re-examination, the Complainant disclosed that she had been defiled before that same year and that after the Appellant left PW4 called her to her place when she was standing at the Appellant's door.

10. **MN**, PW2, aged 9 years was found not to appreciate the import of giving evidence on oath. According she made an unsworn statement. According to her, on 6th June, 2018, she was at home with the Complainant when the appellant called them to his house and offered them *githeri*. Once they were done eating, the Appellant sent her with a jerrican to the river. She did so and went to play and did not return leaving the Complainant with the Appellant. According to her, that was the first time at the Appellant's house. When she returned at 4pm she found her grandmother with the Complainant eating and she did not know what happened to the Complainant.

11. **Elizabeth Nthenya**, PW4 testified that on 6th June, 2018 at 1pm she was going to the toilet and as she was passing the Appellant's house, she heard a child crying. She stopped at her door and waited when she saw the Complainant emerging from the Appellant's house. Upon inquiring from the Complainant why she was crying, the Complainant informed her that the Appellant had cupped her mouth, taken her to bed and raped her. PW4 waited for the Complainant's grandmother, PW3, to return and informed her about the incident. According to her, the appellant was there all along having been sent home for lack of fees though by then he was living alone. It was her evidence that they had lived with the Appellant there for 3 months.

12. In cross-examination, PW4 denied that she had sought to be in a relationship with the Appellant and reiterated that the child was crying in the Appellant's house and was still crying by the time she opened the door and came out. PW4 could not tell if the Appellant's door had a blind. According to her they were neighbours with the Appellant and that the other neighbour was a teacher who at that time was at school. She stated that no one else lived on the plot though there were business premises in the area. At that time, however, she was the only person in the plot which was not fenced. She stated that there was a market there and that she waited for the Complainant's grandmother and relayed the information to her since she was still working.

13. In re-examination, PW4 explained that the Appellant lived 5 meters from her while the toilet was on the Appellant's side where she was heading when she heard the cries from inside the house.

14. PW3, **NMM**, the Complainant's grandmother who was living with her at that time testified that the Complainant was 13 years old and referred to her child health card. It was her evidence that on 6th June, 2018 she was at work having left at 2pm. At 5pm while she was making food, PW4, a neighbour, inquired from her whether the Complainant had disclosed to her anything and she responded in the negative. She then called the Complainant and upon interrogating her, the Complainant disclosed to her that they had been called by the Appellant who gave them *githeri* and afterwards sent PW2 for water and then defiled her. She reported the incident to the police post after which the Appellant was arrested and they were taken to Ndithuru Police Station after which the Complainant and thereafter the Complainant was taken to the Hospital.

15. It was her evidence that the Appellant had moved in two months prior to the incident and they had no issues. According to her P3 form which she identified was filled in the following day. It was her evidence that the two children had not gone to school owing to fees.

16. PW5, **Brian Musyoka Kavete**, a clinical officer at Ndithini Health Centre examined the Complainant when she was taken to the facility. According to him, there was no blood or discharge noted on the inner wear which was torn. In his view the girl was 13 years but had no bruises on the *minora* or *majora* labia though there were whitish vaginal discharge. The hymen was torn but there was no venereal disease. They however did not do the urinalysis because they did not have the kit. In his opinion there was a sign of penetration but the Complainant disclosed that she had been sexually active before hence the hymen was torn. It was his evidence that the Complainant disclosed that the mother would leave her with her younger sister and they would go to the appellant's house severally for food. He filled in the P3 form on 6 th June, 2018 about 8 hours after the incident and exhibited the same. Upon him examining the Appellant, he found that the Appellant had normal genitalia with no bruises noted on penile shaft.

17. In cross-examination, he stated that his conclusion that there was defilement was based on the fact that discharge was coming out. It was his evidence that he managed to get information from the Complainant that the culprit used condom. Her underpants were stained with black stains due to the discharge. Though he agreed that the discharge could also be because of a disease, he reiterated that they did not do urinalysis. According to him, the Complainant disclosed to him that she had been sexually active since 2017.

18. In re-examination, he stated that the Complainant told him that she initially had sex in 2014 and 2017.

19. **PC Cpl. John Nganga**, the investigating officer, was at Ndithini Police Station on 6th June, 2018 when the Appellant was taken to the

station on suspicion of defilement. He interrogated the victim who told him that at 1pm the appellant called them to his house, gave them *githeri* together with her younger sister before sending the younger sister for water. In the meanwhile, the appellant proceeded to defile the Complainant. After conducting his investigations, he proceeded to charge the Appellant.

20. It was his evidence that the appellant's age was 13 years at the time based on the clinic card which he exhibited. In cross-examination he stated that on the plot are single rooms 10 X 10 and the plot is not fenced.

21. Upon being placed on his defence, the Appellant opted to make an unsworn statement. According to her he used to be a student at Kikomba Secondary School. He had gone to stay at his step-father's house but they rented for him a house through PW4 who was a tailor and who was to assist him in cleaning the house and make it habitable which she did. He then moved in and a week later the two became close friends and even shared meals together.

22. According to him, one day, PW4 went to his house at night to wash his clothes and made sexual advances towards him which he accepted and they slept together. It was his statement that he even gave PW4 his spare keys and she would clean the house and cook for him. He stated that they never had issues and had sex at both their houses. However, when his mother got a report that he had a lover, it created friction because his mother threatened to cease paying fees for him unless he stopped the relationship. As a result, he brought the relationship to an end and this did not go well with PW4 whom he had promised to marry after school. Consequently, PW4 stopped attending to him.

23. The appellant stated that the Complainant and PW2 used to assist him in fetching water. On 6th June, 2018, he woke up early and went to school but was chased away for fees and he returned to the house. He then met the two girls outside their grandmother's house and they two informed him that they were hungry and had not eaten. Out of kindness he gave them *githeri* in his house and then heard PW4 call out. It was his averment that PW4 had threatened to get even with him for having ended their relationship claiming that he used her. Tough he tried to calm her, she went to the toilet and when she came out went on with her business and in the evening he was arrested. He blamed PW4 for framing him.

24. In his judgement, the learned trial magistrate formed the view that the case revolved around the believability of or otherwise of the Complainant. He found that all questions were answered succinctly and in great detail without hesitation and she did not prevaricate or waver. According to the trial court, the complainant was honest and upfront to the point of confirming that she was not a virgin and had had sex before. The Court did not find any reason why the 13 year old child could be lying and he did not find any evidence of a frame up. Since it was the Appellant who invited the Complainant into his house, it was the court's view that the allegation that she worked in cahoots with PW4 could not be true. The Court was satisfied beyond any reasonable doubt that her evidence and the corroboration by PW2, PW3, PW4 and PW5 were sufficient to convict the Appellant of the charge hence the conviction for the offence of defilement.

25. In this appeal, the Appellant submits that the offence was not proved since penetration was not proved as having been by him. It was further submitted that there was failure to conduct *voir dire* examination as required by law. In support of his case, the Appellant relied on the decision of the Supreme Court of India in **K. Anbazhagan vs State of Karnataka and Others Criminal Appeal No.637 of 2015**.

26. According to the Appellant, the contradictions in the Complainant's evidence showed that she was not truthful.

27. It was further submitted that penetration was not proved in light of the inconsistencies in the prosecution evidence. According to the Appellant the trial court failed to consider the grudge between the Appellant and PW4. It was submitted that the evidence adduced was manifestly inadequate to support conviction and that the learned trial magistrate shifted the burden of proof to him.

28. Citing several authorities, the Appellant submitted that in arriving at the decision whether a minor has understood the solemnity of the oath and is capable of telling the truth, such understanding must be expressed in writing on the trial court record. In this case, it was submitted, nowhere is it indicated that the minor understood the solemnity of the occasion as the learned trial magistrate simply stated that the witness may give sworn statement. Accordingly, it was submitted that the evidence of PW1 was not properly received hence required corroboration under section 19 of the ***Oaths and Statutory Declarations Act*** and section 124 of the ***Evidence Act***. However, in this case the proviso to section 124 of the latter was not complied with as there was no record that the witness was telling the truth. As regards, PW2, it was submitted that the learned trial magistrate once again omitted to indicate that the witness was possessed with sufficient intelligence which omission is fatal to the prosecution's case.

29. It was submitted that by waiting till PW3 returned before raising alarm, PW4's evidence raised eyebrows hence the need to scrutinise her relationship with the Appellant. It reiterated that since there was evidence that the Complainant had been penetrated in 2017, it was not proved that it was the Appellant who penetrated her. The Appellant also took issue with the failure by the prosecution to prove that the Complainant had been sent away due to school fees.

30. In opposing the appeal, it was submitted by **Mr Ngetich**, learned counsel for the Respondent that the prosecution through PW 6 produced the health card of the complainant as evidence. According to the health card, the complainant was born on 18th February 2005. The health card placed the complainant at the age of 13 years at the time of the offence which evidence was never challenged by the appellant hence the prosecution proved by the health card that the complainant was a minor aged 13 years at the time of the offence.

31. As to whether penetration was proved, the Respondent relied on the evidence of PW1, PW3, Pw4 and PW5. As regards the issue whether penetration was occasioned by the accused, reference was made to the evidence of PW1 and PW4 as well as the confirmation by the Appellant that he invited the two girls to his house for a meal.

32. Regarding the proprietary of *voir dire* examination, it was submitted that from the record *voir dire* was done before the Complainant who was aged 13 testified in court. According to the Respondent, *voir dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus, under the ***Evidence Act***, the test is one of competency as the court is supposed to consider whether the child witness is

developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.

33. As to the question of who is a child of tender years, reference was made to s*ection 2 of the Children's Act defines a child of tender years to mean* ***"a child under the age of 10 years"***. However, Court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voir dire* examination. This was based on the case of **Kibangeny Arap Korir v Republic, [1959] EA 92**. It was however submitted that the fact that *voir dire* examination is not administered or not administered properly dies not necessary vitiate the trial and this submission was based on the decisions of the Court of Appeal in **Maripett Loonkomok vs. Republic [2016] eKLR** and ***Patrick Kathurima versus Republic Nyeri CRA 137 of 2014.***

34. As regards corroboration, it was submitted that in the present case, the learned trial Magistrate rightfully relied on the proviso under Section 124 of the ***Evidence Act***.

35. As for the contention that the defence was not considered it was submitted that since the prosecution witnesses placed the Appellant at the scene and he was also positively identified by the complainant, PW2 and PW4, the defence of the accused person was hopeless denial and could not dispel the overwhelming evidence tendered by the prosecution. It was therefore submitted that the conviction was safe and that this appeal does not raise any basis to disturb the conviction. The Court was urged to uphold the conviction and confirm the sentence.

Determination

36. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

37. I associate myself with the opinion of the Supreme Court of India in **K. Anbazhagan vs State of Karnataka and Others Criminal Appeal No.637 of 2015** where the said Court expressed itself *inter alia* as hereunder:

> **"We are absolutely sure that the learned Single Judge, as the appellate Judge, shall keep in mind the real functioning of an appellate court. The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test. This being the position of a Judge, which is more elevated as the appellate Judge, we are of the considered opinion that there is no justification for rehearing of the appeal as the matter has been heard at length and reserved for verdict."**

38. The prosecution's case in summary was that on 6th June, 2018, the Appellant called PW1 and PW2 and offered to give them *githeri*. After they had eaten the same, he sent PW2 away to go and fetch water. In the meantime he grabbed PW1, the complainant who was aged 13 years to his bed, removed her pants, removed his trouser and defiled her. During that ordeal, he covered the Complainant's mouth to prevent her from screaming. After he was done he left. The cries of the Complainant drew the attention of PW4, a neighbour staying in the same plot who was going to the toilet. She then saw the Complainant emerging from the Appellant's house crying and when she inquired from her what had happened to her, the Complainant told her that she had been defiled by the Appellant. PW4 waited for the return of the Complainant's grandmother with whom the Complainant was staying and relayed the information to her after which the matter was reported to the police and the Complainant taken for treatment.

39. PW5, the clinical officer who attended to the Complainant found no blood or discharge on the inner wear which was torn. Similarly, there were no bruises on the *minora* or *majora* labia though there were whitish vaginal discharge. Though the hymen was torn, the Complainant disclosed that she had been sexually active before as she had been involved in sex in 2014 and 2017. In his opinion there was a sign of penetration. According to him, his conclusion that there was defilement was based on the fact that discharge was coming out though the information he got from the Complainant was that the culprit used condom. Due to the said discharge, the Complainant's underpants were stained with black stains though he agreed that the discharge could also be because of a disease. They however did not do urinalysis.

40. On his part, the Appellant stated that the charges were fabricated against him due to the fact that he terminated the relationship between him and PW4 who swore to hit back at him.

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

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon***

conviction to imprisonment for a term of not less than twenty years.

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

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

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

(b) the accused reasonably believed that the child was over the age of eighteen years.

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

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

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

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

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

43. As regards the age of the complainant, in this case, it is not contested that the Complainant was 13 years. This is supported both by the oral evidence and the health card and it was not challenged by the Appellant. Accordingly, the prosecution proved the age of the Complainant beyond any reasonable doubt.

44. The next issue is whether the Complainant was penetrated and if so who penetrated her. Section 2 of the ***Sexual Offences Act*** provides that:

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

45. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."

46. In the case of **Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR** the court held that;

''As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.''

47. Regarding the identity of the Appellant, there is no doubt that he was well known to the Complainant. In fact, he admitted that on that day he invited PW1 and PW2 to go and eat *githeri* in his house after they complained to him that they were hungry. That the two girls often went for food in his house was confirmed by PW5 when he interrogated the Complainant.

48. The question is however whether there was penetration of the Complainant's genital organs with the Appellant's genital organs. According to PW5, the only reason why he believed that there was penetration was due to the vaginal discharge that he saw. He was however quick to point out that the discharge could also be because of a disease. As urinalysis was not done, it could not be ruled out that the discharge was due to disease as the Complainant was admittedly sexually active.

49. Therefore, the only other evidence regarding penetration was that of the Complainant. According to her, Appellant then grabbed her, clasped her mouth, dragged her to his bed and started defiling her after removing her underpants and his trouser. Defilement however is a term of art. I have always decried the use of techical terms in describing factual situations. Trial Court should as much as possible get the exact words from the Complainants from which inference can be made that penetration did take place. Such terms as *"he removed his dudu and inserted it in my thing for urinating"* are now recognised as connoting penetration of sexual organs by the accused's sexual organ. The use by a minor of such terms as defile may not necessarily mean that the legal act of defilement took place. In this case where there is no other independent evidence to corroborate the evidence of defilement, it cannot be said that there was penetration of the Complainant's vagina with the penis of the Appellant. It cannot be ruled out that what took place could as well have been indecent act. However, since the Court believed the evidence of the Complainant as regards penetration, I have no reason to doubt that the act of penetration did take place. What is in doubt is what was the instrument through which that penetration was done.

50. Section 5(1)(a) (1) and (2) of the ***Sexual Offences Act*** under which the appellant was convicted provides as follows:

> ***(1) Any person who unlawfully—***
>
> > ***(a) penetrates the genital organs of another person with—***
> >
> > > ***(i) any part of the body of another or that person; or***
> >
> > > ***(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***
> >
> > ***(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.***
>
> ***(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.***

51. This provision was the subject of the determination in **John Irungu vs Republic (2016) eKLR** where the Court of Appeal expressed itself as hereunder:

> **"Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."**

52. As regards the issues of *voir dire* examination and inconsistencies, whereas I agree that the manner in which *voir dire* examination was conducted did not accord to laid down procedure, no injustice was occasioned in the circumstances of this case. Similarly, the minor inconsistencies in the evidence of the witnesses were not fatal to the prosecution case.

53. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

54. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

> **"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."**

55. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

> **"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."**

56. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

57. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

> **"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 recognised 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."

58. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

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

59. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

60. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

"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's case."

61. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

62. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

63. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

64. As regards the defence, the trial Court did consider the Appellant's defence which was that of animosity between him and PW4 and found that no merit in it. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"

65. Whereas I appreciate that there were minor discrepancies in the evidence of PW1 and PW4, it is my respectful view that such minor discrepancies are common.

66. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence could only disclose the commission of the offence of sexual assault contrary to section 5(1)(a)(1) of the ***Sexual Offences Act***. Though that was not the main offence with which the appellant was charged, in my view, it is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

67. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294*, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:**
>
> > ***"Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."***
>
> **That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial."** [Underlining mine].

68. The Court proceeded:

> **"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500)*. In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."**

69. Accordingly, since the Appellant is entitled to the benefit of the lesser offence, I hereby set aside the appellant's conviction of the offence of defilement and substitute therefor the conviction of the offence of sexual assault contrary to section 5(1)(a)(1) as read with section 5(2) of the ***Sexual Offences Act***.

70. Before I sentence the Appellant, it is my view that this is a case where a pre-sentence report ought to be placed before the court. Accordingly, I direct that the Probation Officers investigates the matter and file their report for the purposes of sentencing.

71. Judgement accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 3RD DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Ngetich for the Respondent

CA Susan