Wachira v Republic (Criminal Appeal E088 of 2023)
[2025] KEHC 15551 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E088 OF 2023

AK NDUNG'U, J

OCTOBER 30, 2025

BETWEEN

JOSEPH KARIUKI WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No. E014 of 2022– L. Nyaga, RM))

JUDGMENT

1. The Appellant, Joseph Kariuki Wachira, was convicted after trial of indecent act contrary to Section 11(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 19/01/2022 at Chaka town in Kieni East subcounty within Nyeri County unlawfully and intentionally touched the vagina of E.M.M a child aged 16 years with his fingers. On 18/10/2023, he was sentenced to twelve (12) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed this appeal on 26/10/23 vide a petition of appeal and subsequently filed amended grounds of appeal accompanying his submissions and sought leave to amend in the said submissions. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.

    ii. The learned magistrate erred by failing to note that section 33 and 77 of the *Evidence Act* were contravened.

    iii. The learned magistrate failed to note that section 34 of the *Sexual Offences Act* was contravened.

iv. The learned magistrate failed to note that there was non-disclosure of material evidence contrary to Article 50 of the *Constitution*.

v. The learned magistrate erred by relying on a defective charge sheet.

vi. The learned magistrate erred by failing to invoke section 33 of the *Sexual Offences Act* regarding adducing circumstantial evidence while determining the case.

vii. That his defence was quashed without weighing it against the prosecution's weak case.

viii. The learned magistrate erred by meting a sentence which was harsh, excessive and unconstitutional.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the complainant was not truthful as her statement was not credible, it was inconsistent and disjointed. Other witnesses who testified only gave hearsay evidence as no one witnessed the ordeal. The complainant testified that she was lying on the table but on cross examination, she did not describe how she slept on the table. She did not testify of falling on the floor contradicting her statement in the investigation diary that she was overpowered but she did not fall on the floor. She testified that the school nurse did not ask that any tests be done whereas the school nurse testified that she told the doctor to conduct a pregnancy test. She testified that he touched her breasts, pulled her skirt higher, widened her legs and stretched his hand into her private parts whereas she told the school nurse that he unbuttoned her blouse, unzipped her skirt and touched her in between the legs.

4. That her father testified that the complainant informed him that she was touched on her private parts and he did not mention touching of the breasts, pulling the skirt and widening the legs. That as per investigation diary, it was reported that he had removed his trouser whereas the complainant testified that he only unzipped his trouser and testified in re-examination that he did not remove his trouser. That she told the school nurse that he unzipped her skirt and not the doctor's zip. She testified on cross examination that the first button of her blouse was unbuttoned but the school nurse testified that she did not have time to check whether her blouse was unbuttoned yet it would be easy to notice such a thing. The complainant testified that the school nurse told her that she might be having hysteria yet the school nurse testified that she was not aware that the complainant had hysteria.

5. He submitted that the complainant recorded that she was unconscious which was amplified by the investigating officer who testified that it seemed that she was unconscious and that someone unconscious cannot tell when they are touched. That PW1 recanted her statement on PMF1 where it was stated that she was unconscious but managed to scream as she testified that she told the doctor she was feeling dizzy and she slept on the table. That her father testified that she informed him that she had fainted while in school and she was taken to clinic where she felt dizzy and she rested and when she gained consciousness... The school nurse testified that the complainant informed her that she got dizzy/unconscious and the doctor was touching her which she affirmed during cross examination that the complainant was dizzy and feeling unconscious. That this was an afterthought as she recanted her earlier report. That she had reported that she was unconscious but managed to scream but when cross examined on the same, she testified that she did not scream and on re-examination, she testified that she could not scream as she was overpowered and weak.

6. Further, the first report indicated that she was overpowered and fell on the floor but on cross examination, she testified that she did not fall on the floor as per the investigation diary. That all these shows that she was not truthful and she lacked integrity and honesty which was amplified by her father and the school nurse who testified that they were not aware that she was sexually active. The complainant falls under the category of a hostile witness who contradicts his/her former statement

and her oral statement could not secure a conviction and therefore, the case was not proved beyond reasonable doubt.

7. He submitted that the trial court failed to record the demeanour of the complainant when she was testifying contrary to section 199 of the Criminal Procedure Code and her observation was only recorded in the judgment which proves to be an afterthought because she could not remember a remote case in a myriad of workload. The trial court ought to have cautioned itself as the complainant was a minor susceptible to third party influence, coaching or coercion from adults with malicious intentions. Further, the clinical officer did not form an opinion whether the offence of indecent act was committed or not. That the prosecution sought for summons for Dr, Bill Muriuki whist the doctor who testified in court was William Muriithi. Further, he relied on PRC form to fill the P3 form thus he relied on evidence from another medical practitioner whom he was not familiar with and he produced the PRC form, though he was not the maker thus contravening section 33 and 77 of the *Evidence Act*. His testimony was therefore not genuine and authentic. That the production of evidence of the complainant's previous sexual conduct by PW5 was in contravention of section 34 of *Sexual Offences Act*.

8. He submitted that the prosecution failed to call crucial witnesses being the laboratory technician and patient who were at the hospital at the material time. Laboratory technician was crucial as she was next to the consultation room which was partitioned by cardboards and would have heard any screams, commotion and conversation. That even the trial court agreed that the technician would have had first hand evidence of the incident. That he would have uncovered complainant's incredibility and her testimony would have been adverse to the prosecution's case. The patients who were present would have perceived either in hearing or seeing the occurrences which would have been crucial to the case. Further, the prosecution failed to prove that he was a registered nurse and the trial court stated that he was a professional nurse and used it as an aggravating factor hence he was discriminated because of unproved facts. That the professional body especially the nursing council of Kenya should have been involved to do investigations.

9. That in his duties, he is trained to perform breasts examinations and other tests which can be termed as indecent act under the *Sexual Offences Act* and that is why section 5(1) (ii) of the Act placed a defence for professional medical examination hence the prosecution was mandated to investigate in conjunction with the nursing council of Kenya whether the alleged offence was past the professional and ethical procedure. That PW3 misguided the trial court when she testified that a stethoscope was not required in the circumstances whereas as a nurse, she understood the same was vital in examining patient. He submitted hat the learned magistrate failed to record reasons for believing the complainant contrary to section 124 of the *Evidence Act* as she failed to record the reasons during the examination of the complainant but only recorded in the judgement. Hence, she recorded the reasons in the judgment as an afterthought to cure a mistake committed during the proceedings.

10. He submitted that he was not accorded a fair trial as he was not supplied with witness statement of PW5, the doctor which contravened his right under Article 50(2) of the *Constitution*. The charge sheet was defective as he was accused of touching the complainant's vagina whereas he was also convicted of touching the complainant's breasts which was not in the particulars of the charge sheet hence the error was fatal and caused him an injustice and which error was uncurable under section 382 of the Criminal Procedure Code. That he had raised this issue during cross examination of PW4 which was noted by the trial court in her judgment. That the error occasioned him an injustice since he was convicted of a particular that was not captured in the main charge. Further, the charge was defective on account that a vagina cannot be touched without actual penetration as the vagina is the birth canal whereas the vulva is the outer anatomical region which is visible. Thus, touching the vagina can only fall under

sexual assault under section 5(1) of the Act. Further, the charge sheet listed four witnesses whereas five witnesses testified and the names of the complainant was captured in initials hence he could not tell from the charge sheet who was EMM.

11. That adducing circumstantial evidence pursuant to section 33 of the SOA would have been important in determining whether the offence was committed. That in this case, it was not mentioned that he coerced or begged for sexual favour and it therefore beats logic how he would have proceeded blindly in indecently touching a total stranger in broad day light and at his workplace, risking his career and it beats logic how he could make sexual advances to a patient and more so, a minor seeking healthcare. It also beats logic how the complainant could be touched and remain silent without raising an alarm. That he would have locked the door but it remained unlocked and there was a window without curtain so anyone at the waiting bay could have witnessed the alleged incidence. That PW1 testified that the school nurse was at the door when the incidence was alleged to have happened raising the question on how she did not witness nor heard any scuffle. That the complainant appeared calm when she was testifying proving that he never offended her. That he did not ran after the allegation and even took himself to the police station since he did not have guilty conscious. That the complainant testified that she told him that she could forgive him but he kept on denying that he committed the offence which was amplified by PW3 who testified that the complainant told him to say the truth and she will not institute charges against him which was a clear blackmail and the complainant was trying to dupe him in confessing. Hence there was no circumstantial evidence that could have pointed to his guilt.

12. He submitted that his defence was termed as a mere afterthought though it was the duty of the prosecution to rebut his defence. It was termed as a mere afterthought since it was raised during his defence raising the question at what point was he supposed to raise the defence other than during the defence hearing pursuant to section 211 of the Criminal Procedure Code. That the prosecution ought to have called for evidence to rebut his defence failure to which his defence went unchallenged. Therefore, the trial court erred rejecting his defence for raising it at the stage when it should be raised and absolved the prosecution from the legal burden.

13. With respect to sentence, he submitted that it was harsh, excessive and failed to consider all mitigating factors, that he was a first time offender and non-aggravating circumstances of the offence. That mandatory minimum sentences are frowned upon as they deny trial court discretion to sentence according to the circumstances of the case.

14. In rejoinder, the Respondent's counsel submitted that no leave was sought pursuant to section 350(2) of the Criminal Procedure Code to amend grounds of appeal previously filed and he urged the court to disregard the grounds that were filed without leave of the court. That age was sufficiently proved through birth certificate which was produced as Pexhibit1. The complainant's evidence was cogent and believable though the Appellant denied the allegations. That even though no one witnessed the offence, section 124 of the *Evidence Act* empowers the court to convict solely on the evidence of the complainant. Therefore, there was proof that there was unlawful intentional contact to the complainant's private parts. Identification was also proved since the Appellant confirmed that the complainant and PW3 were his clients on the material day and the offence was committed during the day.

15. As to failure to call crucial witnesses, he submitted that the court should consider whether the witnesses called have established all the ingredients of an offence and whether the witnesses can be believed. As to non compliance with section 33 and 77 of the *Evidence Act*, he submitted that the medical evidence could only be corroborative in this case and even if it was not availed, the same would not have affected the case as the Appellant was not charged with defilement which would have required proof of penetration. With respect to sentence, he submitted that the trial court considered all the mitigating

circumstances and aggravating circumstances. Further, it was upon the Appellant to establish that the trial court while sentencing him took an irrelevant factor, a wrong principle was applied or that the sentence was excessive and thus an error of principle which he failed to establish. He submitted that the sentence of 12 years was not only lawful but lenient in the circumstances.

16. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

17. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

18. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

19. To this end a summary of the evidence at trial would be a suitable point of departure.

20. Complainant in her sworn testimony testified that she was born on 24/03/2005 and she was a student at (particulars withheld) Girls school. On 19/01/2022, she was sick and she was taken to Tiba clinic where she consulted a doctor and she was told to get some samples. She was not able to get the samples and she informed the lab technician who told her to inform the doctor. She also informed the lab technician that she was feeling dizzy and weak. She went to the doctor's office and told him that she was feeling weak and dizzy and he offered her a glass of water and when he returned with a glass of water, she was lying on the table as she was weak and she was not able to do anything. She was seated and was lying on her hand while it was placed on the table. He placed the glass of water on the table and went to the door to check who was there and returned. He started touching her breasts and proceeded to pull her skirt higher and widened her legs and touched her private parts. He then opened his trouser zip and when the nurse asked whether she could get in, he took the pressure machine, sat down and closed his zip.

21. That when the nurse was about to get in, she stood up and walked out and told her that she did not want to be treated there because the doctor had assaulted her. The nurse went in and asked the doctor but he

denied. The nurse was shouting and so the lab technician intervened and they explained to her but the doctor claimed to be false accusation and that there was a previous similar case. The nurse contacted the owner of the clinic and the deputy principal and before their arrival, the doctor approached them and said that they should settle the case but the nurse declined. That when the owner of the clinic and the deputy principal arrived, they all assembled at the doctor's office and he confessed and sought for forgiveness. That at first, she had told him that she can forgive him but he kept denying that he did the act. They went to the police station and she was also taken to hospital for treatment. She was treated at Kiganjo health centre and she identified the clinical record filled at Kiganjo centre. She also identified the P3 and PRC forms and her birth certificate. She identified the Appellant.

22. On cross examination by Appellant's counsel, she testified that they reported at Chaka police station and she was accompanied by the deputy principal and the school nurse. Her parents were not there. She was frequently collapsing and the school nurse told her that she might have hysteria. The school nurse did not ask for any tests to be done but it was the doctor who recommended that tests be done. The school nurse did not request for the pregnancy test. She felt dizzy and slept on the table and that her statement read that she slept on the desk and she did not describe how she had slept. That she slept but she could realize what was happening around her and she did not scream. That PMF1 was written that she was unconscious but managed to scream. She was overpowered by him but she did no fall on the floor as per the investigation diary. She was on the table and he had not removed his trouser. The first button of the blouse was unbuttoned and he only touched her. That she could perceive what was happening and she did not try to fight back. That it was only her and the doctor in his office and she rushed out when the school nurse wanted to get in. She maintained that she told the school nurse that she did not want to be treated there as she was being sexually harassed. She denied that she told him to write a letter indicating that she was sick so that she can go home.

23. On re-examination, she testified that she does not suffer from memory loss and that she could not scream because she was overpowered and she was weak. That she was present when the investigation diary was filled. That he unzipped his trouser but did not remove his trouser. That he touched her on the breasts and private parts.

24. PW2, complainant's father testified that he was contacted by his wife who requested him to call complainant's school as there was a matter that needed their attention. He contacted the deputy head teacher who told him that the complainant had been taken ill and was taken to Tiba clinic where she was sexually assaulted. The teacher informed him that the Appellant had admitted what he had done to the complainant and so they asked him what they should do. She also hinted that it was not the first case as there have been a previous incidence with another girl. He asked the teacher to report the matter at police station. He testified that they travelled to Chaka on the following day and the complainant recorded her statement at Chaka police station. With police officers, they proceeded to Tiba clinic where the owner told them that he had released the Appellant the previous day. He also informed them that this was not the first sexual assault case against the Appellant.

25. He testified that the complainant informed him that she had fainted while in school and she was taken to Tiba clinic. She felt dizzy and rested and when she gained consciousness, she woke up to the assault by the doctor. That they were informed that the doctor touched her breasts and private parts. That the officer who arrested the Appellant requested that they meet at Naromoru as the Appellant was asking if they could settle the matter out of court and the police informed him that he had made a confession and wanted them to meet. The Appellant told them that he had an issue with masturbation and he had no intention to do the act upon the complainant. He confessed that he was masturbating beside the complainant and he did not know what got over him. That he said that masturbation was

a problem he struggled with and his wife was aware of it. He testified that there was no agreement regarding dropping of the case.

26. On cross examination, he testified that he was not present when the incident happened but was informed by the deputy principal and his daughter of what transpired. That it was only the Appellant and PW1 were in the doctor's room during the incidence. The complainant informed him that he touched her on her private parts and the charge sheet did no mention touching of the breasts. That the owner of the clinic informed them that there was an earlier incidence with another girl though he did not give them the date nor the names of the other girl. He maintained that the Appellant admitted having assaulted the complainant and his problem about masturbation in presence of police officers. That his statement talked about sexual assault and he was not aware that sexual assault involves penetration. That before she was taken to clinic, he was informed that the complainant had fainted and while at the clinic, she felt dizzy. That they were made aware that the complainant was sexually active through the PRC form.

27. PW3 testified that she was an employee at complainant's school and she had taken her to Tiba clinic on the material day. She told the doctor to conduct a pregnancy test, amoeba and h-pylori on the complainant. The complainant was called by the doctor who referred her to the lab. She stepped out of the consultation room and the complainant returned. She was getting into the consultation room when the complainant stepped out of the consultation room and told her that she got dizzy/ unconscious and the doctor was touching her. That the doctor unbuttoned her blouse inappropriately, unzipped her skirt and was touching her in between her legs. That she went to the consultation room and confronted the doctor who informed her that it was the complainant who was refusing to give samples for the test. The complainant insisted that he was touching her inappropriately and told him to say the truth and she will not institute any charges against him.

28. The doctor insisted that they should talk over the matter in the consultation room and he closed the door and he was trying to apologize to the complainant. He informed them that sometime back he had been misjudged for sexual assault but was found innocent. She contacted the deputy principal and the owner of the clinic who informed them that that was the second time and it was alarming so he would fire the Appellant. With the deputy principle, the owner of the clinic, the Appellant, lab technician and the complainant, they went into the consultation room where the Appellant admitted he had done the act but it was not out of his own volition and something had gotten into him. He was apologetic and the owner of the clinic said that there was such an incidence but it was followed on after the girl had left the hospital.

29. On cross examination, she testified that she was the school nurse. That a doctor should examine a patient after they have given consent. The complainant told her that her blouse was unbuttoned though this was not in her statement. That she did not have time to check whether her blouse was unbuttoned when she left the consultation room. That a blouse or shirt is usually opened to conduct tests using stethoscope but the same was not needed given the complainant's symptoms. That she was dizzy and feeling unconscious. That she was not aware that she had other medical conditions like hysteria. That swabs can be done to test pregnancy but it can cause abortion. She did not witness the incidence but the complainant informed her of what transpired. She was not aware that the complainant had informed the doctor that she was home sick and had requested for sick off.

30. On re-examination, she testified that she had indicated in her statement that the complainant required some tests including pregnancy test. The complainant did not tell her that she was home sick and that she needed a letter to go home.

31. PW4, the investigating officer testified that she was instructed to take up the matter and accompanied the complainant to hospital where the PRC form was filled. She also accompanied the complainant to Tiba clinic but they did not find the Appellant. With the help of the owner of the clinic, she was able to trace the Appellant. She arrested him on 02/03/2022 and charged him. She produced complainant's birth certificate as Pexhibit4.

32. She testified on cross examination that it seemed that the complainant was unconscious at the material time and that she had been referred to the lab but could not get samples and she went back to the doctor. That someone unconscious cannot tell when they are touched. That she narrated what the complainant told her. That she was told that there were other patients at the waiting bay at the material time but only the complainant and the Appellant were at the consultation room. She was not aware of any other incident or charge against the Appellant. The complainant stated that on gaining consciousness, she found the doctor trying to unbutton the first button of her school blouse and he was touching her breasts but the charge sheet did not mention breasts and only mentioned the vagina. That she was not informed that the complainant was homesick and wanted to go home.

33. On re-examination, she testified that the owner of the clinic informed them that he had expelled the Appellant due to the allegations.

34. PW5, a medical doctor testified that the complainant was examined and on general body examination, no injuries were noted. Few tests were done and they were all negative. She had an old broken hymen. He filled the P3 form and signed it. That the information on the P3 form were similar to that in the PRC form. The PRC form was filled in Naromoru health centre where she had been treated first. That he relied on the information on the PRC form to fill the P3 form. He produced the P3 as Pexhibit2 and PRC form as Pexhibit3.

35. On cross examination, he testified that according to the PRC form, the type of sexual assault was vaginal and there were no injuries or lacerations on the genetalia. The hymen was old broken and the victim was sexually active before. That according to the PRC, the perpetrator touched the victim's private parts. There was no mention of fingers in the PRC form. That the findings could not confirm or rule out the existence of a sexual assault.

36. The Appellant in his sworn defence testified that he knew the complainant and on the material day, he was working at Tiba clinic as a nurse. That PW3 went to his office and wrote on a piece of paper the tests he wanted him to conduct on the complainant as she did not want the complainant to know. She wrote pregnancy test and she did not write any other tests. That PW3 remained in the consultation room during consultation and he noted that the complainant needed further tests like h-pylori, stool microscopy, stool for ova and cysts tests and so he sent her to the lab. They left and after sometime, the complainant returned with the lab tests which were negative. The complainant told him that she was homesick and she requested him to do a letter so that she could go home as she was tired of school. He refused and he informed her that it was unprofessional as she was not sick.

37. She walked out and he overheard her telling PW3 that the doctor had touched her. PW3 went to his office and asked him whether it was true and he told her that he did not touch the complainant. That she made some call and they had a sitting and he was asked whether he had touched the complainant but he told them that he did not touch her. That he did not admit touching the complainant while at the meeting and it is like they wanted him to admit. That he was asked to leave so that they could talk. He testified that he did not go back to work since he was unhappy of the allegations. He was contacted in march by a police officer and he was required to appear at Naromoru police station.

38. He was asked whether he touched the complainant but he denied. That they did not agree on this matter and so he was charged. That he suspected that the complainant developed a grudge when he refused to write sick off for her. That at no time was the complainant unconscious at the consultation room and she did not lean on his desk. He did not see her unconscious. That there was no one else at the consultation room when he was taking the details. That he did not confess that he had touched her. That it was not true that he had removed his trouser as indicated in the investigation diary and it is not true that his trouser zip was open as alleged by the complainant. There has never been a similar incident as this case in the clinic and he has never been charged.

39. On cross examination, he testified that he is a registered nurse and he had proof and he had worked at Tiba clinic for one year two months. He attended to the complainant during the day and she was complaining of stomach ache. She took the lab tests to him. He denied giving her a glass of water and that she was there for less than 5 minutes. That the lab was next to the consultation room separated by cardboards and there was no one at the waiting bay. That he decided not to go back to work and it is not true that he moved back to Nanyuki because he was guilty. That the grudge was because he refused to give the complainant sick off letter.

40. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

41. It is trite that for the charge of indecent act with a child to stand, the prosecution must prove the age of the victim (must be a minor), contact of one's body part to either the genitalia, breast or buttocks of another, and that contact was done intentionally. This is defined under section 2(a) of the *Sexual Offences Act* thus;

> " indecent act" means any unlawful intentional act which causes—
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

42. The Appellant raised a preliminary point of law to wit, the charge sheet was defective in that the charge sheet read that he touched the complainant's vagina whereas the complainant testified that he touched her breasts. That the initials were used as the complainant's name and that the charge sheet listed four witnesses whereas five witnesses testified.

43. The substantive law on a defective charge sheet is section 134 of the Criminal Procedure Code. The said section provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

44. Indeed, the charge sheet read that he touched the complainant's vagina whereas the complainant testified that in addition to touching her private parts, he also touched her breasts. It was her testimony

that he proceeded to pull her skirt higher, widened her legs, stretched his hands into her private parts and touched her private parts.

45. From the definition of indecent act under section 2(a) as seen above one need to only prove that he either touched the breasts, buttock, or genital organs and the trial court found that failure to include breasts in the charge sheet was not fatal as section 2(a) of the Act does not reqiure that all parts must be touched. I am persuaded that the trial court correctly interpreted the law on defects in a charge sheet and noted that not all defects (and, I would add omissions) would invalidate a charge sheet. This was an error that is curable under section 382 of the Criminal Procedure Code which provides;

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

46. The bottom line is that the Appellant understood the charge and the evidence was adduced in his presence and his able advocate cross examined the witnesses on all aspects of the charge and I see no prejudice suffered by him. In any event, there is evidence that he touched the complainant's vagina and the evidence thus supports the charge even without mentioning breasts in the particulars. He also claimed that he was convicted of touching the complainant's breast. This is not true. The court's conclusion was that he was convicted of indecent act.

47. Regarding the use of initials as the complainant's names, I think there is a misapprehension of the law on the part of the Appellant. This is a standard practice in cases that involves minors. Failure to also include the 5th witness was not fatal since this was an error which did not prejudice the appellant and no miscarriage of justice has been occasioned. Furthermore, the 5th witness was the doctor who testified as PW5 and produced the P3 and PRC forms. His evidence was not relevant in this case as this was not a case of defilement but rather one of indecent act where the evidence of doctor is not required.

48. Further, I find no value in the complaint over non-compliance with section 33 and 77 of the *Evidence Act* and the failure to supply the Appellant with the doctor's statement , since, as alluded to above, the evidence of the doctor really had no bearing with the proof of a charge of indecent assault. This is evidence that did not in a strict sense form the basis of a conviction.

49. The age of the complainant in this case was proved through the complainant's certified birth certificate produced as Pexhibit4 which shows that she was born on 24/03/2005. The offence was committed on 19/01/2022 and therefore the complainant was a minor at the material time placing her in the ambit of Section 11(1) of the *Sexual Offences Act* under which the Appellant was charged.

50. In relation to the Act complained of, the complainant testified that while in the consultation room, the Appellant went to the door and checked who was there and returned. He then started touching her breast, pulled her skirt higher, widened her legs, stretched his hand into her private parts and touched her private parts. He also unzipped his trouser and when the school nurse enquired whether she could get in, he took the pressure machine, sat down and closed his zip. She stood up and got out and informed PW3.

51. The trial court while convicting him believed the complainant's testimony and guided by section 124 of the *Evidence Act*, she held that her evidence was sufficient. She further stated that she viewed her as a truthful witness and in her assessment of her demeanour, she presented herself as a truthful witness who was incapable of being compromised.

52. It is an undenied fact that the Appellant and the complainant were at the material time alone in the Appellant's consultation room. The complainant is categorical that the Appellant touched her breasts and lifted her skirt and stretched his had into her pant and touched her private parts.

53. The Appellant denies this and offers in his defence that the complainant asked him to write her a doctor's letter to go home as she was tired of school. He declined telling her that it was unprofessional to do so and the complainant walked out and he heard her saying he had touched her.

54. I have weighed this evidence. I find it most improbable that the complainant, a student, would have asked for such a letter and even if she had, it is doubtful that she had the guts to frame the Appellant with the serious charge as herein. For what benefit would she do so against a person she did not know yet the framing of the Appellant would not assist her get the letter she would have wanted if at all?

55. Like the trial court below, I do not believe the Appellant and I agree with the trial magistrate who upon hearing both divides and who had the advantage of seeing and hearing the witnesses testify, including seeing their demenour, concluded that the complainant was truthful and correctly appreciated and invoked Section 124 of the *Evidence Act*.

56. In his submissions the Appellant raised several issues that according to him discredit the prosecution's evidence. He implied that the prosecution's evidence was marred with contradictions and inconsistency that dented the complainant's credibility.

57. It is trite law that minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. Where inconsistencies or contradictions are not substantial and fundamental to the main issues in question before the court, then they should be rightfully ignored. The court is well aware of human fallibility and the incidences of memory loss after a long duration during an incident and hence the allowance for minor contradictions.

58. The applicable legal principle is well settled and it is as set out in numerous authorities 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. (See Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).

59. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in Njuki & Other Vs Republic (2002) 1 KLR 771 held that:

> " Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indisrepanincies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code".

60. Also, the Court of Appeal in the case of Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR the court stated:-

> "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 necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it."

61. The Appellant's submission that the complainant testified that the school nurse did not ask for any tests to be done whereas the school nurse testified that she had requested for a pregnancy test to be done as an example of a contradiction is not sustainable since it is noteworthy that he testified in his defence that the school nurse wrote the test he wanted to be conducted in a paper as she did not want the complainant to know. So, when the complainant said that the school nurse did not ask for any test to be done shows that she was truthful as she did not know that the nurse had requested for some tests privately without her knowledge.

62. Other contradictions cited was that the complainant testified that the school nurse mentioned that she might be having hysteria whereas the school nurse testified that she was not aware that she had hysteria. That her father did not mention that he touched her breast but only mentioned touching of private parts. That she told the school nurse that he unzipped her skirt and not his zip. That she testified that the first button of her blouse was unbuttoned while the school nurse testified that she did not have time to check whether her blouse was unbuttoned yet it would be easy to notice such a thing. All these were trivial cotradictions and notably, these are witnesses who were not in the consultation room and it is therefore expected that they were reporting on what they were told and it is not surprising that their accounts of the event would lack uniformity.

63. The Appellant submitted that crucial witnesses were not called to testify being the lab technician who could have given first hand evidence and other patients who were in the hospital at the material time.

64. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the *Evidence Act* which provides that;

> "In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

65. In Bukenya and Others V. Uganda [1972] EA 349 it was held that;

> "While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

66. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate.

67. My evaluation of the evidence leads me to the conclusion that the Appellant has misapprehended the fact that this case turns on the evidence of PW1 as put against his evidence, all other evidence coming after the fact and thus auxiliary.

68. In my view, the trial court correctly appreciated the law relating to evidence in a charge like the one that was before it. The court found that though the lab technician would have given first hand evidence, there is no requirement for corroboration in sexual offences. On failure to call the patients who were in the clinic on the material time, it is noteworthy that there was no impression that they were other patients in the clinic. The Appellant himself testified on cross examination that there was no one at the waiting bay.

69. The Appellant submitted that the trial court contravened section 199 of the Criminal Procedure Code and section 124 of the *Evidence Act* by failing to note the complainant's demeanour when she was testifying but only commented on her demeanour in the judgment which was written months after the complainant had testified. That there was no way the trial court could have remembered this remote case bearing in mind the workload in magistrate's court.

70. This submission is not well taken. My view is that, there is no way the court would have forgotten the complainant's demeanour as she observed her while testifying. Section 199 of the Criminal Procedure Code also does not state that it is mandatory that the court must record the demeanour during the trial. The said section states;

> "When a magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination."

71. The court in KGY v Republic [2020] KEHC 7813 (KLR) held that;

> "Section 199 states that a magistrate shall in addition to recording evidence also record such remarks, if any, as he thinks material respecting the demeanour of a witness. It is clear from the wording of the provision that the recording of remarks respecting the demeanour of a witness is discretionary and not mandatory. As such it cannot be said that there was a miscarriage of justice or that the trial was a nullity because the learned Magistrate in the present case made no remarks respecting the demeanour of the witnesses."

72. Ultimately, from a reading of section 124 of the *Evidence Act*, it is clear that a trial court can convict an accused person on the evidence of the victim alone if it believes the victim is truthful and the trial court records the reasons for that belief. In the instant case, the trial court convicted him after believing the testimony of the complainant and the court recorded as much.

73. The submission that the production of evidence of the complainant's previous sexual conduct by PW5 was in contravention of section 34 of the Act does not assist his case in any way. Furthermore, there was no evidence that was produced on the complainant's previous sexual conduct. It was only mentioned that she was sexually active since her hymen was found to be broken.

74. Another attack on the judgement is found in the submission that the Appellant's defence was not considered by the trial court and it was erroneously termed as an afterthought. He raised a defence that the complainant wanted him to write a sick off letter for her but when he refused, that is when she framed him. It is to be noted that he cross examined the complainant on this issue which she denied. It is further noteworthy that PW2 and PW3 did not mention that he raised that issue of failing to write a sick off during the meetings that were held after the act. Had the allegation been true, this is the first

thing he would have told the school nurse, the Deputy Principal of the school and the owner of the hospital when he was confronted over the matter.

75. There is also the evidence of PW1, PW2 and PW3 who all testified that he admitted and sought for forgiveness and admitted to PW3 that he was struggling with masturbation and he meant no harm to the complainant. It was in evidence of PW1, PW2 and PW3 that this was not the first case as they were informed by the owner of the clinic. I am quick to note that the evidence of the 3 by itself would not be enough to secure a conviction as none of them is qualified to record a conviction.

76. In his submissions, the Appellant seems to suggest that he touched the complainant in the course of his professional duty. Introducing the application of Section 5 (i) (ii) of the *Sexual Offences Act* which places a defence for professional medical examination at the submissions stage whereas the same was never raised at trial is not only a belated attempt at obfuscating the flow of justice but is self- defeatist. Nothing would have been easier than for the Appellant to have raised this defence at trial if he had touched the complainant within the bounderies allowed in his profession. I take the view that such a defence is not available to the Appellant in view of his strenuous denial that he had touched the complainant inappropriately.

77. Overall, the prosecution laid down a cogent case based on sound evidence and the trial court's finding that the Appellant committed the offence cannot be faulted.

78. With respect to sentence, it submitted that it was harsh and the trial court failed to consider the fact that he was a first time offender and used the fact that he was a nurse who took advantage of his patient as an aggravating factor whereas there was no proof that he was indeed a nurse. Further, mandatory sentences have been frowned upon by superior courts as they deny the court the discretion to consider special circumstances of a case.

79. Section 11(1) of the *Sexual Offences Act* provides;

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

80. He was however sentenced to twelve years imprisonment and while sentencing him, the trial court considered his mitigation and the fact that he was a first time offender and also considered that he took advantage of the minor in the course of his profession when he was expected to protect such a minor and offer her the required treatment.

81. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

82. The Appellant himself admitted in his defence that he was a registered nurse and was practising as such so the trial court was obliged to use it as an aggravating factor.

83. On the issue of the sentence being unconstitutional, the issue of minimum sentences has now been distinguished by the Supreme Court in R v Joshua Gichuki Mwangi & others Petition No. E018 of 2023 from mandatory sentences discussed in the Muruatetu case where the court clarified that

Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*. The court rendered itself as follows;

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....
>
> Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence".

84. I find no basis upon which to interfere with the sentence meted out by the trial court.

85. With the result that the Appeal herein lacks merit. It is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER, 2025.

A.K. NDUNG'U

JUDGE