Sigei v Republic (Criminal Appeal 35 "A" of 2020) [2023] KECA 154 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 154 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 35 "A" OF 2020

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 17, 2023

BETWEEN

WESLEY CHERUIYOT SIGEI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bomet (M. Muya, J.) delivered on 25th July, 2016 in HC Criminal Appeal No. 60 of 2015)

JUDGMENT

1. Wesley Cheruiyot Sigei, the appellant, was convicted for the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Penal Code* in Sotik Principal Magistrate's Court Sexual Offence Case No. 69 of 2013 by Hon. N. Barasa, Resident Magistrate. The appellant was sentenced to serve 20 years in prison. The appellant being dissatisfied with the judgment of the trial court lodged an appeal to the High Court at Bomet. Upon hearing the appellant's appeal, M. Muya, J dismissed it thereby sustaining the findings of the trial court on both conviction and sentence. The appellant is now before this Court on a second appeal against the judgment of the High Court in Bomet in Criminal Appeal No. 60 of 2015.

2. In the memorandum of appeal before us, the appellant raises four grounds of appeal, namely, that the learned Judge erred by relying on contradictory, insufficient, uncorroborated and fabricated evidence; that the learned Judge failed to reevaluate the evidence on record and in the process arrived at the wrong decision; that the learned Judge erred in law by disregarding the *alibi* defence; and, that the learned Judge erred in failing to find that the age of the complainant was not conclusively proved.

3. In a nutshell, the prosecution's case against the appellant was that on 3rd November, 2012 at about 5.00pm the complainant was washing dishes outside their house when the appellant who was their neighbor arrived home while drunk. The appellant called the complainant to a vacant room adjacent

to her home but she declined. The appellant went to where she was, grabbed her and dragged her into the unoccupied room where he proceeded to defile her. The complainant managed to escape from the appellant's grasp and informed NC (PW2) who then telephoned JK (PW3), the mother of the complainant, and the complainant reported the incident to her. The complainant (PW1) was later taken to Kapkatet Hospital by her mother and the next day, they made a report to Litein Police Station. The complainant also testified that she was 12 years old.

4. PW2 in her testimony corroborated the communication between her and the complainant. She testified that on the material day at about 5.00pm she was at her shop when the complainant went to her crying. The complainant reported to her that the appellant was disturbing her and wanted to rape her. She used her phone to facilitate communication between the complainant and PW3. She, however, did not see the appellant at the scene.

5. On her part, PW3 told the trial court that while at her place of work she received a call that her daughter had been defiled. She proceeded home where the child narrated to her what had happened. She then called administration police officers who went and arrested the appellant. PW3 took her child to Kapkatet Hospital where upon examination it was confirmed that she had indeed been defiled.

6. APC Gabriel Korir (PW4) stated that when he received a report of the incident, he went to the house of PW3. He found PW3 and PW2 interrogating the complainant. The complainant stated that she was washing utensils when a neighbor went and took her to a vacant house nearby and defiled her. While still inquiring into the matter, the appellant who was drunk arrived and the complainant identified him as the defiler. He arrested the appellant and escorted him to Litein Police Station as the child was taken for treatment at Kapkatet Hospital.

7. PW5 PC Joan Otieno testified that on 4th November, 2012 at about 10.00am, she received PW1 and PW3 who reported that PW1 had been defiled. She issued them with a P3 form which was filled at Kapkatet Hospital.

8. PW6 George Ouma, a clinical officer at Kapkatet Hospital testified that he filled a P3 form in respect of PW1. He testified that based on his physical examination of the girl and the treatment notes, he noted that the thighs were tender, spermatozoa were present, with an injury to her genitalia of less than a centimeter. He formed the opinion that the complainant was defiled. PW6 also assessed the age of the complainant and formed the opinion that she was about 12 years old. The witness produced a P3 form and an age assessment report as exhibits.

9. The appellant testified as DW1 and called KBL (DW2) and VC (DW3) as his witnesses. The appellant stated that he was a lorry driver and on the material day he went to Kisumu with his turnboy, DW2, where they delivered maize at Kisumu Millers. They arrived back home at about 8.00pm where they parked the vehicle at Ngoina Road and he proceeded home. On arrival, he was arrested and he only managed to call his wife the next day.

10. DW2 corroborated the evidence of the appellant that he worked with him and on the material day they had taken maize to Kisumu. They parted ways after parking the lorry at a petrol station upon arrival from their trip. The next day when he passed by the house of the appellant, he was informed by DW3 that the appellant had been arrested.

11. DW3 testified that she was married to the appellant and on the material day she was in the compound where the alleged offence took place and that she did not hear of it until after she got information that her husband had been arrested. It was also her testimony that on the material day, the appellant left home at 5.00am for Kisumu where they were to deliver maize. The appellant did not come back. When she called DW2 at around 9.00pm, he informed her that they had arrived and the appellant was on

his way home. The following day she received a call from her husband informing her that he had been arrested.

12. In dismissing the appellant's appeal, the first appellate Court found that the appellant accosted the complainant at 5.00pm during broad daylight and proceeded to defile her. The learned Judge also found that penetration and the age of the complainant being the ingredients of defilement were proved by PW6.

13. The appellant's counsel supported the appeal through submissions dated 24th February, 2022. On the first ground of appeal, counsel submitted that the evidence of PW1, PW2 and PW3 was contradictory rendering the prosecution case unbelievable. He pointed out that although the complainant had testified in her evidence-in-chief that the appellant defiled her on a muddy floor as it had rained on the material day, she had stated in her cross-examination that it had not rained on the material day. Counsel argued that the complainant's evidence was contradicted by that of PW2 who testified that the floor of the house was muddy even though she did not see any mud on the complainant's clothes. In regard to the evidence of PW3, counsel submitted that although her testimony was that the complainant's clothes had mud and they had taken them to the police station, the investigating officer indicated that she did not receive any clothes as exhibits. Further, that the treatment notes relied on by the medical officer to fill the P3 form were not produced as exhibit. Counsel also submitted that although the clinical officer had testified that the complainant was bleeding, the complainant herself stated that there was no blood on her clothes.

14. Counsel for the appellant urged that based on the identified contradictions, it was not possible for the trial court to reach the conclusive finding that the appellant was guilty of the offence. To this end, counsel relied on this Court's decision in the case of Hamisi Bakari & Another v Republic [1987] eKLR where it was stated that where minimum sentences are involved, courts must ensure that all the ingredients of the offence are properly proved.

15. On the second ground of appeal, counsel submitted that the first appellate court abdicated its duty to reevaluate the evidence on record thereby reaching an erroneous conclusion by affirming the findings of the trial court. Counsel submitted that had the first appellate court independently reevaluated the evidence, it could have noted the discrepancies and contradictions in the prosecution's case hence reaching a different conclusion from that of the trial court. Counsel argued that it was not possible that PW2 could not have seen the appellant. Further, that PW4 had testified that the vacant house was locked when he arrived at the scene and it was therefore not known who had locked it.

16. As for the third ground of appeal, counsel stated that the learned Judge erred by disregarding the appellant's *alibi* evidence on his whereabouts on the material day. According to counsel, it was incumbent upon the prosecution to discredit the *alibi* defence as there was no onus placed on the appellant to prove its credibility. Counsel supported this argument by relying on the case of *Peter Kioko Kisilu v Republic* [2007] eKLR and the decision in *Uganda v Sebyala & others* [1969] EA 204 as cited in *Solomon Kirimi M'rukaria v Republic* [2014] eKLR. In conclusion, counsel for the appellant urged this Court to allow the appeal and acquit the appellant.

17. Counsel did not make any submission on the appellant's claim that the age of the complainant was not proved.

18. In opposition to the appeal, the respondent filed submissions dated 19th October, 2022. It was the respondent's case that the offence of defilement as legislated by Section 8 of the Sexual Offences Act was proved. On the requirement to prove the age of the victim, counsel for the respondent submitted that the age of the complainant was proved by the evidence of PW1 and PW6. Counsel pointed out that PW6 produced an age assessment report and relied on the case of *Mwalango Chichoro Mwanjembe*

v Republic [2016] eKLR to submit that the age assessment report was sufficient proof of the age of the complainant. Counsel therefore urged this Court not to interfere with the findings of the two courts below on the issue of the complainant's age.

19. In support of the assertion that the complainant was penetrated, counsel for the respondent submitted that the evidence of PW1 that the appellant grabbed her, removed her pants and did bad things to her was corroborated by PW6 who produced a P3 form. It was submitted for the respondent that the evidence of PW1 and PW6 did indeed confirm beyond reasonable doubt that penetration occurred.

20. With regard to the identity of the perpetrator, counsel submitted that the offence was committed at 5.00pm and the appellant being a neighbour to the complainant was well-known to her. Counsel for the respondent further submitted that the evidence of PW1 was subjected to cross-examination which tested its veracity and that the complainant confirmed what she had told the court in her evidence in chief with regard to the identity of the appellant.

21. On the *alibi* defence, counsel submitted that the appellant did not produce any document to show that he was on duty at his place of work on the material day. Counsel urged this Court to find that the defence was not proved. Reliance was placed on the decision of this Court in *Michael Saa Wambua & another v Republic* [2017] eKLR in support of the proposition that an *alibi* defence can be dislodged by calling evidence to rebut it or by weighing it against the totality of the prosecution case. It was counsel's submission that the trial court tested the appellant's *alibi* defence against the evidence of the prosecution before disregarding that defence.

22. Finally, on the alleged contradictions and discrepancies in the prosecution case, counsel submitted that there were no contradictions and even if there were any, they were minor and did not go to the root of the case. Counsel therefore urged this Court to dismiss the appeal and uphold the appellant's conviction and sentence.

23. We have carefully considered the record of appeal, the judgments of the trial court and the first appellate court, as well as the rival submissions by the parties herein. We are cognizant that our role as the second appellate court is to assess whether based on the evidence on record, the findings of the first appellate court are anchored on proper interpretation and application of the law.

24. This being a second appeal, the scope within which this Court must discharge its mandate is limited to considering matters of law only as per Section 361 of the *Criminal Procedure Code*, Cap. 75. In that regard, the jurisdiction of this Court when discharging its mandate as a second appellate Court was summarized in *Adan Muraguri Mungara v Republic* [2010] eKLR as follows:

> "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

25. We are also guided by this Court's opinion in *Erick Onyango Ondeng' v Republic* [2014] eKLR that:

> "...This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

It appears to us a point so basic that we should not have to keep repeating it to counsel time and again: at the heart of our appellate system is the self evident and eminently rational proposition that questions of fact must be settled at the lower levels of the judicial system and that as the cases progress through the higher levels, the focus must be on issues of law. It would negate and undermine value addition in our appellate system if all that the second appellate court did was to once again reconsider and re-evaluate the evidence with a view to identifying any possible minute and insignificant inconsistencies. The second appellate court cannot simply deal with issues of fact in exactly the same way as the trial and the first appellate courts."

26. A perusal of the submissions placed before us by the parties discloses two issues for our determination. First, whether the appellant's defence was given due consideration and second, whether the discrepancies and contradictions in the respondent's case against appellant were fatal to the prosecution case. It is our view that in the process of addressing these two issues, all the grounds of appeal raised by the appellant will be resolved.

27. The claim by the appellant that his alibi defence was not considered leads us to the question as to whether all the elements of the offence of defilement which is created by Section 8(1) of the *Sexual Offences Act*, 2006 were proved to the required standard in law. It is a well settled principle that for the offence of defilement to be proved, three elements ought to be established beyond reasonable doubt. These are the age of the complainant to determine whether indeed the victim was a child and for sentencing purposes; the fact as to penetration; and, the identity of the perpetrator. In the present appeal, the most contested element is the identity of the appellant as the perpetrator of the offence. It is even on this issue that the appellant's *alibi* defence is anchored.

28. It was the appellant's case that he was not at the scene of crime at the time of the alleged commission of the offence. His evidence is in line with that of DW2 and DW3 who all testified that the appellant set off for Kisumu on the material day, and according to DW2, they only came back at around 8.00pm. DW3's testimony was that she did not hear from the appellant until the next day when he called her from behind bars. The respondent on the other hand asserts that the appellant was sufficiently identified by the complainant who knew him prior to the date of the incident. The respondent further contends that the complainant in the phone call to her mother disclosed that the person who had defiled her was the appellant. According to the respondent, the evidence adduced at the trial leads to the conclusion that the identity of the appellant as the perpetrator was tight and beyond reasonable doubt.

29. The trial court conducted a voir dire examination upon the complainant and after being satisfied that she understood the nature of an oath proceeded to take her sworn testimony. According to the complainant, the scene of crime was within a residential compound where the appellant, the complainant, PW2, PW3 and DW3 all lived. The appellant and the complainant were neighbours with only a vacant house being between their respective houses. It is within the vacant house that the crime was supposedly committed. The time of the offence is also noted as being about 5.00pm. The complainant further testified that the appellant was drunk when he dragged her into the empty house, blocked her mouth and defiled her before she managed to run away and informed PW2.

30. From the evidence on record, it would appear that at the time of commission of the offence, both PW2 and DW3 lived in the same plot. While PW2 confirmed giving her phone to the complainant to contact her mother, she denied ever seeing the appellant within the compound at that time. DW3 whose house was adjacent to the empty house where the alleged offence took place claimed not to have seen the appellant on that day even though she was home the whole day and only heard from him the next day. According to DW3, the appellant and DW2 were away on a work trip to Kisumu. The evidence of

PW4 who was the arresting officer is that he made the arrest at about 8.30pm upon the appellant being identified by the complainant. In essence, it is only the evidence of PW1 which places the appellant at the scene of crime.

31. We are aware that Section 124 of the *Evidence Act* permits a court to base a conviction on the evidence of a single witness. In our jurisdiction, it is a well settled principle that under the said enactment, in sexual offences, where the only evidence available is that of the victim, the court can rely on that evidence to convict, if, for reasons to be recorded, the court is satisfied that the victim is a witness of truth. It is the trial court that is tasked with conducting the assessment as to the victim's truthfulness because it has the advantage of seeing and hearing the victim and the other witnesses.

32. After considering the evidence of the complainant, the trial court in finding that the appellant's identity was proved held as follows;

> " This court finds and holds that since the time the accused approached the complainant to the time he dragged her to the vacant house, the complainant had sufficient time to recognize him and even at the time of reporting to pw2 the neighbor and pw3 her mother she knew very well the person who had done the bad things to her and as a result she pointed him out for the arresting officer pw4.
>
> Consequently, the identity of the accused is sufficiently proved and this court refuses to believe the evidence of defence that the accused person was away on duty at that particular time. There was in fact no reason that could make complainant or her mother pw3 to fix the accused as Dw1 accused person and DW3 accused person's wife confirmed that there was no bad blood amongst them."

33. The first appellate court on its part addressed the issue of identification as follows:

> " The time was 5.00 p.m. This was in broad daylight and he proceeded to have sexual intercourse with her."

34. It would appear that whereas the trial court considered the appellant's *alibi* defence, the first appellate court did not give any consideration to the issue. We note that the issue was specifically raised before the learned Judge as the seventh ground in the supplementary petition of appeal dated 22nd October, 2015. Be that as it may, the question is whether the *alibi* defence raised by the appellant was dislodged by the respondent. As we have already pointed out, the *alibi* defence raised by the appellant which appears to be supported by the evidence of DW2 and DW3 goes to the core of the identification of the appellant.

35. This Court sitting at Kisumu stated in the case of *Erick Otieno Meda v Republic* [2019] eKLR that there is a four-tier test for an alibi defence as follows:

> " The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an *alibi*, we observe that:
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> a. An *alibi* needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> c. The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the *alibi*, but the prosecution must have presented its case

that the accused is guilty beyond a reasonable doubt so as to allow the *alibi* to fail."

The Court proceeded to note that:

> "The law today is that it is up to the prosecution to displace any defence of an *alibi* and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices."

36. In applying the test established in the cited case, the record reveals that the *alibi* defence raised by the appellant as to his whereabouts was corroborated by the evidence of DW2. PW2 also testified that she did not see the appellant at the scene of crime at 5.00pm while DW3 gave evidence stating that the appellant left in the morning for Kisumu to deliver maize and did not return home. The evidence can be said to corroborate the appellant's case that he was not at the scene of crime at 5.00pm as alleged by the complainant. Indeed, the arrest of the appellant at 8.30pm may give credence to the appellant's defence.

37. The defence case must, however, be considered vis-à-vis theprosecution case in order to determine if the *alibi* defence is believable. In *Michael Saa Wambua* (*supra*) this Court explained how the prosecution can counter an *alibi* defence as follows:

> " Our construction of section 309 of the *Criminal Procedure Code* and understanding of the principle in the Njuki & 4 Others versus Republic case, (*supra*) is that there are two ways in which an alibi defence put forth by an accused person may be rebutted. One of them is for the prosecution to call evidence in rebuttal. The second is for the court to weigh it against the totality of the prosecution case."

38. It must be remembered that the burden of disproving the *alibi* defence rested with the prosecution and it was not upon the appellant to prove his defence beyond reasonable doubt. He was only required to demonstrate that his defence was believable. The question is whether the evidence adduced by the prosecution dislodged what appears to be a strong *alibi* defence. A perusal of the trial proceedings clearly shows that the appellant never brought up the issue of an *alibi* during cross-examination of the prosecution witnesses. The defence was only sprung up when the appellant and his witnesses testified after the close of the prosecution case. Ideally, the prosecutor ought to have proceeded under Section 309 of the *Criminal Procedure Code* and asked for an opportunity to call evidence to rebut the appellant's case. Failure by the prosecution to adduce evidence in rebuttal of the appellant's case was, however, not fatal to the prosecution's case because the trial court was entitled, as it did, to weigh the *alibi* defence against the evidence already adduced by the prosecution witnesses.

39. The evidence on record was that the complainant had identified the appellant by name and as a neighbour. She also mentioned the name of the wife of the appellant. This information was immediately relayed to PW2 and PW3. When the appellant arrived as PW4 was interviewing the complainant, PW2 and PW3, the complainant without any hesitation identified the appellant as her defiler. The complainant's evidence that the appellant was drunk when he defiled her was confirmed by PW4 who testified that the appellant was drunk. The concurrent conclusion of the two courts below that the appellant was positively identified by the complainant is therefore unshakeable.

40. The appellant argued that PW2's testimony that she never saw him at the scene of crime means that the complainant was untruthful. Our view is different. The evidence on record shows that the complainant

had to seek refuge at PW2's shop. It is not known how far the shop was from the residential houses. The fact that the appellant disappeared from the scene after committing the crime does not mean that he was innocent. His defence would have been more convincing had PW2 said she found another man at the scene. She did not say so. She instead stated that there was nobody at the scene. This confirms PW3's evidence that there was no one else at the plot at the material time apart from her daughter and PW2.

41. Indeed, a closer look at the appellant's defence discloses that the same is unbelievable. Although DW2 claimed to have worked with the appellant form morning to evening on the material day, he never mentioned the time they went to work and the time they came back. His evidence cannot therefore be said to be corroborative of that of the appellant. The evidence of DW3 is also not persuasive. It cannot be that she was locked up in her house the whole day and never heard the noise from the vacant house or even heard the arrival of the police officers. In any case, as correctly observed by the trial magistrate, there was no reason why the complainant and her mother would go to the police station and hospital at night in a bid to nail the appellant for undisclosed reasons. We agree with the two courts below that the appellant was correctly identified as the defiler. The appellant's *alibi* defence was therefore rightly rejected.

42. The next issue we address is whether there were discrepancies or contradictions in the case by the prosecution and whether such discrepancies or contradictions went to the root of the prosecution case. In considering the effect of discrepancies on the prosecution's case, this Court in *Philip Nzaka Watu v Republic* [2016] eKLR expressed itself as follows:

> "It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

The Court went on to state that:

> "Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

43. Similarly, in *Joseph Maina Mwangi v Republic* [2000] eKLR, this Court stated that:

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 *CPC*, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

44. We are aware that trivial contradictions do not affect the credibility of a witness and cannot vitiate a conviction. It is only inconsistencies or contradictions that are substantial and fundamental to the main issues in question before the court which are capable of creating some doubt in the mind of the court.

In instances where the contradictions are so enhanced, an accused person will be entitled to benefit from such contradictions. In that regard, this Court observed in *Erick Onyango Ondeng'* (*supra*) that:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno v Republic* (1972) EA 32).
>
> It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses."

45. In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.

46. We note that the appellant has taken issue with the evidence of PW1, PW2, PW3 and PW6. The appellant submitted that the testimony of the complainant was contradictory as she claimed in her evidence-in-chief that the appellant defiled her on a muddy floor as it had rained on the material day but stated during cross-examination that it had not rained on the material day. The appellant also submitted that the complainant's evidence was contradicted by PW2 who testified that the floor of the house was muddy even though she did not see any dirt on the complainant's clothes. According to the appellant, PW3's testimony that she had taken the complainant's soiled clothes to the police station was contradicted by the investigating officer who stated that she did not receive any clothes as exhibits. The appellant further complains that the treatment notes relied on by the medical officer to fill the P3 form were not produced in evidence. The appellant also contends that the clinical officer's testimony that the complainant was bleeding was contradicted by the complainant who told the trial court that there was no blood on her apparel.

47. We have perused the record and we find that the same does not support the appellant's allegation of contradictory testimony. On the claim that the complainant contradicted herself as to whether it had rained or not, there is no testimony about rain in the evidence-in-chief of the complainant. It was only during her cross-examination when she testified that it had rained and her clothes became muddy a little bit. That testimony is not contradictory. As for the claim that PW2 contradicted the complainant, we find that PW2 affirmed the complainant's testimony that the house was muddy. The fact that PW2 did not see any dirt on the complainant's clothes is not a major contradiction that should lead to the upsetting of the conviction. After all, PW2 stated during cross-examination that there was no mud everywhere in the house.

48. On the claim that there was contradiction between the evidence of PW3 and that of the investigating officer as to what happened to the complainant's clothes, we observe that the investigating officer was not the first police officer to receive the complainant's report at the police station. She took over the investigations the next day after the report had been made the previous night. PW3's testimony was

that she took the complainant's clothes to the police station when reporting the incident. Further, that she returned home with the clothes. On the other hand, the investigating officer who testified as PW5 simply stated that she was not given any clothes as exhibits. The evidence of PW3 and PW5 does not clash in any way. Finally, we find the appellant's claim that PW6 talked of blood on the complainant was unsupported by the record. The fact that the clinical officer did not talk of any blood cannot be said to be contrary to the complainant's testimony that there was no blood on her underpants.

49. It was necessary for us to revisit the evidence at length in order to verify whether or not there was any substantial discrepancy or contradiction in the evidence of the prosecution witnesses. It is our position that if there were any contradictions, they were so minor and they cannot make us deviate from the findings on the facts by the trial court and the first appellate court.

50. Having considered the arguments of the parties in this appeal, we reach the conclusion that this appeal has no merit. We observe in passing that the sentence imposed by the trial court and affirmed by the first appellate court is lawful. In any event, the appellant has not appealed against the sentence. We therefore dismiss the appellant's appeal in its entirety.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR