REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 184 OF 2014

BETWEEN

DAVID KIOKO KAMENE......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C. K Kisiangani- RM dated 26th September, 2014 in Machakos Chief Magistrate's Criminal Case No. 123 of 2014)

BETWEEN

REPUBLIC..COMPLAINANT

VERSUS

DAVID KIOKO KAMENE...ACCUSED

JUDGEMENT

1. The appellant, **David Kioko Kamene**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 123 of 2014 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 offence were that the appellant on the 16th day of January, 2014 within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **MM**, a girl child aged 15 years. Alternatively, the appellant faced the charge of Indecent Act with a Child Contrary to Section 11(1) of the ***Sexual Offences Act***, the particulars being that the appellant on the 16th day of January, 2014 within Machakos County, intentionally and unlawfully caused his penis to touch the vagina of **MM**, a girl aged 15 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the main offence of defilement, convicted him accordingly and sentenced him to serve 20 years in prison.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> 1. **That the trial court erred in both law and facts by not considering medical evidence was not satisfactory and P3 Form did not support defilement evidence.**
>
> 2. **That the trial court erred in both law and facts by relying on contradictory evidence.**
>
> 3. **That the trial court erred in both law and facts by not considering the defilement charges were based on hearsay and grudge from the child's parents.**
>
> 4. **That the trial magistrate erred in both law and facts in convicting the appellant against the weight of evidence.**
>
> 5. **That the trial court erred in both law and facts by not considering the fact that the sentence of 20 years is harsh and excessive for the event fabricated by the mother of the complainant.**

4. At the hearing of the case the prosecution called five witnesses.

5. PW1 was the complainant. After *voir dire*, she testified that she was 16 years old and knew the appellant as **David Kioko**, who was fencing near their home and whom she identified in Court. According to her on 16th January, 2014, at noon she was watering plants with her 2 year old sibling when the appellant went and held her by the hand, took her to the bush near where they were drawing water, removed her clothes including her panty while holding her hand, removed his trouser and underwear and inserted his penis into her vagina. Since the appellant's penis could not fit in the complainant's vagina, the complainant's vagina was torn and she bled. Though the complainant screamed there was no one nearby who could help her since there is no house next to where they were drawing the water and her mother had gone to [Particulars Withheld] Primary School for a meeting and her father had gone to preach.

6. The complainant then took her pant which had some blood and without putting it on went home. Since he appellant had told her not to disclose the incident to anyone she did not tell her mother. It was only on 18th January, 2014 when she saw puss while urinating that she disclosed the same to her mother and revealed that someone had defiled her. Thereafter her father went to the police and was given a P3 Form and she then went to Wamunyu Health Centre for medication. She produced her clothes and a baptismal card as exhibits.

7. According to her she was 15 years but at the time of her testimony she was 16 years having been born on 9th April, 1998. During the time of her defilement, the appellant gave her 50/= but she declined to take the same. She insisted that she clearly saw the appellant and though she did not know him previously, for two weeks she used to see him in the neighbourhood and reiterated that the appellant's name was **David Kioko Kamene**.

8. PW2, ANU, a preacher at [Particulars Withheld] Church in [Particulars Withheld] Village was the complainant's father. According to him, the complainant was 16 years old. On 16th January, 2014 he had gone to church and returned at 5.00pm unaware of what had happened. He continued with his daily routine up to Sunday 19th January, 2014 at 9pm when he was informed by his wife, **EMN**, PW3, that the complainant had been defiled by the appellant who had attempted to give the complainant 50/= but the complainant refused. Since it was in the evening, they reported the matter the following morning to the Assistant Chief and later went together to report the same at Wamuyu Police Station on 20th January, 2014 accompanied by the complainant after which they were given a P3 Form to take to the Hospital where the complainant was examined.

9. PW2 averred that he saw the complainant's clothes which were torn. According to him, his wife also did not know about the incident. It was his evidence that he did not know the appellant before the incident and only came to know after the incident that he had been employed by a neighbour. He confirmed that there is a watering point in his neighbour's place. He stated that the appellant was arrested after he had pointed him out to the police based on the complainant' disclosure. He stated that the complainant had informed him that she feared reporting since she had been threatened by the appellant.

10. **EMN**, the complainant's mother testified as PW3. According to her, the complainant was 15 years old. On 16th January, 2014 at around 10am she left and went to [Particulars Withheld] Primary School for a meeting and left the complainant with their two year old child. When she returned at 5pm she found the children home. However on 19th January, 2014 when she went to the bathroom she found the complainant's panty with blood and upon asking her why there was blood on her panty, the complaint revealed that a man, whom she did not know by name but knew by appearance had touched her. The complainant proceeded to show her the said man whom PW3 had seen since he had been employed by their neighbour and they used to meet at the dam while drawing water. PW3 testified that she was told the man's name was **David Kioko**.

11. According to her evidence the complainant disclosed to her that the latter had gone to get water from the dam when she was defiled and the reason why she had not disclosed the incident earlier on was because she had been threatened that she would be beaten if she did so. It was her testimony that the complainant's clothes were torn and upon examining her there was a wound and puss in her private parts. Thereafter the appellant was arrested by a police officer after she informed her husband on 19th January, 2014 and she recorded her statement at the police station.

12. PW4 was Alice Mwalia, a clinical officer working at Wamunyu Health Centre. According to her on 20th January, 2014 she filled the P3 Form for the complainant who was 15 years and who went to the Heath Centre alleging that she had been defiled while watering plants four days earlier in a nearby river. She was informed by the complainant that the person who defiled her offered her 50/= but she refused and that the person undressed her and defiled her.

13. On examination, the complainant was in a fair general condition, but had a foul smelling discharge and blood was oozing from her vagina. Her labia was swollen and there was a perimeter tear. There was a discharge which was bloody and smelling blood and the urine had puss, a sign of infection. She however did not notice spermatozoa since the complainant was taken there four days after and sperms die after 72 hour. She accordingly produced the P3 Form as exhibit.

14. **PC Barnabas Kirolia**, PW5, attached to Wamunyu Patrol Base, testified that on 20th January, 2014, at around 12.53pm he was in the report office when PW2 went to the office with the complainant, aged 15 years. The complainant informed him that on 16th April, 2014 at around 12.30pm she was with her small sister fetching water near a dam when the appellant approached her, tried to entice her with 50/= and when she refused, the appellant forced her into the nearby bus while covering her mouth and defiled her.

15. The witness recorded the complaint and issued them with a P3 Form to take to Wamunyu Heath Centre where it was filled in. Three days later he got information that the appellant had been sighted around [Particulars Withheld] area and he proceeded to arrest him, took him to the police station and charged him with defilement.

16. The witness produced the complainant's birth certificate, baptismal card and her clothes as exhibits.

17. According to him the incident was reported four days after the incident and the appellant threatened the complainant not to report. It was his evidence that the complainant knew the appellant since they were neighbours.

18. Upon the close of the prosecution's case and after considering submissions made by the parties, the Learned Trial Magistrate found that a prima facie case had been established against the appellant and placed him on his defence.

19. In his defence, the appellant testified that he was a *shamba* boy who was employed to do farm work. He was however assigned the task of watching over his employer's mangoes which were being stolen. However it was not until 10th January, 2014 that he saw some pupils on the mango trees who ran away save for one boy who was on the tree whom he told to come down and beat. The following day on 11 th January, 2014, at 12.30 pm, a woman who was passing by the road called him and demanded to know why he beat her son. The appellant however informed her to ask his employer whereat the said women became harsh and informed him that he would leave the said mangoes to be guarded by another person. The appellant did not however disclose this information to his employer.

20. On 24th January, 2014 he was arrested and placed in custody at Wamunyu Patrol Based and was charged with the offence. According to him, he did not know anything about the charge and did not know the prosecution witnesses and only saw them in court.

21. In her judgement, the Learned Trial Magistrate based on the evidence of the PW1 and her birth certificate and baptismal card found that the complainant was fifteen years at the time of the defilement.

22. She further found that the complainant's evidence of penetration was corroborated by the evidence of the clinical officer and the P3 Form.

23. As regards the identification of the appellant as the culprit, it was the Court's finding that the appellant was known to the complainant as he had been employed by their neighbour. The Learned Trial magistrate therefore had no difficulty in finding that there was no possibility of mistake in the identification of the appellant.

24. The Court also found that the appellant's defence which was directed towards an assault rather than defilement had not created any doubt in the prosecution's case. The appellant was therefore found guilty of the offence and as convicted accordingly.

Appellant's Submissions

25. In his submissions, the appellant relied on **Charles Kibe Mungai vs. R [2015] KLR and JMR vs. R [2016] eKLR** and submitted that the Court should adopt an empirical approach in the implementation of the ***Sexual Offences Act***.

26. In this case it was submitted that the complainant's age of 16 years was fairly the age group of the defendant who had just attained 18 years by the time of his arrest. It was the appellant's submission that there was no mention of violence and that the absence of violence or threat of use of violence though, it may be argued, is immaterial, may infer consent for the purposes of defence under section 8(5) of the ***Sexual Offences Act*** where the victim may have deceived the defendant into believing that she was 18 years old.

27. Based on authorities it was submitted that the burden of proof in criminal cases is always on the prosecution and never shifts to the suspect and that the standard in such cases is beyond reasonable doubt.

28. The appellant also raised the issue of the contradictions in the evidence of the complainant and PW2 and PW3 regarding the torn clothes and the attempted enticement of the complainant with 50/=.

29. According to the appellant, based on **Charles Kibe Mungai vs. R [2015] KLR and JMR vs. R [2016] eKLR** if penetration was caused by the use of any other instrument other than penile, then the offence committed was neither defilement nor sexual assault.

30. The Court was therefore urged to pronounce itself against the deflected burden of proof and the diminishing standard of proof in sexual offences and proceed to acquit the appellant.

Respondent's Submissions

31. It was submitted hat from the evidence of PW1 as well as the documentary evidence showing that the complainant was born on 9th May, 1998, the complainant's age w placed at 14 years at the time of the offence.

32. As regards penetration, it was submitted that the evidence of the complainant was corroborated by the evidence of PW4 and the P3 Form.

33. It was further submitted that the complainant knew the appellant though not by name and was able to see him and identify him clearly.

34. It was therefore submitted that the prosecution proved all the ingredients of the offence beyond reasonable doubt while on the other hand the appellant's defence was hopeless and could not dispel the overwhelming evidence tendered by the prosecution hence the appellant's conviction was safe.

Determination

35. I have considered the evidence on record in this matter.

36. 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. 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.***

38. 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."**

39. As regards the age of the complainant, in **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

> **"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."**

40. The importance of establishing the complainant's age in defilement cases cannot be over-emphasised. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"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."**

41. Closer home in the case **of Kaingu Elias Kasomo vs Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

42. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated**

20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

43. However in In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000**, was observed as follows:

> **"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

44. In the case of **Richard Wahome Chege –vs.- Republic Criminal Appeal No 61 of 2014**, the Court of Appeal sitting in Nyeri while considering the question of proof of age of the victim held as follows:

> **"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself"**

45. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

46. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case there was oral evidence which was supported by the documentary evidence in the form of birth certificate and baptismal card that the complainant was born on 9th April, 1998. The offence was committed on 16th day of January, 2014 by which time the complainant was 15 years. Accordingly, it is my view that the prosecution proved that the complainant as a child pursuant to the provisions of the ***Sexual Offences Act*** as read with the ***Children Act***.

47. However, the Court was urged to consider the fact that the complainant's age was nearly 16 years and being a female was fairly the age group of the defendant who had just attained 18 years by the time of his arrest. The law is however clear at section 8(4) of the ***Sexual Offences Act*** that:

> ***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.***

48. While this Court appreciates the injustice that is occasionally caused by a strict application of some of the provisions of the ***Sexual Offences Act*** where both the victim and the culprit are children and the offence was committed in circumstances that may be termed as "experimental expedition" in this case there is no such evidence. There is no evidence from either the complainant or the appellant that they were in a relationship. To the contrary the complaint's evidence was that she was held by the hand and dragged into the bush. The clothes exhibited were found to have been torn an indication that the complainant did not voluntarily remove her clothes. While the appellant belatedly in this appeal invoked the defence in section 8(5) of the ***Sexual Offences Act***, that defence was not alluded to at the hearing. The said section provides that:

> ***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.***

49. Therefore for the defence to be successfully invoked, it must be proved that the complainant deceived the accused into believing that she was over the age of 18 years at the time of the commission of the offence and that the accused did believe this to be the position. In this case there is no material placed on the record on the basis of which the court can find that that was the position.

50. The second condition to be proved for the offence to be proved to have been committed is whether there was penetration. 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;***

51. In this case the complainant's evidence was that the appellant inserted his penis into her vagina. However that process led to the tear of the complainant's vagina and resulted into her bleeding. On examination, the complainant was found to have had a foul smelling discharge and blood was oozing from her vagina. Her labia was swollen and there was a perimeter tear. There was a discharge which was bloody and

smelling blood and the urine had puss, a sign of infection. The findings were similar to the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held that:-

> **"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."**

52. The appellant relied on **Charles Kibe Mungai vs. R [2015] KLR and JMR vs. R [2016] eKLR.** In the former, **Waweru, J** was dealing with the offence of sexual assault and he expressed himself as hereunder:

> **"I have looked at the charge as laid against the Appellant under section 5(1) (a) (i) & (2) of the Act which provides –**
>
> ***5. (1) Any person who unlawfully –***
>
> ***Penetrates the genital organs of another with –***
>
> ***(i) any part of the body of another or of that person; or ………………***
>
> ***is guilty of an offence termed sexual assault.***
>
> ***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.***
>
> **Penetration by finger as the Appellant was charged would thus constitute the offence of sexual assault. However, the definition of "penetration" under section 2(1) of the Act poses a serious challenge. That definition is –**
>
> **'*penetration* means the partial or complete insertion of the genital organs of a person into the genital organs of another person'.**
>
> **According to this definition therefore, to constitute the offence of sexual assault the penetration must be by genital organs of a person into the genital organs of another person. Fingers are not genital organs. This conflict between the definition of penetration under section 2(1) and the offence of sexual assault as created under section 5(1) of the Act needs to be resolved first. I did not have the benefit of full submissions on the issue, and I will therefore not resolve the conflict now. Suffice it to say, for this present case, that because of the definition of penetration under section 2(1) of the Act, the particulars of the charge did not disclose the offence charged. The charge was thus incurably defective, and I so hold. The conviction cannot be upheld. If I upheld the conviction, the sentence was clearly illegal. The Appellant was a minor not only at the time of commission of the offence, but also at the time of conviction and sentencing. The trial court never referred to the provisions of section 8(7) of the Act, which in turn would have taken him to section 191 of the Children's Act. That section takes precedence over any other law with regard to sentencing of minor offenders. It provides a wide range of options to the trial court on how to deal with a convicted minor. Those options do not include imprisonment."**

53. I entirely agree with **Waweru, J** that since penetration under the ***Sexual Offences Act*** can only occur in circumstances where there is partial or complete insertion of the genital organs of a person into the genital organs of another person, the offence of sexual assault under the ***Sexual Offences Act*** can only be proved where the penetration of the sexual organ is by the insertion of the genital organs of one person into the genital organs of another person. Of course under section 2 of the ***Sexual Offences Act*,** "genital organs" includes the whole or part of male or female genital organs includes the anus. It was based on that reasoning that **Waweru, J** found that the particulars of the charge did not disclose the offence charged hence the charge was thus incurably defective. I agree that where the offence under the ***Sexual Offences Act*** requires as one of its ingredients penetration and the particulars do not state that there was insertion of the genital organs of a person into the genital organs of another person, those facts would not disclose the offence.

54. However where, as is this case, the appellant was charged with defilement and both the particulars of the offence and the evidence show that there was insertion of the genital organs of a person into the genital organs of another person, the charge cannot be said to be defective.

55. I am therefore satisfied that the prosecution proved that that there was penetration as defined under the ***Sexual Offences Act***.

56. As regards the identification of the appellant as the person whose action led to the penetration of the complainant, the complainant was emphatic that she knew the appellant as she had been seeing him two weeks before the incident and the appellant was employed by their neighbour and the offence occurred in broad daylight. The fact of the appellant's employment by the neighbour was not denied by the appellant. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

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

57. *In **Anjononi & Others vs. The Republic [1980] KLR 59** it was held that*:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

58. In **Wanjohi & 2 Others vs. Republic [1989] KLR 415**, the Court of Appeal held that, "recognition is stronger than identification but an honest recognition may yet be mistaken."

59. Similarly in **R vs. Turnbull (1976) 3 ALL E.R 549** the Court held that:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

60. Although the appellant in his defence averred that the charge was as a result of his actions in beating up the boy whom he caught stealing his employer's mangoes, the case facing him was that of defilement and not assault. The complainant proved that she was defiled and pointed the finger at the appellant. In those circumstances, the Learned Trial Magistrate was properly entitled to find as she did that the appellant's defence did not dislodge the prosecution case.

61. As regards contradictions in the prosecution case, whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. 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.**

62. 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 and than that one or both suffered from a defective memory."**

63. 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*."**

64. In my view the contradictions pointed out were not so material as to vitiate the conviction.

65. Whereas this Court has held in Mombasa High Court Criminal Appeal No. 262 of 2012 - **Hamisi Mwangeka Mwero vs. Republic** that mandatory minimum sentences by reducing the Court to a mere rubberstamp, are repugnant, the Court is still entitled where the circumstances warrant to impose what is *prima facie* mandatory minimum sentence. In this case the appellant took advantage of his masculinity, dragged the complainant and without any evidence of provocation defiled her.

66. The Court of Appeal in **Thomas Mwambu Wenyi v Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira vs State of Maharashtra** at paragraphs 70-71 where it was held on sentencing that:-

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."**

67. Having considered the evidence presented before the trial court it is my view that the appellant was properly convicted on the offence of defilement and I have no reason to interfere with both the conviction.

68. As regards the sentence, the offence in question is serious as it has a long lasting psychological trauma on the victim and children ought to be protected from people with predatory tendencies. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973]**

EA 370:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."**

69. In the premises it is my view that the sentence meted to the appellant was appropriate in the circumstances.

70. Accordingly, the appeal fails and is dismissed.

71. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Machakos this 1st day of October, 2018.

G V ODUNGA

JUDGE

In the presence of: