Katiku v Republic (Criminal Appeal E007 of 2022)
[2024] KEHC 3980 (KLR) (24 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E007 OF 2022

FR OLEL, J

APRIL 24, 2024

BETWEEN

DAVID MUTUKU KATIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal of the conviction and sentence arising in Machakos Sexual Offences case number 23 of 2019 delivered on 6th December 2021 by Hon E.H. Keago, Chief Magistrate)

JUDGMENT

A. Introduction

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on 18th of March 2019 in at [Particulars Withheld] Machakos Sub County within Machakos County, he intentionally and unlawfully caused his penis to penetrate the anus of INM a child aged 8 years.

2. In the alternative he was charged with an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006.The particulars of the offence were that on 18th of March 2019 at [Particulars Withheld] in Machakos Sub County within Machakos County, he intentionally and unlawfully touched the anus of INM a child aged 8 years with his penis.

B. Facts at Trial

3. The Appellant took plea on 28.03.2019, denied the charges and a plea of not guilty was entered. PW1 CJT, testified that on 18.03.2019, her children went to school and later in the day, she saw other children come from school at 3pm but did not see the minor. When she asked them where he was, they told her that he was at school. She called the teacher who told her that the minor did not attend school on the said date. She proceeded to check on her son but met him on the way. Upon inquiry why he

did not attend school, he started crying and she escorted him back home, she noticed that he walked with a problem. On the said date the minor took a shower and slept. He refused to go to school the next day and told PW1 to go and talk to the teacher alone, which she did and the teacher said that she had not noticed any issue. On 19.03.2019 as she was bathing the minor, he complained of pains in his anus and started to cry. She checked and noted that he has bruises in his anus.

4. The next day, on 20.3.2019, they woke up and she told the minor that they were going to school and the minor told her that he met someone on the road who took him to the bushes and did bad manners to him through the anus. He identified the person as David Mutuku Katiku , their school cook. She bathed him and too him to the hospital in [Particulars Withheld] where he was examined and found to have bruises in his anus. They were referred to Machakos Level 5 hospital where he was attended to. She went to the police station where she made a report. She said her son was 8 years old. She was later called that there was a suspect whom they needed the minor to identify. She said she did not know the suspect, but the minor positively identified him as the person who sodomized him. She produced treatment notes from Machakos Level 5 and receipts as Exhibits.

5. Upon cross examination, she stated that the minor did not attend school on 18.3.2019 and had identified the accused from the identification parade as a person he knew and he stated, that the appellant was a cook at their school. She said the incident happened before he could get on the main road. When she met her son, his school shirt and sweater were in the bag.

6. PW2 PM, the grandmother of the minor testified that the minor herein INM was 8 years old. On 18.03.2019 she was at home in [Particulars Withheld] when she was called by PW1, her daughter who told her that her son had gone to school and had not returned. PW1 later called her and told her that the minor had returned with torn clothes and requested her to go and see him. She did but the minor did not tell her what had happened.

7. The next day PW1 called her and told her that she had taken the minor INM to hospital at Kimutwa Health centre. The minor had confided in the clinical officer at Kimutwa health centre and narrated what had transpired. He thereafter referred them to Machakos level 5 Hospital. She accompanied them to the referral hospital, where the minor was seen, sent to the laboratory and given medication. The following day, they went back and he was given more medication and counselling. Thereafter, they went to police station where they were issued with a P3 form. The minor was taken for counselling for three more sessions. She took him for age assessment as they had not obtained a birth certificate due to the fact that the birth notification was misplaced. She said the Appellant was unknown to her but the minor had positively identified him.

8. Upon cross examination, PW2 said that she did not know why the minor initially did not tell his mother about the incident, she had accompanied the minor to the police, but was not present, when he attended the identification parade, she did also could not remember the day the minor was taken to hospital and did not witness the incident.

9. PW3, INM, the minor, after voire dire examination stated that he was a pupil at [Particulars Withheld] primary school but had left the school in 2019 term 2 and joined [Particulars Withheld] Primary School. He was 8 years old and recalled that on 18.03.2019 at 7.00am while walking to school alone, someone chased after him while cycling. The person caught up with him and took him to the forest where he removed his short and then penetrated his anus with a penis. He said he lay on his stomach when he was being sodomizing/penetrated, he cried and had raised alarm as the assailant took him to the forest but nobody came to his rescue. He said he was penetrated once and the assailant released him after pulling up his shorts. The assailant left and went away and he too returned home.

10. The minor further stated that it was in the morning but he still went home and on arrival he met his mother who asked him why he had returned home before time and he told her what had happened to him. His mother took him to hospital where he was given some medication and later, he was taken to the police station at Machakos where he told them what had happened. PW3 stated that the suspect was known to him as he used to cook at their school. He said he had known the suspect for a while and identified the person who defiled him as the accused in the dock. He further testified that they had not disagreed with the appellant while in school and he is still on medication.

11. Upon cross examination, PW3 stated that he used to go to school alone at about 7.am and the road he used was big and would normally be used by motor vehicles and other people. The said road also had bushes besides it, about 5 meters away. He testified that, on the material day, as he went to school he met a person and there were no other persons going to work nor homesteads nearby. He denied sitting under trees upto 5pm and his mother had looked for him because he did not attend school. He denied telling his mother that he was pricked by a thorn and/or had been beaten by someone. The incident had occurred at 7.00am and initially he had not told his mother about the incident.

12. The Minor further testified that his brother would normally go to school earlier than him and after the incident he had told the police what had transpired. He reiterated that the incident had occurred at 7.00am along the road to school and it was his mother who took him to the hospital. He had informed her of what transpired on 20.03.2019 and not earlier on 18.03.2019, he had to be caned before he revealed what had happened to him. PW3 denied lying to his mother nor did he meet her at 5.00pm while she was looking for him. He said he did not shower on the material day.

13. Upon re-examination he said that he raised alarm when he was taken to the bushes, but there was no homestead nearby and nobody was by the roadside to rescue him. He said he was alone on the material day of the incident, but usually goes to school with his brother. The accused had threatened to beat him if he told anybody about the incident.

14. PW4 DR. John Mutunga testified that he worked at Machakos Level 5 Hospital and had worked there for 10 years. He had worked with one Dr. Lydia Nyawenda for 4 years thus was conversant with her handwriting. While making reference to the P3 form which he produced as an exhibit, he stated that the P3 form was for "I.NM" aged 8 years old. It was reported that he was sodomized by someone known to him on 18.03.2019 and on examination he did not have any physical injuries on the private parts. On the anal region, he had laceration on the upper part of the anal opening. There was no discharge on the thighs or anal opening. On laboratory examination the accused swap had no spermatozoa. HIV and syphilis tests were negative. The doctor concluded that the child needed psychological counsel. The P3 form was duly signed on 28.03.2019. The PRC form was also produced, it had similar findings as the P3 and showed that the child had laceration noted above the anus.

15. Upon cross- examination, he stated that he was not the one who examined the minor. The P3 and PRC documents were prepared by his colleagues. All the laboratory tests were negative. He said the minor was fully examined and it was indicated that the offence had occurred on 18.03.2019 and reported on 20.3.2019. The child was well kept, clothes were not stained. He further testified that the laceration can also be caused by other objects, but the minor had reported that he had been sodomized by a person known to him.

16. PW5 IP Gerfus Okoth attached to Machakos Police Station. He testified that on 26.03.2019 he was at the station and was asked by the investigating officer, Corporal Somoina to conduct an identification parade. She informed him that there was a suspect of defilement in custody and it was necessary that the parade be done to see whether the complainant can identify the suspect. He arranged the identification parade as procedurally required and the accused was identified by the complainant (PW3). He said he

placed 8 people on line within the police station in an open enclosed place. He informed the suspect/ Appellant of the intended parade and he chose where to stand. He chose to stand between the 4th and 5th person. The members of the parade were from the public of the same height and similar complexion. The procedure was explained to the complainant and he was told to identify the suspect by touching him. PW3 identified the suspect by touching the appellant. He asked the suspect whether he had any issues and he said "sio huyu", (it is not that one) the suspect indicated that he was satisfied with the identification parade process and proceeded to signed the Identification parade form.

17. Upon cross examination, he stated that the mother of the complainant was not at the parade and it was conducted to confirm the allegation that the complainant (PW3) knew the suspect and he could identify him. After the identification parade, the appellant had remarked, "sio huyu" to signify that he did not know PW3. His role was only to conduct the identification parade and was not the investigating officer.

18. PW1 was recalled and she further testified that on 18.09.2019 she was at home. PW3 would usually arrive from school at 4pm but on that day he arrived home at 5pm. She said she was not there when he arrived and she found PW3 in a t- shirt as he had removed his school shirt. She said she took him to hospital on 20.03.2019 and did not know if identification happened on 18.03.2019. Further she did not threaten the victim but she spoke to him as a parent. PW3 confirmed that he was defiled by the accused who served them food at school, and PW3 had been positively identified him at the police station. The doctor too had confirmed that the victim was defiled. She further testified that the offence was committed along Katumani road, but did not know if the accused person was on duty in school on 18.03.2019.

19. Upon further re-examination, she further stated that her son came home on 18.03.2019, and he had left for school at 6.30am. The incident occurred on a footpath which is not very busy. She denied threatening her son before he could tell her what happened and said that it is the minor who described Mutuku Katuku (the appellant), as their cook. When she went to school on 19.03.2019, she had met the deputy head teacher who confirmed that her son did not attend school. She confirmed that she did not continue to attend to her child at the hospital as she was in the labour ward.

20. PW6 Sister EM worked at [Particulars Withheld] Primary School near [Particulars Withheld] Machakos County, Kalama Sub County as the head teacher. She said that on 18.03.2019 she was on duty. She said they have an attendance register which she produced and it showed that the minor did not attend school on 18,19 and 20 March 2019. Upon cross examination, she stated that on 18.93.2019 the minor was not in school and she did not get any report from the minor's parents. Later on, she was informed by the parents that the minor had been defiled.

21. PW7, Corporal Somoina Tumaipar stationed at Machakos Police Station, the investigating officer testified that on 21.03.2019 she reported for duty as usual and found that a defilement case had been allocated to her for investigation as she went through the OB. The report was that one minor (INM) had been defiled on 18.3.2019 by the school cook while on his way to school. The complainant reported that he left home at 7.00am with his elder brother who ran ahead and left him at the compound gate. He also started to run and after 500metres he saw someone cycling behind him. When the cyclist reached him, he dropped his bicycle down and chased him on foot and he caught him. The assailant grabbed him and took him to the bushes where he undressed him, forced him to face down, he then penetrated his anus with his penis. The victim raised alarm but was not rescued him. After the incident the suspect took out a piece of cloth that was tied to the bicycle and he cleaned his anus and his penis. He then threatened him not to go to school and home nor was he to tell anybody what had transpired. The minor remained at the scene until evening.

22. When he was proceeding home that evening, he met his mother who has come looking for him. He was walking with difficulty and when he was asked what was wrong, he said he had been pricked by a thorn and they went home. On 19.3.2019 when he woke up, he was not feeling well so he did not go to school. His mother (PW1) went to report that he was not to attend school and that is when she realised that her son had not attended school on 18.3.2019. When PW1 went home, she wanted to know from him, why he did not attend school but he refused to say anything. On 19.03.2019 he complained of pain in the anus but did not say what happened.

23. On 20.3.2019, PW1 told him to attend school and that is when he told her that on 18.03.2019, he met with Mutuku who defiled him. The matter was then reported to Machakos Police station and he was referred to hospital where he was examined and PRC form filled which showed injuries on his anal region. PW7 issued a P3 form which was filled at Machakos level 5. She wrote the witness statements and took the child for age assessment, he was found to be 8 years old. She was given a birth notification but it did not have a date. PW7 visited the scene which was 500 metres from the minor's home and the footpath was deserted and leads to the main road. She visited the school and confirmed that there was a cook called Mutuku Katuku and that the complainant did not attend school on 18, 19 and 20 March 2019.

24. PW7 further testified that the accused was arrested at Ekalala where he was locked for another case of defilement vide OB 27/25/3/2019. An identification parade was conducted by IP Kepha Okwangi where the complainant identified the accused. She also identified the accused in the dock.

25. Upon cross examination by the accused, she stated that she was on duty on 21.3.2019, and that is when she took the minor for age assessment as he did not have a certificate of birth. The accused was reported to be cycling a bicycle but she did not get the bicycle, nor was the cloth used for cleaning recovered. She was told that the accused was not at work on 18.3.2019 and even prior to that and further the P3 form had been filled on 20.3.2019. She visited the scene with Pc Omolo and did not find anyone on the footpath and they were taken to the scene, by the complainant (PW3) and his mother (PW1). The footpath passes through thick bushes and the main road was about 700 metres away and the school about one (1) kilometre plus ahead. The report of defilement was confirmed by the doctor. She confirmed that PW3 went to the hospital two days later.

    upon re-examination, PW7 confirmed that she had issued the P3 form on 20.3.2019 and PW1 accompanied by PW3 had taken it to hospital and returned it alongside with the PRC form.

26. The trial court found that the appellant had a case to answer and placed him on his defence on the main charge. The appellant gave sworn evidence and called two witnesses to testify on his behalf.

27. DWI, the Appellant, testified that he was a sand harvester and was aware of the charges he was facing. He had started to work at [Particulars Withheld] Primary school on 16.2.2019 and on 20.2.2019 left [Particulars Withheld] and moved to [Particulars Withheld] to visit his aunt, where he was staying and working. He used to harvest sand and also feed the cows. It was his evidence that he worked at [Particulars Withheld]from 20.2.2019 until 25.3.2019 when he was arrested. It was his testimony that on the alleged date of the incident, he was not at [Particulars Withheld] location which is 150 kilometres from [Particulars Withheld]

28. The accused person denied knowledge of the complainant, where he comes from nor did he know his parents. It was his evidence that if anything happened to the complainant, he was not the one who committed the offence. He said that the identification parade that was done at Machakos identified him easily as he used to work at the school, where PW3 attended and used to know him by face. He told the parade officers that the complainant knew him before. He said his duty was just to cook for

the children at the school but they were not known to him. It should be noted that the victim's mother had testified that she threatened to beat the minor if he did not identify the person who committed the offence. According to him, the doctor found that nothing had happened to the victim.

29. In Cross examination, he state that he left school on 19.2.2019 and the incident occurred on 18.3.2019. He said he was not there when the incident happened and he was aware that he had to prove the defence of an alibi. He said the complainant and his parents were unknown to him thus had no reason to frame the charges against him. He too held no grudges against them. The appellant further testified that he was not comfortable with the identification parade as the rules guiding the same were not explained to him. He also did not know which rules were broken in the identification parade, but confirmed that the minor identified him. Lastly, he testified that not all cooks were present at the identification parade, which was an error.

30. DW2 WK, testified that she knew the charges the accused was facing and in her opinion the charges were not true, as the accused person had gone to her home on 20.2.2019 for the memorial of her late husband. Upon cross examination she said she did not know where he accused was working or used to work. She said the incident occurred on 18.3.2019, on which date the appellant was at her home assisting the masons. She did not know what the appellant stated in court but she had told the court the truth.

31. DW3 Samuel Kaloki Nzioka, testified that he was an uncle of the accused person. He testified that he was aware of the charges the appellant was facing. He contended that on 19.3.2019 he heard on radio that that the accused person had sodomized a child at Kalati and yet he was not at Kalati. To his knowledge, the appellant at the material time was at Kasinga in Yatta. He called his wife where they were attending the memorial and she told him that the accused person was still at Kasinga assisting the masons and the previous day he was at home and had not gone anywhere. After two weeks, his son was contacted by police officers who work at Machakos and he told them that David Mutuku Katiku was at Kasinga. The accused person was arrested and charged. Upon cross examination, DW3 stated that he was not at Yatta, nor he did not tell the police that David Mutuku Katiku was at Yatta. He said it was the first time he was giving the evidence of alibi. He further stated that the accused used to cook at Maithyas, Kamuti when he went to Yatta for the memorial service.

32. After the hearing, trial court did consider all the evidence adduced and found the Appellant guilty of defilement. The appellant was allowed to mitigate after which, he was sentenced to serve fifteen (15) years in prison.

C. The Appeal

33. Dissatisfied by the conviction and sentence, the Appellant filed his petition of Appeal dated on 18th January 2022, after being granted leave to Appeal out of time. The grounds of Appeal raised were that;

    a. That the learned trial magistrate erred in both fact and law by convicting me on evidence that didn't meet the minimum threshold to uphold a conviction.

    b. That the learned trial magistrate erred in both fact and law by not considering my sworn defense.

    c. That the credibility of the identification parade done was questionable and doubtful.

    d. That the trial magistrate erred in law and fact by not considering the period I spent in remand custody as per section 333(2) of the Criminal procedure code.

e. That I also pray for a non-custodial or a community-based sentence as enshrined in the *Probation of Offenders Act*.

34. The Appeal was canvassed by way of written submissions.

D. Appellant Submissions

35. The Appellant filed submissions on 16.06.2023 wherein he submitted on three issues. First, he did contend that there was a violation of his right to fair trial as regards to the the manner in which the identification parade was conducted. The parade was conducted with members of the public with him being the only one from police custody. He made reference to the proceedings where he said it was said that;

> "I picked members of the parade from the public....he is the one who described David Mutuku Katiku their cook."

36. He submitted that the outlook of a person who was in police custody for hour's was different from that of a person walking along the streets. He said he had been a cook at the school where the minor was a pupil and questioned why all the cooks from the school were not lined up with him at the identification parade. Conversely, if the school only had one cook then it was a case of recognition thus there would be no need for an identification parade. Reliance was placed on Article 50 of *the Constitution* of Kenya 2010. While it was not in dispute that the victim was sodomized, his was a case of mistaken identity. He urged the court to consider his defence of alibi.

37. Secondly, it was submitted that a vital witness was not called and evidence not adduced. The prosecution did not adduce evidence to show that he was a cook at the said school or that he had ceased working at the school. That there was no photographic evidence of the deserted footpath where the alleged incident is said to have occurred which, area the appellant alleged had bushes on the side and has a lot of traffic from people and motor vehicles.

38. The appellant further submitted that he was not tested to see whether he had an infection or not. The minor was found not to have an infection and testing him would have proven that he was innocent. The prosecution had failed to produce essential evidence and to avail all documents to prove that he was not the only cook in that school and also failure to align all male cooks for identification was fatal. He relied on the cases of Dzombo Mataza vs R [2014] e KLR, Bukenya vs Uganda [1972]EA 548 , Nganga vs Republic C.A Cr App no 50 of 1981, Wendo vs R [1953] 20 EA 166, Ramson Ahmed vs R Vol. 22 .

39. The final issue raised by the Appellant, was that there were material inconsistencies and contradictions going to the root of the case. The Appellant questioned at what point the minor put his shirt in the bag for it not to get dirty and what made his shirt torn yet it was in the bag. He relied on the cases of Vincent Kasyola King'oo vs R [2014] , Tobas Ogada vs R, Cr case no 61 of 2018, Josiah Afuna Angulu vs R, cr appeal no 277 of 2006 [UR] . The court had failed to reconcile the said discrepancies and contradictions to find that the prosecution evidence had gaps, which created doubt as to whether his conviction was safe and asked the court to quash the conviction and set the sentence aside.

E. Respondent's Submissions

40. The Respondent filed submissions on 31.01.2024 in which counsel submitted that, on the issue of the identification parade, it was properly conducted following the procedure in the police standing orders by No IP 236684 IP Gerfus Okoth. Further, there is no requirement that all participants of

the identification parade be obtained from the cells, it only required, that the parade officer to get persons of the same social stature and similarity which provisions PW5 compiled with. In addition, it was necessary to test if the allegations of the complainant were correct.

41. It was further submitted that there were no material inconsistencies in the evidence presented by the witnesses and corroborated by medical evidence. The evidence of the complainant (PW3) was corroborated by PW1 and PW2 and the history he gave to the Clinical Officer who examined him at [Particulars withheld] Health centre. The evidence of PW4 confirmed that the complainant had a laceration on the upper part of the anal opening.

42. Lastly, on the defence of alibi raised by the Appellant, while relying on the case of Slim Athuman versus Republic (2016) e KLR, it was submitted that such a defence ought to be raised before the close of the prosecution case to give the state an opportunity to dispel the same or counter the same. In this case, it was submitted that the Appellant raised this defence of alibi, hurriedly at the close of the prosecution case and the Appellant's witnesses were not able to fully account where the Appellant was on the alleged material period/date. Further, during cross examination of the prosecution witnesses, he did not allude to any such defence or show that he was not at the scene.

43. The prosecution thus prayed that this Appeal be dismissed.

F. Analysis & Determination

44. I have considered the trial court record, the memorandum of appeal and the submissions of the parties as filed and find the following as the issues for determination;

    a. Whether the identification parade was properly conducted.

    b. Whether the ingredients of the offence of defilement were proven

    c. Whether the sentence melted out should be interfered with.

45. This being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno versus Republic (1072) EA 32 where the court of appeal set out the duties of the first appellant court as follows;

> " An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya versus Republic (1957) EA 336) and the appellant court own decision on the evidence made. The 1st appellant court must itself weigh conflicting evidence and draw its own conclusion (Shantital M Ruwala versus Republic (1957) EA 570). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court and collect finding and conclusion. It must make its own finding and draw its own conclusion. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact the trial court has had the advantages of hearing and seeing witnesses. See Peters versus Sunday Post (1958) EA 424."

(i)Whether the identification parade was properly conducted.

46. The correct procedure of conducting an identification parade is provided for under paragraph 7 of the National Police Service Standing Orders. The Court of Appeal in David Mwita Wanja & 2 others vs.

Republic [2007] eKLR emphasized on the importance of a properly conducted identification parade and expressed itself as follows:

> " The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -
>
> It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

47. An identification parade was conducted in this case by PW4 who produced the identification parade form. The Appellant contends that he did not understand the identification parade rules as they were not explained to him which is denied by PW4. The Appellant signed the identification parade forms, which implies that he consented to appear in the parade. He was also informed that if he desired, a friend or solicitor to be present he may so request, to which he responded and said; "NIKO SAWA". In addition, he raised no objections to the arrangements or persons in the parade.

48. From the record, the witness and the suspect were kept in different rooms before the parade was conducted and according to PW4, the Appellant independently chose where to stand in the parade, from where PW3 identified him by touching him. In the premise, I do find that the procedure of conducting identification parade as provided under paragraph 7 of the National Police Service Standing Orders were complied with and the appellant has not shown any breach of the said standing order.

49. Secondly while on the issue of identification. This incident occurred on 18.03.2019 at about 7.00am in the morning. PW3 was petrified and traumatized by the assault and did not reveal what transpired until 20.03.2019, but when he did so to PW1 and PW2, he was categorical that he had been defiled by the Appellant, who he knew as a cook at their school. He specifically identified the Appellant by name, "M their school cook".PW3 during his evidence in chief stated that, "The suspect is known to me. He used to cook at our school. I had known him for a while. The person who defile me is the accused in the dock. I had not disagreed with him while in school."

50. The Appellant in his defence did confirm that he worked as a cook at [Particulars Withheld] Primary school before he allegedly moved to [Particulars Withheld] In his evidence he stated that, "The identification parade was done at Machakos. He identified me easily as I used to work at their school. He used to know me by face. I told the parade officers that the complainant knew me before....."

51. From the above evidence it is clear that this was a case of recognition, the incident happened at daytime, PW3 had ample opportunity to see his assailant as he followed him, held him and eventually assaulted/ defiled him and further identified him as a person he knows and by name. There is therefore no doubt whatsoever that the appellants identification was sufficiently established by evidence.

(ii) Whether the ingredients of the offence of defilement were proven.

52. The second issue is whether the ingredients of the offence of defilement were proven. Section 8 (1) and (2) of the sexual offence Act provides that;

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    2. 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.

53. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

54. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a 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." (emphasis added)

55. From the evidence on record the age of the minor in this case was proved to be 8 years old. This was stated by PW1, PW2, PW3, PW4 and PW7. Pw7 produced an age assessment report that indicates that the minor was 8 years old. I have no doubt in my mind that this element has been proven.

56. The second element is the second ingredient is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

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

57. The same section defines "genital organs" to include;

> " the whole or part of male or female genital organs and for purposes of this Act includes the anus."

58. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

59. The medical evidence on record was presented by PW4, a doctor who gave his evidence and stated that there was penetration of the upper part of the anus. He relied on the P3 form and the PRC form which he produced into evidence. He stated that ;

> "It is reported that he was sodomized by someone known to him on 18/03/19. On examination he did not have any physical injuries on the private parts. On the anal region, he had laceration on the upper part of the anal opening. There was no discharge on the thighs or anal opening. On laboratory examination the accused swap had no spermatozoa. HIV test was negative. Syphillis test was negative. The doctor concluded that the child needed psychological counsel. The P3 form was duly signed on 28/03/19.
>
> I have the PRC for the same minor aged 8 years. The child presented with a history of sodomy as he went to school. There were lacerations noted above the anus."

60. The conclusion on the P3 form indicates as follows;

> "probable type of weapon(s) causing injury; human penis nature of offence : anal defilement"

61. The minor in his evidence in chief did testify that he was on his way to school when the Appellant grabbed him, took him to the bushes and his exact words were that; "he then penetrated my anus with his penis. I lay on my stomach." In addition, the mother of the minor, PW1 told the court that she checked the anus and noted that he had some bruises. At this juncture, it is safe to confirm that there is no doubt that there was penetration of the minor's anus.

62. The third and last element is identification. In this case there was recognition and identification. This fact was confirmed by the Appellant, PW1, PW2, PW3, DW2 , the minor and the investigating officer(PW7) .In James Murigu Karumba vs. Republic [2016] eKLR, it was held by the Court of Appeal based, on Suleiman Juma alias Tom – v- R (2003) eKLR; (2003) KLR 386 that:

> "Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."

63. Nonetheless, as analysed in paragraph 46 – 51 above it is the finding of this court that a proper identification parade was conducted and the Appellant was identified by the minor. I find that the offence of defilement was therefore adequately proven in this case.

64. The appellant further submitted that the prosecution evidence had inconsistencies. The Appellant contends that at one point the minor says that he placed his shirt in the bag so that it does not get dirty and that it was PW1 evidence that the minor had come home with torn clothes. The Appellant questions what time the minor put the shirt in the bag for it not to get dirty.

65. Justice G.V Odunga J (as he was then) in the case of Charles Ratemo vs Republic, Machakos HCCR E035 of 2021 (unreported stated as follows when considering a similar issue:

> In the case of John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13, the court stated that: "Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."
>
> 57. This was the position in Willis Ochieng Odero vs. Republic [2006] eKLR, where the Court of Appeal held: "As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But HCCrA 17 of 2018 Page 26 that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."
>
> 58. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."
>
> 59. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: - "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

66. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were minor inconsistencies in the evidence of the said witnesses, which is common, I am unable to find that the same were material enough to warrant interference with the conclusions arrived at by the trial Magistrate.

67. The Appellant also raised the issue of his alibi not being considered by the trial court. The Appellant contends that the court did not consider his evidence while the Respondent contends that the defence was raised as an afterthought as he ought to have raised it before the close of the prosecution case.

68. Alibi was defined in the case of Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR) where the Court held that:

> " an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged."

69. Alibi defence must be raised at the earliest opportunity because the burden of proving falsity is on the prosecution. In the case of the Victor Mwendwa Mulinge vs. Republic [2014] eKLR, the Court of Appeal stated thus:

> " It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution. See Karanja v HCCrA E013 of 2021 Page 45 Republic [1983] KLR 501 this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought."

70. In Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

71. The Appellant contends that on the day the offence was committed, he was in Mugesia location where he worked. His evidence was that he initially worked at the Uganda Martyrs Primary school on 16.02.2019 and on 20.02.2019 he left kamutwa for Mugesia for where he worked until 25.03.2019, when he was arrested. DW2 stated that the Appellant went to her home on 20.02.2019 and on 18.03.2019 when the incident occurred, the Appellant was still at her home assisting masons.

72. DW3 stated that on the day of the incident, the Appellant was at Kasinga in Yatta and not Kalati where the incident is said to have occurred and he called his wife, who told him that the Appellant was at home and had not gone anywhere. The Appellant insists that he was at Mugesia. DW2 stated that she stays at Mutea Location in Makueni County. These are three different locations.Either the Appellant and/or his witnesses was correct/truthful or all of the said witnesses were incorrect/untruthful. I cannot therefore fault the learned trial magistrate for disbelieving the said alibi defence which in any case was raised as an afterthought and not made the basis of his cross examination of any key witness, not even the school principle who testified as PW6 was cross examined by the appellant on any aspect of his Alibi.

Sentencing

73. As regards the sentence, the Appellant was charge with defilement contrary to section 8(1) and 8(2) of the *sexual offences Act* No 3 of 2006. Further, the said Section 8(2) of the said *sexual offences Act*

expressly provides that a person found guilty of defilement of a child ages eleven year or less shall upon conviction be sentenced to imprisonment for life.

74. The appellant upon conviction did mitigate and the trial Magistrate sentenced him to serve a period of fifteen (15) years, which sentence was to run from 28.03.2019, when the said appellant was charged in court.

75. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

76. It has not been shown that the trial magistrate made any error while sentencing the appellant. The sentence melted out too, without prejudice is not manifestly high/excessive in the circumstances of the case nor has it been shown that the trial court overlooked some mutual factors or took into account some wrong material or based his decision upon a wrong principle. If anything, the Appellant needs to be consoled that the trial magistrate applied the current jurisprudence regarding mandatory sentence and at his discretion opted not to hand down a life sentence as provided for under the said Act.

G. Disposition

77. The upshot, having considered the evidence adduced and submissions made, I do find that this Appeal is not merited and proceed to dismiss the same.

78. Right of Appeal 14 days

79. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 24th Day of April, 2024.

In the presence of;

Appellant present from Machakos GK Prison

Ms Otulo for Respondent

Sam Court Assistant