REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL APPEAL NO. E039 OF 2024

JULIUS NYAMAI MURINZU……..
……APPELLANT

VERSUS

REBUPLIC……
RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Ruiru by Honourable C. A. Okello (PM), in Criminal (S.O) Case No. E040 of 2023 on 6th December 2024).

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Principal Magistrate Ruiru whereas he was charged of the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006 an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. He was convicted of the principal charge and sentenced to 20 years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 6 grounds which can be summarised as follows:-

a) The learned trial magistrate erred in law and in passing the judgment convicting the appellant while the prosecution did not prove the required burden of proof;

b) The learned trial magistrate erred both in law and in fact by failing to observe that the victim was not truthful in accordance to Section 124 of the Criminal Procedure Code.

c) The sentence was harsh and excessive.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the learned magistrate failed to conduct a proper *voir dire* examination as required under **Section 19 of the Oaths and Statutory Declaration Act**. The appellant relies on the cases of **D.W.M vs Republic [2016] eKLR**; **John Otieno Oloo vs Republic** (no citation given) and **Johnson Muiruri vs Republic [1983] KLR 445** and submits that the trial magistrate did not put any questions to the child to ascertain whether she understood the meaning of telling the truth or the significance of the oath. Relying on the cases of **Joseph Opando vs Republic Cr. App. No. 91**

of 1999 and **Johnson Muiruri vs Republic [1983] KLR 445**, the appellant argues that the trial magistrate failed to record any reasons for concluding that the minor understood the nature of the oath. Thus, the testimony of the minor was improperly admitted and therefore her evidence was legally inadmissible and should not have formed the basis of his conviction.

5. The appellant relies to the case of **Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013** and submits that the prosecution failed to prove the element of penetration. The appellant further submits that only PW1 testified on the element of penetration and her credibility is in serious doubt as no *voir dire* examination was conducted to test whether she understood the duty of speaking the truth or the nature of an oath.

6. The appellant further submits that the testimony of the minor is vague and imprecise as the incident occurred at night while she was sleeping. As such, it was impossible for PW1 to conclude that it was the appellant's male organ that penetrated her anus. The appellant argues that the medical evidence only provided that there was harm in the anus and did not specify that the harm was caused by a male organ. Furthermore, the minor's statement to the investigating officer raised concern as the minor only testified that's he felt pain and found him nearby when he woke up. PW1 did not see or directly witness actual penetration occurring and further she did not describe the

offender. Thus the absence of direct, reliable evidence to prove penile penetration means the key ingredient of the offence was not proved.

7. The appellant refers to the case of **Maingi & 5 Others vs Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118** and submits that mandatory minimum sentences under the Sexual Offences Act are unconstitutional. The appellant further submits that the Supreme Court in **Republic vs Joshua**

Gichuki Mwangi (Petition No. E018 of 2023) held that the High Court is the appropriate forum to adjudicate challenges to the constitutionality of sentencing laws, as a matter of first instance. The appellant argues that the trial magistrate failed to consider the mitigating circumstances for instance that he was a first offender, his advanced age and the period he spent in custody. The appellant argues that the sentence of twenty years is harsh and excessive and a sentence of ten years is more appropriate considering the circumstances.

The Respondent's Submissions

8. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to **Section 8(1)** and **8(3) of the Sexual Offences Act** and the case of **Kyalo Kioko vs Republic (2016) eKLR** and submits that it proved the ingredients of the offence of defilement. The respondent relies on the case of

Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that PW1 was 13 years old at the time of the giving her testimony. A copy of the complainant's birth certificate serial number 045384 was produced which indicated that she was born on 15th July 2010 meaning the minor was 12 years when the offence was committed.

9. The respondent relies on **Section 2 of the Sexual Offences Act** and the case of **Mark Oiruri Mose vs Republic (2013) eKLR** and submits that PW1 testified that on 2/7/2023 at around 7.30pm she was in the house with a neighbour's child, Zarech Waithera who was three years old when the appellant, her mother's friend went to their house while drunk. The appellant slept on another mattress. The minor stated that her mother was not home and when they finished eating PW1 picked the other mattress and placed it on the floor and slept with Zarech. The minor stated that as she was sleeping she started feeling pain in the anus and she woke up to find the appellant on top of her and she pushed him away. She testified that the appellant was doing bad manners as he put his penis in her anus. The witness testified that she pushed him and he covered himself with a blanket. The appellant had removed her trouser and panty.

10. The respondent submits that PW3 produced P3 Form that indicated that the complainant had a tear on her vagina which was not complete. The anal test showed that she had tears on her anus at 12 o' clock due to friction. Further, there was injury on her genitalia. The witness

produced treatment notes, PRC Form and lab request form as exhibits. The medical officer concluded that there was evidence of penetration on the anal opening by a big object which caused a tear and it is possible that it was caused by a penis. The respondent thus submits that the evidence produced during the trial clearly proved the element of penetration to the required standards.

11. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that PW1

    testified that the appellant used to go to their husband with her mother and so she knew him well. The complainant's mother PW2, found that appellant inside the house together with the complainant and when the complainant told her what happened she started beating the appellant. The complainant locked the house leaving them inside and went to report the matter at Watalaam Police Post. PW2 further stated that the appellant was her boyfriend, a fact that was confirmed by the appellant in his defence. The respondent submits that from the evidence that was adduced herein, it is clear that the appellant is the person who defiled the victim. As such, there was no possibility of mistaken identity.

12. The respondent submits that the complainant was aged13 years at the time of giving her testimony and the trial court stated that there was no need for *voir dire* and the

witness was sworn. The respondent further submits that the trial court had the benefit of observing the demeanour of the complainant and was convinced of her testimony hence the judgment entered herein. Relying the cases of **Mohammed vs Republic [2008] 1 KLR (G&F) 1175** and **James Mwangi Muriithi vs Republic [2016] eKLR**, the respondent argues that although the actual questions put to the witness by the trial magistrate were not recorded, from the examination the trial magistrate elicited from PW1 that she was 13 years old and a standard 6 pupil at Riara Primary school. Thus, PW1 understood the oath and the duty to tell the truth and the fact that the trial court did not record the questions put to PW1 is not enough to vitiate the *voir dire* examination because the answers by the witness confirm

that she understood the nature of the oath and the duty to tell the truth. Furthermore, the evidence of PW1 was corroborated by PW2, her mother who entered the house just shortly after the incident and stated that she found the appellant and the victim inside the house and the victim told her that she was defiled by the appellant.

13. The respondent relies on the cases of **Supreme Petition No. E002 of 2024 Republic vs Evans Nyamari Ayako** and **Supreme Petition No. E013 of 2024 Republic vs Julius Kitsao Manyeso** and submits that sentences in cases of defilement under the Sexual Offences Act are legal and not in contravention of the constitution.

14. The appellant filed rebuttal submissions to the respondent's submissions and he reiterated what he submitted on in his earlier submissions.

Issues for determination

15. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence meted out against the appellant was lawful and reasonable.

The Law

16. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts

and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

17. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court 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 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]EA 424." This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

Whether the prosecution proved its case beyond any reasonable doubt

18. In order to establish whether the prosecution proved its case beyond a reasonable doubt, it is important to address the following issues raised by the appellant:

    a) Whether there was conclusive evidence of all the ingredients of defilement;

    b) Whether trial court conducted a proper *voir dire* examination on the complainant

Whether there was conclusive evidence of all the ingredients of defilement.

19. Relying on 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."**

20. On the age of the victim, the court of Appeal in **Edwin Nyambogo Onsongo vs Republic (2016) eKLR**, the court stated as follows in respect of proving the age of the victim in cases of defilement:

"….the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence

such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

21. PW1 testified that she was aged 13 years old and was in class 6 at Ruiru Primary School. PW2, the complainant's mother testified that the minor was 13 years at the time of the testimony and that she was in grade 6. PW4, the investigating officer testified that from the child's birth certificate she was born on 15th July 2010 and she was 12 years old at the time of the incident. The minor's birth certificate serial number 045384 shows that the minor was born on 15th July 2010, as such she was aged 12 years and 11 months at the time of the offence. It is therefore my considered view that the prosecution proved the element of age of the minor as required by the law.

22. **Section 2(1) of the Sexual Offences Act** defines penetration as:

"The partial or complete insertion of the genital organs of a person into the genital organ of another person."

23. On the element of penetration, PW1 testified that on the material day at around 7.30 pm, she was in the house with a neighbour's child called Zarech Waithera who was 3 years old at the time. The minor further testified that her mother was not home and that they lived in a one roomed house. She stated that the appellant, her mother's friend went to their home looking drunk and slept on the other mattress. The minor and the neighbour's child were eating and when they were done she picked the other mattress put it on the floor and slept with Zarech. PW1 testified that when she was sleeping, she began feeling pain in her anus and when she woke up she found the appellant on top of her. PW1 testified that the appellant was doing bad manners to her as he had put his penis in her anus. She testified that she pushed the appellant and he covered himself with a blanket. The witness further testified that the appellant had removed his trousers and pant. She further testified that when her mother came home, the appellant opened the door and she told her what the appellant had done to her. The minor testified that her mother began beating the appellant and she locked both of them inside the house and went to Watalaam Police Station to report the incident. The police woman recorded the report to the effect that the appellant had done "tabia mbaya" to her and that he was still in their house.

24. PW2, the complainant's mother testified that the appellant was her boyfriend. On the material day, she arrived home at 9pm and found

the appellant, Zarech and the complainant. The appellant opened the door and stated that her daughter was on the bed crying. The witness testified that upon inquiring why the minor was crying, she told her that the appellant had inserted his male organ in her anus. PW2 stated that she began beating the appellant and the minor locked them in the house and came back with the police officer who arrested the appellant.

25. PW3 Dr. Dennis Odhiambo Omondi, a medical officer at Ruiru sub county Hospital, testified that the minor was seen on 2/7/2023 at 11pm and the clinical officer found that she had a tear on her vagina which was not complete. The anal test showed that she had tears on her anus due to friction. The medical officer concluded that there was evidence of penetration on the anal opening by a big object which caused a tear and it was possible that the tear was caused by a penis. PW3 produced the P3 Form, treatment notes, PRC Form and lab request forms as exhibits.

26. In a case of defilement, the minor's evidence is corroborated by the medical evidence. Thus the evidence of PW1 is corroborated by the medical evidence of the doctor who pointed out that examination done on PW1 revealed that her anus had tears due to friction which showed evidence of penetration by a big object possibly a penis. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.

27. On the issue of identification, PW1 testified that the appellant was her mother's friend who did not spend many nights at their house. PW2, the complainant's mother testified that the appellant was her boyfriend and she had known him for a month. She further testified that on the material day, she found the appellant at her house with her child PW1 who was crying. The witness further testified that on the material day, she was to go with the appellant to her house but the appellant came to her house earlier. She further stated that the appellant used to sleep on a mattress and she would sleep between him and the minor on the same mattress. The appellant was indeed well known to the complainant. This was a case of recognition and not simple identification. The appellant confirmed that PW2 was his girlfriend with whom she met in a club. The testimony of PW1 identified the appellant as the perpetrator.

28. The appellant has complained that the incident occurred during the night and therefore the minor could not confirm that it was him. PW1 testified that she was alone in the house on the material day with her neighbour's child and the appellant. She further testified that she woke up due to the pain she was feeling in her anus and saw the appellant on top of her inserting his penis into her anus. She testified that she pushed him and he covered himself with a blanket. PW2 further testified that when she got home, the appellant opened her house and informed her

that the minor was crying. The witness confirmed that it was only the appellant, the minor and Zarech who were in the house. The appellant was therefore positively identified by both witnesses thus establishing the element of identification.

29. The appellant further argued that the trial court did not conduct a proper *voir dire* examination on the complainant. The law requires *voir dire* examination be conducted on children of tender years before their evidence is taken in court. The Court of Appeal in **D.W.M vs Republic (2016) eKLR** expressed itself as follows on the manner of conducting *voir dire* examination:-

It is evident from the above that the learned magistrate did not reflect in the record the questions put to HW during the *voir dire* administration but reflected her responses to those questions. The need for the administration of *voir dire* on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through caselaw. In Sula vs Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down

questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion after.

30. In **Patrick Kathurima vs Republic Nyeri CRA 137 of 2014**, the Court of Appeal after reviewing the caselaw on the subject held:-

It is best, though not mandatory in our context that the questions put and the answers given by the child during *voir dire* examination be recorded verbatim as opined by the English Court of Appeal in Regina vs Compell (Times) December 20, 1982 and Republic vs Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.

On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety. There was however no hard and fast rule laid down by this court in the Kathurima case that in all cases where

voir dire **procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-**

The trial magistrate's failure to reflect on the record the questions put to HW during the *voir dire* examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutor's case solely depended on whether the evidence on which it was anchored met the threshold of proof beyond reasonable doubt.

31. The Court of Appeal observed that the law is that absence of *voir dire* examination is not automatically fatal to the evidence of a witness as it held in **Maripett Loonkomok vs Republic (2016) eKLR** that:-
We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi vs R Criminal Appeal No. 10 of 2014.

32. In the instant case, the trial magistrate stated that there was no need

for *vior dire* examination and called for the witness to be sworn upon the prosecutor stating that the complainant was 13 years old. The trial magistrate recorded the minor's evidence and on cross examination the minor was consistent and cogent in giving her testimony. It is clear from the evidence of the complainant that she was an intelligent girl as she ably answered the questions put to her by the appellant during cross examination. From the evidence of PW1 and PW2, there was no evidence that there was any other male person in the house at the time of the incident other than the appellant in this case. Indeed the appellant confirmed in his defence

that he went to PW2's house but did not find her and waited for her to come home. As he got up at around 10pm, PW2 had returned and he opened the door. Thus, the appellant had the opportunity to commit the offence during the absence of PW2 from her home. Although the mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such a character that taken together with other circumstances may amount to corroboration. The evidence of PW2 that she found only the appellant, the minor and baby Zachery with the appellant who opened the door for her is corroborative evidence to that of PW1. The appellant was identified as the only male person in the house. PW2 found the complainant crying and that she immediately informed her what the appellant had done to her which

points at the appellant as the perpetrator. The appellant's admission that he was in the house with the minor and the baby fortified the evidence that it was the appellant who defiled PW1. It was the appellant who opened the door for PW2 which was admitted. The appellant was identified as the only male person in the house. The evidence of the minor on the act of defilement was in my view well corroborated. On perusal of the judgment, I am of the considered view that the appellant was correctly convicted on cogent evidence.

33. The trial court fully analysed the prosecution's evidence and found the appellant guilty of the offence. Consequently, I find that the prosecution proved its case against the appellant beyond any reasonable doubt.

Whether the sentence is harsh and excessive

34. The Court of Appeal, on its part in **Bernard Kimani Gacheru vs Republic [2002] eKLR** restated that:-

"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the

appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

35. **Section 8(3) of the Sexual Offences Act No. 3 of 2006** provides 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.

36. The Supreme Court decision in **Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)** held that:-

    Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence. The judgment of the Court of Appeal delivered on

October 7, 2022 was 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 remained lawful as long as Section 8 of the Sexual Offences Act remained valid. The Court of Appeal had no jurisdiction to interfere with that sentence.

37. Taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the child's future, it is my considered view that the sentence of 20 years is lawful and not excessive. The appellant was arrested on 2nd July 2023 and was sentenced on 9th December 2024. He therefore stayed in remand for a period of one (1) year and five (5) months. There is no evidence that he was out on bail or bond during the hearing and determination of the case. Pursuant to **Section 333(2) of the Criminal Procedure Code**, the appellant shall serve a sentence of twenty (20) years imprisonment to commence from the date of arrest being 2nd July 2023.

38. It is therefore my considered view that the conviction and sentence were based on cogent evidence and are hereby upheld.

39. This appeal therefore, fails and it is dismissed.

40. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2026.

F. MUCHEMI
JUDGE