Wanjohi v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 697 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E032 OF 2024

DKN MAGARE, J

JANUARY 30, 2025

BETWEEN

FRANCIS GICHUKI WANJOHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of the trial court, D.N Bosibori, SRM, in Mûkûrwe'inî PMCSO No. E013 of 2023. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. He was convicted and sentenced to 20 years imprisonment.

2. The particulars of the offence were that on the diverse dates between 14th August 2023 and 16th September 2023 at Mûkûrwe'inî sub-county within Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of TMN, a child aged 14 years.

3. The Appellant was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. The Appellant was admitted to Ksh. 100,000/= bond.

4. The trial court considered the case and rendered Judgment. The Court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was also sentenced to 20 years imprisonment. The Appellant, aggrieved, lodged this appeal through a Petition of Appeal dated 7th June, 2024 and raised the following grounds:

    a. The learned trial magistrate erred in finding that the prosecution proved defilement beyond reasonable doubt.

    b. The learned trial magistrate erred in law and fact in dismissing the Appellant's defence.

c. The learned trial magistrate erred in law in not taking into account the character of the complainant in favour of the Appellant.

d. The learned trial magistrate erred in law and fact and occasioned a miscarriage of justice.

e. The learned trial magistrate erred in law in meting out a sentence that was harsh and excessive.

Evidence

5. PW1 the complainant testified that she was born in 2009. She attended [particulars withheld] Primary in Muranga and dropped out at class six in mid-2022. This she attributed to poverty since her mother could not pay school fees. She had several accounts, but it is not clear which account is true. It was her account that the Appellant had been her boyfriend for a month. She met him on 14.8.2023 at 8.00 pm, and she accompanied him to his house. Despite having been a boyfriend for a month, this was allegedly the very first time they met.

6. She continued that the duo slept on one bed in a single room that had a seat, table, and bed. They had supper before going to bed. She stated that the Appellant removed his yellow shorts and red t-shirt and blue underwear, when they got in bed. She stated that she refused to undress. However, the Appellant undressed her forcefully, though she did not have any underwear. After this the Appellant lay on top of her and started having sex with her in-between her legs, where she urinates from using his body parts. She could not recall the name of the body parts used. He raped her for hours.

7. Her further testimony was that she did not seek help since it was at night. After the incident, she went to the seat, and he followed her and ordered her to return to the bed, or he will chase her away. She, therefore, returned. The next day, she met the Appellant's mother, who inquired whether she attended school and asked her to feel at home. She told her she attended [particulars withheld] Primary School, a fact she knew was false. She could stay at the Appellant's house while the Appellant went to play football and his mother to work. She could farm during the day while the mother was away and the Appellant was away in school. This story subsequently changed that she was locked in the house. That piece of evidence was false, as the other prosecution witnesses had spotted her. Her testimony is simply difficult to belief.

8. She stated that the Appellant's mother could give her and the Appellant food. On the fifth day, the Appellant again forcefully removed her clothes and did tabia mbaya, using his penis in her vagina, and did it for a minute. This time she remembered the organ used. It is clear from the totality of the evidence that at some stage, she tries playing a child, and at another stage, she forgets and plays an adult.

9. PW1 also testified that on the last incident, when the Appellant had forcefully asked that she lie on top of him, the door was knocked. While at it, the Appellant, as well as herself, dressed up. The Appellant switched on the lights and opened the door at around 11 pm. They found that it was her brother, DMN, and his two friends who were at the door. There was a commotion. However, D managed to take her with the Appellant to Karindi Police Post, where the matter was later referred to Mûkûrwe'inî Police Station.

10. On cross-examination, it was her case that she first met the Appellant on 14.8.2023. She maintained that they did not know each other before then. She then found enlightenment and told the Appellant on the third day that she had dropped out of school. He asked her to go to his home, and they went together. During the day, the Appellant would lock her indoors. She also testified on cross-examination that she did not inform the Appellant that she was no longer schooling.

11. PW2, was the Complainant's mother LNM. Her evidence was that on 14.8.2023, she was at home with her children including PW1. However, at around 8 pm PW1 said she was going out to relieve herself but went missing. PW1 did not return that evening. They waited for her for two days and then reported her missing at Gikondi Police Station, on 17.8.2023 as a missing child.

12. She testified that she received information from a relative that PW1 was seen but again disappeared. Finally, she learned PW1's whereabouts when her son, DM, PW3, confirmed to her that he had escorted her and the Appellant to a police post. PW1 and the Appellant were transferred to Mûkûrwe'inî Police Station. She went there and found the Appellant and PW1 arrested.

13. On cross-examination, she confirmed that PW1 did not proceed to Grade 7. She would loiter around. It was her evidence that on the day PW1 disappeared from home, she had not sent PW1 to the shops.

14. PW3 was DMN. He testified that he was PW1's brother and a son to PW2. PW1 disappeared from home and after a month, PW2 informed him that PW1 had been spotted. This is a different story from PW1's evidence. He then traveled at night from Kiambu to the Appellant's home and found PW1 in the house of the Appellant. According to him, PW1 was cohabiting with the Appellant. The witness was in the company of his two friends. He continued that he managed to take the Appellant and PW1 to the police post.

15. On cross examination, PW3 stated that the Appellant wore shorts and a shirt when he encountered him at night. The Appellant's mother was also present and the neighbors hit the Appellant using their hands before he took the Appellant to the police post.

16. PW4 was Henry Gachanja Mwangi. He testified that on 17.9.2023, he left Witeithie with PW3 and one James Njenga at 11 pm to Nyakahuho area on an alert that PW3's sister had been missing from home for a month. They had information that PW1 would be seen with the Appellant at the Appellant's home. They found PW1 and the Appellant in bed. They ordered the duo out and demanded them to go to the police post. There was resistance from the Appellant and his mother but the present neighbors were unhappy and wanted to beat up the Appellant. The witness was assisted by PW3 and James Njenga, who escorted the Appellant and PW1 to the police post.

17. PW5 was Mercy Karugu, the Clinical Officer who examined PW1 and found an old broken hymen with no laceration. On examination she found smelly whitish discharge. She indicated that the Appellant had a history of disappearing from home. She relied on the PRC and treatment notes prepared by herself. PW1 had a smelly vaginal discharge whitish in colour. She tested for VDRL, HIV and pregnancy and all were negative. The PRC was dated 17.9.2023 and the treatment notes prepared on 17.9.2023.

18. On cross examination, it was her case that the genitalia was normal but she concluded that defilement had occurred because hymen was broken and there was discharge. That the hymen could however be broken by trauma, injury, use of drugs or penetration. The discharge could be due to poor hygiene or infection.

19. PW6 was No. 102106 PC Elizabeth Mwikali attached to Mûkûrwe'inî Police Station. She was the investigating officer. It was her case that she was on duty and while with CPL Bongo on 17.9.2023 at 1 am, received a report that a defilement suspect and PW1 had been arrested and were at the post. They travelled to the post and indeed found the Appellant and PW1. In the morning, they escorted the duo to Mûkûrwe'inî Police Station. She then escorted PW1 to Mûkûrwe'inî Hospital where she was examined and P3 and PRC forms and treatment notes prepared. PW1's birth certificate was also available. She stated that the minor told her that she was schooling in grade 7. This fact was not true.

20. On cross examination, it was her case that the parties' homes were about 1.5 Km apart and PW1 informed her that she fled because her mother, PW2 was unable to provide for her so she opted to cohabit with her boyfriend, the Appellant. That she was tall and slim and appeared as a teenager in her physique. For the unschooled, teenagers are aged between 13 and 19 years. She stated that parties agreed to cohabit as husband and wife.

21. The court found that the Appellant had a case to answer. As usual, the court again relied on the provisions of section 306(2) of the Criminal Procedure Code, contrary to the requirements that section 211 of the said act be relied upon. The provisions of section 211 of the Criminal Procedure Code, were not complied with. This alone is fatal to the case, as I shall elucidate later.

22. The Appellant testified on oath as DW1. He testified that he was to join Mûkûrwe'inî Technical Training Institute in September 2023 to pursue Diploma in Electrical Engineering. He was 22 years old at the time of testimony. It was his testimony that on 14.8.2023, around 8.30 pm he was leaving shop when he saw PW1 sitting alone on the ground. When he asked how he could assist PW1, she responded that she needed fare of Kshs. 300/= to get home. He had no money but offered to escort her home, about 2 Km away to Karindi village. As they started off, PW1 changed mind and asked the Appellant to host her for only a night. They proceeded to the Appellant's house. He led her to a separate house to sleep. The Appellant hosted her for a month.

23. Further, it was his evidence that PW1 told him that she did not attend school. She told the Appellant that she was born in 2004 and she was19 years old. She stated that the physical appearance confirmed that she was 19 years old. He testified that he did not defile or touch her vagina, as alleged in the charge sheet.

24. He continued that on 6.9.2023, he was in his house charging his phone when the door was knocked at 10 pm and when he opened he saw 3 youth. They entered and searched his house but found no one and PW3 dragged him out. PW1 was not there as she was in a different house. They went to Karindi Police Post together. They were informed that a child missing report had been filed at the post. They were subsequently transferred in the morning and he was charged in Mûkûrwe'inî Police Station.

25. On cross examination, it was his case that he met PW1 and she needed assistance whereby he took her home but she stayed in a difference house from him. She stayed at his home for one month but he did not defile her. The Appellant was later accosted by 3 men who came to his house at 10 pm claiming PW1 was their sister and arrested him. He stated that he did not report about PW1 to the police or Assistant Chief. He was not interrogated on the evidence that the Appellant was and actually looked 19 years old. This evidence was supported by the investigation officer, who, though evasive indicated that the girl looked like a teenager and was tall.

26. DW2 was Christopher Wanjohi from Gakindu area. He testified that he was the Appellant's elder brother. He saw PW1 twice. He did not talk to the Appellant at any time. He did not know where PW1 slept for the duration she was at their home.

Submissions

27. The Appellant filed submissions dated 20th December 2025. They must have intended 20.12.2024 and I so consider. It was submitted that under Section 8(5) of the *Sexual Offences Act*, the Appellant was meant to believe that PW1 was above 18 years due to her conduct.

28. It was submitted that penetration was not proved. The medical report depicted old broken hymen and the officer was not certain about the course of the broken hymen and foul-smelling discharge.

29. On sentencing, it was submitted that the sentence of 20 years was excessive and an abuse of discretion. Reliance was placed on Benard Kimani Gicheru vs Republic (2002) eKLR. The Appellant also submitted that the character of the Appellant per the presentencing report was straight forward and ought to have been considered for a lesser sentence. Reliance was placed on IMW vs Republic (2024) eKLR.

30. The Respondent filed submissions dated 22.10.2024. It was submitted that the key ingredients of defilement were proved beyond reasonable doubt and the trial court was correct in the conviction. Reliance was placed on the case of Mwarome Munga Janji vs Republic (2021) eKLR to assert the argument that age, penetration and identity were all proved to the required standard.

31. It was also submitted on the issue of sentence that this court was not entitled to alter the sentence unless the trial court was shown to have relied on wrong principles or overlooked material factors. This was supported inter alia by the case of Ogolla s/o Owour vs Republic (1954) EACA 270.

32. It was submitted that the sentence meted upon the Appellant was the minimum sentence under Section 8(3) of the *Sexual Offences Act* and ought not to be interfered with in the circumstances.

Analysis

33. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

34. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong as stated in the case of Mbogo and Another vs. Shah [1968] EA 93.

35. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. I reproduce the said law as follows:

> 8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

36. When dealing with the first appeal, the court is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. 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.

2. 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.

37. The issue for this court's determination is whether the prosecution proved the offence of defilement as against the Appellant beyond reasonable doubt.

38. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable", then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> > " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

39. The parameters that were to be proved in cases like the instant case were settled in the case of George Opondo Olunga vs Republic [2016] eKLR that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and proof of the identification of the perpetrator.

40. At trial, PW1 testified that she knew the Appellant first when they met at 8 pm on 14.8.2023. This was also the Appellant's position. She further testified that the Appellant took her to his house and on three occasions for the 1 month she stayed with the Appellant, the Appellant forced her to have sex through her vagina. This included the last day.

41. It was the common position of the parties that PW1 stayed at the Appellant for one month. This was not borne out in the medical evidence. The P3 form indicated an old broken hymen. There were no lacerations showing forceful penetration. This was the same report on the PRC report. The evidence that the parties will rely on depend on the credibility and support of the same. Where there is doubt, then it must be resolved in favour of the Appellant as an accused.

42. Section 124 of the *Evidence Act* gives special protection to minor victims of sexual offences, subject only if the court, for reasons to be recorded, finds the evidence of them minor truthful. The court noted that the minor was truthful.

43. However, she could look down when answering the accused. This is not a sign of truthfulness. Further, she was lying to every person. To Mucheru Mwangi, it was the mother who chased her away. She was

sent money to return home but did not. She also lied that she was far off and as such the fare they sent was not enough. PW1 refused to return home in spite of frantic efforts by everyone. She also threatened to kill family members when she went home according to PW2. Indeed the attempt to have A return her, she assaulted A with a mug and ran away.

44. To my horror, it is poignant that she had carried a bag full of clothes and went to a total stranger. The story that the Appellant was a boyfriend was false. It may be that she was eloping with someone who stood her up, until when the Appellant offered to take her home. She would play football at 5pm yet she did not leave for home. She maintained that her door was always open. She stated that she did not tell the Appellant, on cross examination from one side of the mouth and on the other side, she told the Appellant that she had dropped out of school. PW1 admitted that her original plan was to visit Kairo.

45. PW1 lied even to her own mother, she misled them that she was far, yet she was 1.5 km from home. To PW2 she stated that she was hosted by the Appellant. This is the same evidence tendered by the Appellant. I do not know why the court could believe PW2 and not the Appellant yet the evidence was exactly the same. The court thus misdirected herself by disbelieving evidence of the Appellant which was corroborated with PW2's evidence.

46. PW2 was more candid or rather naïve. She registered PW1 for examinations but dropped out. This was for KEPSEA. These are continuous assessment and not like the former examinations, KCPE. The first assessment is done in grade 3. This then answers the second conundrum. The birth certificate was recently registered and could not be used for grade 3 assessment. It is a different scenario to register a birth and collect the certificate later. It is not the same as registration of a birth. The certificate was purported to be less than 2 years old. It is not genuine evidence of the age of the complainant. Where the certificate is of doubtful origin, age assessment is crucial. It is thus not clear whether the complainant was a minor.

47. This then plays to the second limb of the defence. The Appellant maintains that the complainant told him that she was 19 and born in 2004. He was not cross examined on this aspect. Though he did not have sex, he took steps to establish the age of the complainant before hosting her. Indeed the complainant told the Appellant that she had dropped out of school. Even if, penetration was to be proved, I find and hold that the defence available under section 8(5) of the *Sexual Offences Act* was proved. Witnesses were agreed that she was told and had a physique to accompany the same.

48. The full tenure of Section 8(5) of the *Sexual Offences Act* on which the Appellant sought to rely provides as follows:

    It is a defence to a charge under this section if –

    a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

    b. The accused reasonably believed that the child was over the age of eighteen years.

    (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

49. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held. On the defence under Section 8(5) of the *Sexual Offences Act*, I am guided that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age

of 18 years. This was the position of the Court of Appeal in Wambui *v Republic (Criminal Appeal 102 of 2016*) [2019] KECA 906 (KLR) (22 March 2019) (Judgment) as follows:

> Section 8(5) of the *Sexual Offences Act* stated that it was a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. Section 8(5) was a curious provision in so far as it was set in conjunctive as opposed to disjunctive terms which would seem to be more logical. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held.
>
> A reading of section 8(6) of the *Sexual Offences Act* seemed to add a qualification to subsection (5)(b) that separated it from the belief proceeding from deception in subsection (5)(a). Therefore, the elements constituting the defence should be read disjunctively if the two sub-sections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.
>
> The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities to be assessed on the basis of the appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two lower courts properly directed their minds to the appellant's defence and the totality of the circumstances of the case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.

50. This defence also requires the court to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. In the case of Paul Munyoki vs Republic [2021] eKLR, the Court of Appeal held that:

> " ...Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond."

Evidence on record does not suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him believe that PW1 was over the age of eighteen years. He appreciated that the victim was small bodied, a fact that should have raised his antennas up and he would have declined to accept the victim.

51. I have had the advantage of seeing the Appellant, and agree with him, that given his own emaciated self, it was plausible to believe a tall and well-built girl was over 18. This is compounded by the fact that the Appellant himself was 22 or 21 when arrested. Their ages were not far off. This was not a pedophile

taking advantage of children. It was a boy, who wrongly believed that helping a truant girl will earn him mercy in heaven but earned him a place in prison.

52. The Appellant's case was largely that PW1 stayed at his home. However they slept in different houses and he never defiled her. The prosecution was duty bound to prove the case against the Appellant beyond reasonable doubt. PW1 to have stated that the Appellant had locked her in the house whenever he left but again that she could do farming. It was also curious for PW1 to recall a few sexual encounters described to last one minute during 3 of the first 5 days out of the month that she stayed with the Appellant without an explanation as to the remainder of the days.

53. PW1 was clear that she wore different clothes on several days. The Respondent did not demonstrate what this court finds crucial, the circumstances under which she had carried her clothes when she accompanied the Appellant to his home. The Appellant in my view was a victim of circumstances and such glaring gaps in the testimony of the prosecution should be interpreted in favour of the Appellant.

54. The failure to report the presence of a stranger is not a sexual offence. The Appellant was not charged with this. The Appellant was not an urbane person who understood the procedures after helping another person. He continued with his ways of life. As admitted by the complainant, the Appellant never bothered to inquire whom she was talking to on phone as it was clearly not his business. The prosecution did not displace the defence that the Appellant simply helped a girl who run away from home. She wanted to stay for one day but overstayed. The Appellant, did not know when to send her away. I do not believe for a moment that penetration occurred. If this happened as described by the complainant, then the complainant could have left the moment the Appellant left for school or when the mother sent fare to get her back.

55. The next question is whether penetration was proved to the required standard. PW1 stated that the Appellant inserted his penis in her vagina and could do so for about one minute. For instance, according to PW1, on the 5th day of her stay, the Appellant lay on top of her and did tabia mbaya using his penis in her vagina. The medical evidence was however that the hymen was old broken and there was foul smelling white discharge from the vagina. There were no spermatozoa or injuries.

56. The evidence of the witness was that they had sex on the last day. However, there was neither laceration or bruises nor inflammation secondary to sexual activity. There was also no spermatozoa seen, in spite of an act having allegedly been done a few hours earlier. The complainant was arrested and had no opportunity to change clothes or shower. There were no tears on the clothes. The duo were said to have had sex on 16.9.2023. The vagina was normal both in the labia minora and labia majora, with whitish foul smelling discharge which could be attributed as per the doctor, to infection or hygiene and not only penetration. There was thus no basis for concluding that defilement was done. From the medical point of view, there was thus no evidence of defilement.

57. The discrepancies, contradictions and omissions described in the evidence of PW1 and lies she made to the mother, brother and investigating officer, I find the conviction unsafe. Her evidence was marred with falsehoods that were not supported by both the anecdotal evidence and medical evidence. It is not surprising that the pre-sentence report indicates that she again ran away in November 2023 upon testifying. When looking at the contradictions and the inability of PW1 to testify truthfully, the conviction is unsafe. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court

has to decide whether inconsistencies and contradictions are PW1, or whether they go to the root of the matter.

58. Lastly, on the aspect of age, age is such a crucial component in sexual offences that it points to the extent of punishment for the offenders. This was also the position of the court in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), where the Court of Appeal stated doth:

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

59. I am unable to find reason to sustain the conviction. The prosecution failed to prove its case beyond reasonable doubt and the court was wrong in convicting the Appellant. Having found that the Appellant ought to have been acquitted in the first place, I find no utility in venturing into the path of the sentence imposed.

60. I wish only to add that the age of the complainant having not been proved, the sentence of 20 years could have been untenable. Therefore, both the sentence and conviction have to give way. In the circumstances, the Appeal succeeds in its entirety. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless lawfully held.

Determination

61. I make the following final orders:

    a. This Appeal succeeds. The conviction on the one count of defilement meted out is hereby quashed. The sentence is hereby set aside in its entirety.

    b. The Appellant be and is hereby set free unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JANUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Applicant – present

Ms. Atina for the State

Court Assistant – Jedidah

M. D. KIZITO, J.