



**Muinde v Republic (Criminal Appeal E028 of 2023)  
[2024] KEHC 6569 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E028 OF 2023**

**MW MUIGAI, J**

**MAY 27, 2024**

**BETWEEN**

**LAWRENCE MUASYA MUINDE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon.Ole Keiwua in S.O No. E044 of 2021 delivered on 10th July 2023 at Kangundo law court)*

**JUDGMENT**

**Background**

1. The Appellant Lawrence Muasya Muinde was charged with the offence of defilement
2. The information that led to the arraignment of the Appellant before the trial court was as follows:  
Offence of defilement contrary to section 8(1) as read with section 8(4) of the [Sexual offences Act](#) No . 3of 2006 and on the alternative count he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [sexual Offences Act](#)  
Particulars of the offences were as follows:  
Lawrence Muasya Muinde : on the 22<sup>nd</sup> day of January 2019 in Kangundo Subcounty within Machakos County, intentionally and unlawfully caused penetration with his genital organ penis into the genital organ vagina of FMM a child of 13 years
3. The Appellant pleaded not guilty to charge and the matter proceeded to full trial.

**Prosecution case at the trial court**

4. Prosecution case was anchored on the evidence of six [6] witnesses.



5. PW1 was FMM who testified that she was 17 years having been born on 15/2/2005 and was at [Particulars Withheld] secondary school. That on 2<sup>nd</sup> January 2019 she was playing with her brother D at home. They went to their neighbor's farm and she hurt her brother's eye who started crying. When they went home and told her mother, she beat her and she ran to hide in the farm for hours because her father wanted to beat her. She got scared of going back home and decided to go to her grandmother's which was 20 minutes walk. She met Lawrence on the way who was a friend to her father. She told him what had happened and her told her to go to his house and pick something for her father then they go home. Upon arriving at his house, he asked her to lie down on the ground which she refused and he threw her on top of the mattress. He asked her to open her legs and put a condom on his penis. He put his penis inside her vagina. He had sex with her and again without a condom. He put his penis on her vagina without a condom for a second time and for a third time. She started bleeding. He took bang and slept. He told her he would kill her if she screamed. The following morning when there was a knock he threatened to kill her with a knife. It was her father who was looking for her. He told him he hadn't seen her. He then escorted him and came back. He locked the door from outside and came back in the evening. He had sex with her and for a second time and smoked bhang. On the 3<sup>rd</sup> day, he went and came back and cooked ugali and cabbages and when she refused to eat he beat her. 3 men came in the house by force and asked him what he was doing. She was naked, Lawrence had taken her clothes . he returned her blouse and skirt without the inner pant. She was taken to kangundo Police station where she recorded her statement. She was taken to Kangundo level 4 hospital treated and given drugs and pads. She was given P# form, treatment notes. The doctor confirmed she was penetrated. She identified Lawrence from the dock as the one who had sex with her for 3 days.
6. In cross-examination, she told the trial court that she did hurt her brother, came to the home veranda at 7pm and decided to go to her grand mother's place. He lied to her to lift the jerican and threatened her with a knife so she could not scream to alert her father. Police came to rescue her. The house window was blocked by a rabbit house. He lied to her that he would take her home and talk to her father not to beat her
7. PW2 was AM. She testified that FMM was her first born born on 15/2/2005. On 2<sup>nd</sup> January 2019, the children were playing at home and she heard Daniel screaming and Mwende told her she had hurt Daniel. The father shouted that he would beat her and she got scared and kept distance. She saw someone passing and thought it was her father thus disappeared. She told her to request her father not to beat her and he agreed. When her father went to look for her she ran away. She looked for her at the neighbours and did not find her. The following morning she went to her mother's place and did not find her. The father went to look for her. He met Lawrence and he told him he had not seen her. They started looking for her. The following morning she called the village elder, police were notified. They started looking into the neighborhood and was found at Lawrence house. She fainted. They went to police station and were referred to kangundo hospital. Doctor confirmed that faith had been penetrated. Faith told her that Lawrence promised to her assist her not to beaten. She stated that Lawrence was their neighbor and they had not grudges
8. In cross-examination, PW2 testified that M left home at around 9pm and she did not know where she went. That the accused was their neighbor and his home was ten minutes away from theirs. They did not do business with him and has never sold 6 chicken. That he used to go to their home and was served food.
9. PW3 was Nicholas Kioko Munyao, he testified that he was a village elder. That on 4<sup>th</sup> January 2019, he received a call from A who told him that her daughter had disappeared and was in Mwanzia's house. Police came and they went to mwanzia's house. police pushed the door and the girl was found inside with no clothes. She used a blanket to cover herself. They reported the incident and he recorded his



statement at kangundo police station. He noted that he knew the accused since birth and had no grudges

10. In cross-examination, PW3 in his testimony told trial court that he came with the police and found Faith naked and he had not seen any notice to vacate land.
11. PW4 was Dominic Mbindyo working at Kangundo Level 4 hospital. He testified that he had a P3 form and treatment notes, lab results in respect of Faith Mwendu Mutua. She went to hospital on 4<sup>th</sup> January 2019 at 6pm and presented a history of having been defiled by a person known to her. On examination they noted there were blood stain, swollen majora and minora, blood stain on the genitalia externally. Blood stain in the vagina olives, lab investigation –urine had +++, high vagina swelling, PDT- negative, HIV –negative. They treated the patient. He signed the P3 form
12. In cross-examination. PW4 stated that he did not examine the accused. He examined Faith the complainant
13. PW5 No.252711 PC Dominic Wanyoro Ndungu based at Kakuyuni police station. He testified that on 4/1/2019 Friday at around 1pm, one Daniel Doto told them that people were going to the house of a boy who had taken a school child. They went to the village and went to the house. They pushed the door and found a naked girl in the house and a man with a short trouser. They arrested the boy and took him to their camp and later OCS Kangundo sent police who took the boy and the girl.
14. On cross examination, he stated that in 2018 he was in college and did not know the accused. The girl was naked
15. PW6 No.86305 SGT. Mudista Kashine testified that on 4/1/2019 he received a case of defilement reported by Angela who told them that Faith was lost on 2<sup>nd</sup> January 2019. The father wanted to beat her and thus she ran away from home. She got scared of going back home and decided to go to her grandmother's which was 20 minutes' walk. She met Lawrence on the way who was a friend to her father. She told him what had happened and he told her to go to his house and pick something for her father then they go home.
16. Upon arriving at his house, he asked her to lie down on the ground which she refused and he threw her on top of the mattress. He asked her to open her legs and put a condom on his penis. He put his penis inside her vagina. He had sex with her and again without a condom. He put his penis on her vagina without a condom for a second time and for a third time. She started bleeding. He took bhang and slept. He told her he would kill her if she screamed. The following morning when there was a knock he threatened to kill her with a knife.
17. It was her father who was looking for her. He told him he hadn't seen her. He then escorted him and came back. He locked the door from outside and came back in the evening. He had sex with her and for a second time and smoked bhang. On 4<sup>th</sup> January 2019 the parents of the complainant with the village elder and two officers of police plus members of public they visited accused person's house and found the complainant naked.
18. The accused was arrested taken to police patrol base and later to Kangundo Police station. The complainant was taken to Kangundo level 4 hospital. On 6.1.2019, they went to the accused house and did a search. They found a black pant, black blouse which complainant identified as hers. The girl was 13 years having been born on 15/2/2005 and produced a birth certificate. P3 form showed that the girl was defiled.



19. On cross examination he stated that he did not witness the defilement and that the accused was in custody when they went to get the girl's clothes and there were no other ladies clothes in the house. He did not follow the accused to the examination room
20. The prosecution closed their case.
21. The trial court upon considering the evidence on record found that the prosecution had established a prima facie case against the Appellant to warrant him being put on his defence and found that the Appellant had a case to answer.

### **The defence case at the trial court**

22. The defence case was anchored on the evidence of one witness.
23. DWI was Lawrence Muasya Muinde He told the trial court that in 2018 he found people in their land he told them to harvest and leave the land and they told him he would not survive. He reported to the chairman. He started keeping chicken and his neighbours stole his chicken. He testified that in the morning of 4.12.2018, he heard people's movements and asked him to open the door. On opening the door the police arrested him. They also searched the house and interrogated him and left him in the compound. On 4.01.2019, he went to market to shop for chicken. He saw Faith Mwendu looking at his rabbits. Philip Kamwanza came out of the maize, arrested him and forced Faith to enter his house and took photographs. He was arrested and taken to court on 7/1/2019. Faith Mwendu was told to lie that that he was with her for 3 days. He stated that the prosecutor was the one coaching the witnesses and that the witnesses lied against him.
24. In cross-examination, DW1 told the court that PW1 lied because they wanted him in prison and was coached by the mother.

### **Trial court judgment**

25. The trial court vide its judgment delivered on 10<sup>th</sup> July, 2023 found that the prosecution had proved their case against the accused person beyond reasonable doubt and was convicted of the offence as charged under Section 215 of the Criminal Procedure Code.

### **The appeal**

26. Dissatisfied by the judgment on the conviction and sentence, the Appellant filed his petition of Appeal
27. The appeal was premised on the following grounds that:
  1. The learned magistrate erred in both fact and law by convicting him on evidence that didn't meet the minimum threshold to uphold a conviction.
  2. That the learned trial magistrate erred in both fact and law by not considering his sworn defence
  3. That the learned trial magistrate erred in law by sentencing him by virtue of the minimum mandatory sentence provisions.
28. The matter was disposed by written submissions.



## **Submissions**

### **Appellant's Submissions**

29. The Appellant in his submissions submitted that the importance of voir dire test. Reliance was placed in the case of Johnson Muiruri vs Republic {1983} KLR and the case of Maripett case.
30. It was submitted that in the absence of a voire dire PW1 who was a minor was not a credible witness and aroused grave contradictions. That the court put the testimony of PW1 to the truthfulness test by dint of section 362 of the CPC and hold that her evidence wasn't credible and watertight to uphold a conviction.
31. Reliance was placed in the case of George Opondo Olunga vs republic[2016] eKLR that stated the ingredients of the offence of defilement.
32. Reliance was made to the case of Bukenya vs Uganda to buttress the point that the duty of the court is to hold the scale to see that justice is done according to the law of evidence before it and the case of Ramson Ahmed vs Rep. Vol 22
33. It was further submitted that the appellant's defense was cogent, consistent and reliable and that the burden of proof should never shift to the accused. He relied on the case of Republic vs Gachanja [2001]KLR 425
34. On sentencing, it was submitted that new jurisprudence declared the minimum mandatory sentences unconstitutional in the case of Philip Mueke Maingi & others vs Republic [2021]
35. Reliance was placed in the case of Michael Kalewa v Republic [2018] to buttress that the point that the court has to consider the aggravating and mitigating circumstances.

### **Respondent's Submissions**

36. Respondent filed submissions dated 22<sup>nd</sup> February ,2024, Mr. Mwongera, the State Counsel submitted that that they opposed the appeal on grounds that the elements of the offence were proved appropriately. Reliance was placed in the case of FOD vs Republic (2014) to buttress the element of penetration as an element of defilement.
37. It was submitted that the testimony of PW1 was beyond a shadow of doubt that the Appellant defiled PW1 on numerous occasions.
38. On the age of the complainant, it was submitted that it was proved by the production of the birth certificate. Reliance was made to the case of George Opondo Olunga v Republic (2016) eKLR
39. It was further submitted that the Appellant offered the defense of alibi. He was not able to avail any witness to corroborate his alibi during the defense
40. Reliance was placed in the case of Victor Mwendwa Mulinge v R [2014] e KLR. The prosecution relied on evidence that was cogent.
41. Reliance was made to the case of Richard Munene v Republic [2018] eKLR on the effect of contradiction or inconsistency in the evidence of prosecution witness.
42. It was submitted that the Trial Court convicted and sentenced the appellant to serve 20 years imprisonment. The sentence was within the law and not excessive.



43. On proof beyond reasonable doubt, it was submitted that the accused was properly identified by all the witnesses. Reliance was made to the cases of Peter Musau Mwanzia vs Republic [2008] eKLR, Wamunga v republic (1989) on the issue of identification.
44. It was submitted that the conviction and sentence against the appellant is sufficient and appropriate

### **Determination/analysis**

1. It is now well settled, that the Appellate Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic 91972)EA 32 & Pandya Vs. Republic (1975) EA 366.
2. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.
3. Also in Peter's vrs Sunday Post(1958) E.A. 424 it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
4. Having analyzed the grounds raised in the Petition , the main issue is whether the prosecution proved its case beyond reasonable doubt and I will therefore proceed to analyze the same

Section 8(1) of the [Sexual Offences Act](#) No 3 of 2006 provides as follows;

(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.

5. The ingredients for the offence of defilement can be summarized as follows;
  - a. Age of the victim (must be a minor),
  - b. penetration and
  - c. Proper identification of the perpetrator.

(see Wamukoya Karani Vs. Republic Criminal Appeal No 72 of 2013 and George Opondo Olunga vs. Republic [2016] eKLR)

6. This Court looked at each element exclusively starting with the first element which 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).

7. In the case of Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense

8. The element of age of the complainant and the victim was proved by the production of the birth certificate by PW2 the mother of the victim who testified that her PW1 was her first born on 15/2/2005. It is therefore evident that the victim was a minor as at the time of the defilement.

9. The second element is penetration. Section 2 of the Sexual Offences Act defines penetration as;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

10. The Complainant, PW1 testified that the accused asked her to open her legs and put a condom on his penis. He put his penis inside her vagina. He had sex with her and again without a condom. He put his penis on her vagina without a condom for a second time and for a third time. She started bleeding. He took bhang and slept. He told her he would kill her if she screamed.

11. The following morning when there was a knock he threatened to kill her with a knife. It was her father who was looking for her. He told him he hadn't seen her. He then escorted him and came back. He locked the door from outside and came back in the evening. He had sex with her and for a second time and smoked bhang.

45. PW4 Dominic Mbindyo, Medical Officer working at Kangundo Level 4 Hospital testified that he had a P3 form and treatment notes, lab results in respect of Faith Mwendu Mutua. She went to hospital on 4<sup>th</sup> January 2019 at 6pm and presented a history of having been defiled by a person known to her. On examination they noted there were blood stain, swollen majora and minora, blood stain on the genitalia externally. Blood stain in the vagina olives, lab investigation –urine had +++, high vagina swelling, PDT- negative, HIV –negative. They treated the patient. He signed the P3 Form. The injuries on the Complainant's genitalia was consistent with recent sexual activity.

12. It is the Court's view and in agreement with the Trial Court that penetration had been proved. The accused did not challenge the issue of the victim stating that she had sex with him on several occasions and instead chose to testify on different issues of land disputes and his chicken selling businesses. The question of penetration was therefore proved as there was no evidence to controvert the Complainant's evidence.

13. The final element to be proved was identification. The complainant PW1 identified by recognition the Appellant. She met him talked with/to him explained to him what happened and why he ran away from his father and this was his father's friend. She trusted him and agreed to go to his house as he told him he was to give her something to take to her father. Thereafter, he had sexual intercourse with her and even when his family came looking for her, the Accused person denied she was with him and thereafter had sexual intercourse with him severally. The time she spent in the company of the Accused person, the



- close contact between them and that they had and she trusted him as her father's friend. The totality of the evidence on record confirms proper identification by recognition by the Complainant.
14. The other prosecution witnesses also identified the accused particularly the complainant's mother, the village elder and the investigating officer when the Accused person was arrested.
  15. The Accused person did not dispute knowing the complainant and in fact did state that he was friends with the father of the complainant.
  16. Given the above facts identification was by way of recognition and such evidence must be carefully examined to satisfy if the circumstances of identification were favorable and free from possibility of error before it can safely be made as a basis of conviction. See *Wamunga Vs Republic (1989) KLR* at 426.
  17. This Court on evaluation of the evidence on record by the Trial Court finds the evidence tangible and cogent to sustain the conviction; there is overwhelming evidence the Complainant was sexually assaulted and the evidence places the Accused person at the scene there is no evidence of mistaken identity but evidence of identification by recognition. This Court finds no fault in the Trial Court's judgment, the evidence against the accused is overwhelming that he committed the offence of defilement.
  18. The Appellant challenged the evidence on record that the Complainant's evidence was not taken under voir dire examination.
  19. Section 125 (1) of the *Evidence Act*, which states: -

“ All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.

In *Patrick Kathurima v Republic*, [2015] eKLR, the Court of Appeal held:
  20. “We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.
  21. In addressing what age would be appropriate for a Trial Court to conduct a voir dire examination, this court has also considered the holding in the case of *Maripett Loonkomok v Republic* [2016] eKLR where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voir dire examination and held that:

“ The only statutory definition of a “child of tender years” is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. The court reiterated the holding in *Patrick Kathurima v R*, Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R Criminal Appeal No.16 of 2014* where it categorically stated that the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.



The court additionally stated that:

“It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person.”

From the foregoing, the court is persuaded that the purpose of voire dire examination is to ensure a fair trial by taking evidence of the child as defined 14 years old by the Court after satisfying itself of the demeanor of the witness and as a child is capable of testifying in Court. In this case the record shows PW1 testified and stated her age as 17 years old. Clearly there was no legal basis for voir dire examination.

### Sentencing

22. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the Trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or considered some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

23. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of ATHANUS LIJODI Vs. REPUBLIC [2021]eKLR

“On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu’s case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.”

24. In *Mainigi & 5 others Vs. Director of Public Prosecution & Another (Petition No.E117 of 2021)* (2022) KEHC 13118 (KLR) the Petitioners who were convicted serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and



Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17<sup>th</sup> May, 2022 did find that –

“to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences.”

25. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi Vs Republic (2017)eKLR* cited the decision of the Supreme Court of India in *Alister Antony Pereira Vs The state of Maharastra* at paragraph 70 – 71 where the court held;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

26. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(2) of the *Sexual offences Act* No 3 of 2006 is the minimum sentence and from recent jurisprudence minimum or maximum mandatory sentences are unconstitutional as the Appellant/Accused person is deprived of fair trial, the Trial Court in Pre – Sentence proceedings is curtailed from considering mitigation of the Accused person before Sentence. Although the sentence is within the law, I find that taking into account recent pronouncements of sentencing, the Appellant repeatedly sexually assaulted the Complainant who sought refuge from him as her father’s friend. The sentence was within the law.

### **Disposition**

27. Having considered the facts in this case, I agree with the trial magistrate in finding the accused guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 Of 2006 and uphold the conviction
28. This appeal therefore wholly fails.

**DELIVERED SIGNED DATED IN OPEN COURT ON 27/5/2024 JUDGMENT IN OPEN COURT MACHAKOS HIGH COURT (VIRTUALLY/PHYSICALLY)**

**M.W.MUIGAI**

**JUDGE**

