REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. E021 OF 2024

MOSES MUTUNGA WAMBUA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the conviction and sentence in Kajiado CM's S.O. Case No. 42 of 2019 - Mulochi SRM)

JUDGMENT

1. The Appellant, **Moses Mutunga Wambua**, was in the main count charged with Defilement contrary to **Section 8 (1) as read with Section 8(2) of the Sexual Offences Act.** (the Act). In that on 6th December, 2019 at **Kimalat** within **Kitengela Township within Kajiado County** intentionally caused his penis to penetrate the vagina of **W.M.M**, a child aged 9 years.
2. He denied the charge, but following a full trial, he was found guilty and convicted. He was thereafter sentenced to serve 30years

imprisonment. Aggrieved by the outcome he lodged this appeal via the memorandum of appeal, was later amended to include the following grounds of appeal:

1. **That the learned Magistrate erred in law and fact by failing to find that the charge sheet was defective.**

2. That the learned Magistrate erred in law and fact by failing to find that the age of the victim was not proven.

3.That the learned Magistrate erred in law and fact by failing to appreciate that a crucial witness was not brought to court.

4. That the Appellant was not provided with the legal representation.

5.That the sentence is harsh and excessive.

3. The appeal was canvassed through written submissions. Through his undated submissions in support of the appeal, the Appellant asserted on the first ground that the charge sheet was fatally defective as he was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act instead of the correct provision, namely Section 20(1), despite evidence disclosing a parental relationship between

him and the complainant. Here citing the complainant's reference to him in her testimony as ''my father". This omission, he argued, created a variance between the charge and the evidence, rendering the charge incurably defective. He further contends that the prosecution failed to amend the charge sheet during trial, thereby prejudicing him. Here placing reliance on decisions in **Sigilani v Republic (2004) eKLR 480**, **Isaac Omamba v Republic (1995) eKLR and Suleiman Juma alias Tom v Republic, CA No. 181 of 2002**

4. As regards his second ground of appeal, the Appellant contended that the prosecution failed to prove the age of the complainant, a crucial element in defilement cases as it determines both the nature of offence and sentence. As held in **Hillary Nyongesa v Republic, CA No. 120 of 2000** Pointing here to asserted inconsistencies in evidence, including the complainant's own statement that she did not know her age while the investigating officer who testified that the minor was aged nine, had relied only on a clinic card, not a birth certificate.

5. While asserting that the medical evidence was unreliable, he pointed out that as the clinic card bore a different name and lacked the complainant's date of birth. Moreover, no age assessment was conducted and the complainant's mother was not called to testify, hence the age of the complainant was unproven.
6. In support of the third ground of appeal, the appellant faulted the prosecution for failing to call crucial witnesses whose evidence was necessary to establish the truth. Especially those mentioned in the evidence, including *"Mlezi,"* the midwife, and the complainant's mother. This omission, he argued, weakened the prosecution case by creating gaps in the evidence. For that proposition the Appellant cited **Michael Githinji Mathenge v Republic (2014), Paul Kanja Gitari v Republic (2014),** and **Bukenya & Others v Uganda (1972) EA 549.**
7. The Appellant argued concerning the fourth ground of appeal that although he faced a serious offence attracting a severe sentence upon conviction, the court, disclaiming such obligation did not furnish him legal representation during the trial. Which amounted to a violation of his constitutional right to legal representation, under

Articles 48 and 50(2)(h) of the Constitution Article. To that end, he relied on the Court of Appeal decision in **David Njoroge Macharia v Republic (2011) eKLR** and **Thomas Alugha Ndegwa v Republic (2016) eKLR**, to submit that his right to a fair trial was violated and he is therefore entitled to a retrial.

8. Finally, concerning the sentence, the Appellant describing the 30 years awarded as harsh and excessive cited **S v Scott-Crossley (2008) (1) SACR 223 (SCA)**, to the effect that an excessive sentence serves neither the interests of justice nor those of the society." He contended that the sentence herein was disproportionate and liable for setting aside.
9. Despite being given adequate time to file submissions on the appeal, the Respondent did not comply.

Analysis and Determination

10. The court has considered the entire record of the lower court together with submissions on the appeal. The duty of the first appellate court is to re-evaluate all the evidence adduced before the trial court with a view to arriving at an independent conclusion. In

Okeno -vs- Republic (1972) E.A 32 the Court of Appeal for East Africa stated as follows:

> **"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) EA. 424."**

11. Three ingredients must be proved beyond reasonable doubt in a successful prosecution for the offence of defilement, namely, age of the victim, penetration, and identity of the perpetrator. This court must evaluate the evidence adduced at the trial to establish whether the prosecution proved these three ingredients to the required standard.

12. The prosecution called four witnesses. **WM** (**PW1)** the minor complainant testifying on oath following a voire dire examination

stated that she was a student in standard one, and identifying the Appellant as her father said that he did something bad to her. Further explaining that while at home, the Appellant removed her clothes and twice *did bad manners* to her, in that he inserted his *thing* (pointing to his crotch) in her *thing* (here pointing at her crotch).

13. After that, the Appellant dressed up and warned her not to reveal the matter to anyone, before taking her to hospital where she got an injection and then to a pastor for prayers, and eventually to the house of one *Mlezi*, some sort of traditional healer, where she spent the night as her father left. When the Appellant returned the next morning to Mlezi's house, police came to the house and arrested the Appellant as local women retrieved **PW1** from the house before she was escorted to hospital.

14. The testimony of **Alfred Sunguti Likhoko (PW2)** described as a pastor with the African Divine Church at Kimalat was that on 6th December 2019 he was sleeping when at around 3:00a.m. he was roused by a knock on his door. Upon opening, he found a woman

known as *Mama Bonny*, and the Appellant, the latter who carried **PW1**. The minor was crying and complaining of stomach pain.

15. The Appellant asked him to pray for her and **PW2** obliged as well as gave some warm water to the child who did not get any reprieve and continued crying. After *Mama Bonny* left at 5:30am, **PW2** advised the Appellant to take the minor to a neighbour described as an expert in women's health issues, and the two then left his house. When he contacted the woman later, she told him that the child had been defiled and he in turn advised her to hold onto the child until authorities were notified.

16. The matter was indeed relayed to the local chief at Kimalat who on 6.12.2019 called **Cpl. Susan Mumbua** (**PW4**) to report, and in the company of other officers, **PW4** proceeded to a scene at Kimalat where they found the Appellant under arrest by members of the public, while **PW1** lying under a shade by the roadside. Arresting the Appellant, police visited his one-roomed house before proceeding to Nairobi Women Hospital at Kitengela where the minor was admitted for two weeks to undergo treatment for vaginal fistula. With regard

to the victim's age, **PW4** produced a maternity clinic book (**Exh. 4)** indicating that the child was born on 30.8.2010.

17. **John Njuguna (PW3)** a clinical officer at Nairobi Women Hospital produced the P3 form **(Exh.1)** on behalf of his colleague Dr. Joy Mwendwa who examined the minor at the hospital. According to the P3 form, the minor had been brought to the hospital by police officers on 7.12.2019 for alleged penile vaginal penetration by her biological father, and was in pain and unable to walk. On examination her clothes had no blood stains, but she had pain below the navel. There was a vaginal laceration and the hymen was broken. There was no discharge present. The conclusion was that the injuries were consistent with penetration.

18. Upon being placed on his defence, the Appellant elected to give sworn evidence. To the effect that, he was a painter based in Kitengela and that on 4th December 2019, his daughter **(PW1)** attended a Maasai cultural function at Kimalat together with other children. Where she consumed mutton, which he claims ordinarily causes her stomach to swell and leads to vomiting. Thus, on the evening of the material date, she complained of stomach pain,

prompting him to take her to Kwa Saitoti Hospital in Kitengela, where she received injections.

19. Although she initially improved, her condition worsened again early the next morning, around 3:00a.m., when she began crying due to stomach pain. Prompting him to seek the help of a pastor, who prayed for the child and later referred him to another pastor. The second pastor also prayed for the child, but when her condition did not improve, he directed the Appellant to a so-called midwife. She examined the child and claimed that her stomach was swollen as she had been bewitched, instructing the Appellant to purchase certain items, including razor blades, kerosene, Vaseline, incense, a candle, and an egg. After he bought the items, the midwife performed certain rituals, gave the child water to drink, and the child fell into such a deep sleep that the Appellant and a certain boy in the house were unable to wake her up. The so-called mid-wife performed more rituals on the minor, then demanded Shs. 1000/- for her services.

20. The Appellant left to get the money, but when she returned with Kshs. 300/- the lady locked herself in the house and raised an alarm, accusing the Appellant of defiling his daughter. This attracted

a crowd, which assaulted him before the police intervened, took him to hospital for treatment, and later arrested and charged him in court. He maintains that he is innocent.

21. The complainant's age as assessed in the P3 form (Exh.1) and per the clinic card (Exh. 4 at page15) was 9 years at the material time, as she was born on 30.08.2010. The Appellant during cross-examination confirmed that indeed the complainant who was his daughter was 9 years old in the material period. Thus, PW1's age was proved, and the Appellant's submission on this appeal to the contrary appears an afterthought.

22. Similarly, penetration was proved via the testimony of **PW1** who described how the Appellant accosted her in the house, undressed her and that he inserted *his thing* which he inserted into *her thing* and *did bad manners* to her*,* euphemism for penetration, twice before taking her to hospital and then to the pastor and ritual healer. She was resolute during cross-examination that the Appellant did bad manners to her before taking her to hospital.

23. The medical evidence by **PW3** confirms that the injuries noted on the minor resulted from penetration, as generally supported by

the observations of **PW2** who spent long hours praying over **PW1** at the Appellant's request before referring him to the so-called expert in women health matters, who turned out to be a ritual healer of sorts. The P3 form indicates that the minor sustained vaginal lacerations, broken hymen and was in pain, and according to **PW2** could neither sit nor stand and was in fact carried into his house by the Appellant on the night of 6.12.2019.

24. The Appellant's desperation is seen in consulting the ritual healer shortly after night prayers by **PW2**, according to his evidence, and confirms that the minor was in a bad state, and not merely suffering from food poisoning as he suggested. The fact that the ritual healer described as *Mlezi* by the Appellant and **PW1** did not testify does not diminish the prosecution case; there is no requirement for the prosecution to call a multiplicity of witnesses. See Section 143 of the Evidence Act.. In **Keter versus Republic [2007] 1EA135** the Court of Appeal observed that:-

"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

25. According to **PW4** the minor was on the date of the Appellant's re-arrest lying by the roadside in pain and had sustained a vaginal fistula for which she was admitted in hospital for two weeks. If indeed, as suggested in the defence before the lower court, the Appellant was framed by *Mlezi* after failing to pay her fees, there is no explanation for the injuries on the Complainant, and which in the first place drove the Appellant to desperately seek help. The mention of a young man at *Mlezi's* house was probably intended to deflect blame for **PW1**'s injuries, but according to the same defence, it is *Mlezi* who accused the Appellant of defiling his daughter. The suggestion that the said young man was present in the house of *Mlezi*, or that he is the one who sexually assaulted **PW1** was never put to her or the **PW4** who arrested him, during cross-examination.

26. There was no dispute that the Appellant was **PW1's** biological father, living with her at the material time, the mother apparently having deserted the home. The sexual assault occurred at home.

Thus, this was a case of recognition which is more satisfactory, assuring and reliable than identification of a stranger. See **Anjononi & 2 Others v Republic [1980] eKLR**. According to **PW1**, the sexual assault occurred in the day at the home of the Appellant while the two were evidently alone. The trial court evidently believed the account of the incident as narrated by the victim, and found, correctly, that it was corroborated. Pursuant to the proviso to Section 124 of the Evidence Act, the trial court was entitled to accept the evidence of **PW1**, having believed her, even in the absence of corroboration.

27. On this appeal, the Appellant has asserted that the charge against him was defective as the offence was brought under the wrong Sections of the law. And hence, he was prejudiced. Under Section 134 of the Criminal Procedure Code, a charge sheet ought to disclose the offence clearly and contain sufficient particulars to inform the accused of the allegation he is facing. Superior courts have consistently emphasized substance over form, being alive to the provisions of Section 382 of the Criminal Procedure Code, that no

finding or sentence shall be reversed on account of any error in the charge unless such error has occasioned a failure of justice.

28. While the Appellant contended that he was wrongly charged under Section 8(1) as read with 8(2) of the Sexual Offences Act instead of Section 20(1) (incest), the key question is whether this rendered the charge fatally defective. From the facts of the case the relationship between the minor complainant and the Appellant was admittedly a father-daughter relationship, which would make the offence one of Incest contrary to Section 20 of the Sexual Offences Act (incest) rather than defilement.

29. The prosecution in its wisdom preferred the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars clearly set out the allegation of unlawful sexual penetration of a minor aged 9 years, and from the record of the trial, the Appellant was keenly aware of the offence he was required to answer to and the elements thereof namely, age penetration and identity of perpetrator. The only additional ingredient relevant to the offence of incest under Section 20(1) of the Sexual Offences Act, and missing in the offence of defilement

Contrary to Section 8(1) of the Sexual Offences Act, is consanguinity. The latter which the Appellant readily admitted in his defence.

30. The mere fact that the evidence also proved a paternal relationship between the Appellant and the complainant does not, without more, render the charge defective. The proof of the existence of such a relationship did not in any way negate the core ingredients of defilement which the prosecution was required to prove, and did prove beyond reasonable doubt.

31. Further, the record demonstrates that the appellant actively participated in the trial and cross-examined witnesses on all material aspects of the case. There is no indication that he was misled as to the nature of the charge or that he would have mounted a different defence had the charge been framed under Section 20 of the Sexual Offences Act. In the absence of such prejudice, any variance between the charge and the evidence would be curable under Section 382 of the Criminal Procedure Code. As held by the Court of Appeal in **Oduor v Republic (Criminal Appeal 25 of 2019) [2025] KECA 409,** citing Section 382 of the Criminal Procedure Code, not any and every defect in a charge renders a conviction

invalid. The court therefore found no merit in the grounds challenging conviction.

32. Regarding the sentence of 30 years which the Appellant describes as harsh, under Section 8(2) of the Sexual Offences Act 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.

33. The Court of Appeal in **Dismas Wafula Kilwake v Republic [2019] eKLR** discussed the penalties Section 8 of the Sexual Offences Act as follows:

> *"In **Hadson All Mwachongo v. Republic** (2016) **eKLR,** this Court stated as follows regarding the sentences prescribed by the Sexual Offences Act:*
>
> > *"**The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the more severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years***

attracts 20 years' imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years' imprisonment."

34. In this case, the trial court citing the Supreme Court decision in **Francis Karioko Muruatetu Vs Republic (2017) eKLR (Muruatetu I)** sentenced the Appellant to 30 years imprisonment. The rationale in the **Muruatetu I** has hitherto been applied in many cases involving offences under the Sexual Offences Act. Including **Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR).**

35. However, the Supreme Court has recently pronounced itself in **Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR)** as follows, regarding minimum sentences prescribed under Section 8 of the Sexual Offences Act:

"In any case, the sentence imposed by the trial 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 the sentence."

36. Further, in **Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024** the Supreme Court in its judgment delivered on 11th April 2024 stated that:

"**(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.**

In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence." (emphasis added).

37. In the circumstances, as explained in Muruatetu II case above, the decision in the **Muruatetu I** case cannot be applied in sentencing an offender convicted under Section 8 of the Sexual Offences Act, and this court, like the Court of Appeal in Mwangi's case above, lacks the jurisdiction to reduce the sentence of 30 years imposed by the trial court. The appeal against the sentence must fail.

38. However, based on the provisions of Section 8 (1) as read with Section 8(2) of the Sexual Offences Act, and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful minimum sentence for the offence for which the Appellant was convicted is life imprisonment, and not 30 years' imprisonment as awarded by the trial court. This Court will therefore set aside the illegal sentence of thirty years' imprisonment imposed by the trial court and substitute therefor the lawful sentence of life imprisonment. It is so ordered. In the result, the appeal has failed in its entirety and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 23RD DAY OF APRIL 2026

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kambaga

Appellant: In person

C/A: Lepatei