Tom v Republic (Criminal Appeal E002 of 2021)
[2024] KEHC 16200 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E002 OF 2021

WM MUSYOKA, J

DECEMBER 19, 2024

BETWEEN

GEOFFREY ANDEFU TOM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. PA Olengo, Principal Magistrate, PM, in Busia CMCSOC No. 95 of 2016, of 22nd December 2020)

JUDGMENT

1. The appellant, George Andefu Tom, had been charged before the primary court, of the offence of defilement, contrary to section 8(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 25th March 2021 within Busia County, he intentionally caused his penis to penetrate the vagina of BA, a child aged 3½ years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.

2. PW1, BA, was the complainant. She narrated how the appellant defiled her, by putting his "dudu" into her private part. PW2, RAG, was the grandmother of PW1. She had left PW1, at her home, with the appellant, and others, as she went for a funeral. Her daughter-in-law, AAO, PW3, came to the place where the funeral was, and reported that PW1 had been defiled by the appellant. She found PW1 naked, with milky substances on her body. She reported to the authorities, after which the child was taken to the police and hospital. PW3, AAO, was within the compound, with PW1, the appellant and another minor, when she heard PW1 call out, and then she heard the appellant urge PW1 to keep quiet, as he would give her a sweet. She asked the appellant to open the door, which he did, and he came out of the house of PW2, with his trousers lowered, and he ran away. She found PW1 with sperms on her laps. She then went out to call PW2.

3. PW4, Machogo Nyabicha, was the clinical officer, who attended to PW1, who had been brought to him with a history of defilement. She had injuries to the vulva. On examination, he noted a laceration on the labia and vaginal walls, which were swollen and tender. A foul smelling whitish discharge oozed from her vagina. PW5 No. 55018, Police Constable Ann Wasike, received the report of the defilement, from PW4, and escorted PW1 to medical facilities. She also escorted the appellant to the same facilities.

4. The appellant was put on his defence, vide a ruling that was delivered on 24th October 2019. He made an unsworn statement, on 10th December 2019. He denied the charges. He claimed that it was a frame-up.

5. The trial was partly conducted by Hon. GN Wakahiu, Chief Magistrate, and partly by Hon. SO Temu, Principal Magistrate. The judgment was delivered by Hon. Olengo, Senior Principal Magistrate, on 24th November 2020. The appellant was found guilty, as all the elements of the offence had been positively proved. He was sentenced, on 22nd December 2020, to serve 20 years imprisonment.

6. The appellant was aggrieved, and brought the instant appeal, revolving around the medical evidence being insufficient to link him to the offence charged; the investigations being shoddy; and the disregard of mild contradictions. More grounds were added in the written submissions, being around the charge being defective; and the trial being unfair.

7. The appeal was canvassed, by way of written submissions, based on directions that had been given on 6th May 2024. I have seen submissions by the both sides, and I have read through them, and taken note of the arguments made.

8. The appellant submits on 4 grounds: defectiveness of the charges, unfairness of the trial; the medical evidence not linking him to the offence; and the evidence being contradictory, inadequate and doubtful.

9. On the defectiveness of the charge, his complaint is that the charge was founded only on subsection (2) of section 8 of the *Sexual Offences Act*, and omitted subsection (1). He avers that the charge should have read: "defilement contrary to section 8(1), as read with section 8(2) of the *Sexual Offences Act*." He cites Sigalan vs. Republic [2004] 2 KLR, in that regard. On unfairness of the trial, he cites Article 50(2)(g)(h) of *the Constitution* of Kenya and Njuguna vs. Republic [2007] 2 EA 370, to argue that his rights to fair trial, with regard to the right to legal representation of his own choice, or at State expense, were contravened. On the medical evidence not linking him to the offence, he argues from the standpoint that the prosecution is obliged to prove the charge beyond reasonable doubt. He cites Fredrick Wadia Masanju vs. Republic [2014] eKLR [2014] KEHC 7316 (KLR) (JV Juma, J)) and Philip Muiruri Ndaruga vs. Republic [2016] eKLR (Mativo, J). On contradictions, he points at instances in the testimonies of PW1, PW2 and PW3. On the medical evidence being doubtful, he points to the fact that PW1 was allegedly taken to Lwanya Hospital, while PW4 was based at Khanyanga Hospital and was at Busia at the material time, and that the documents put in evidence were from Nasewa Health Centre. He cites Dinherrai Ramkrishne Padya vs. Republic App. No. 106 of 1990 EA CA 93, Richard Aspella vs. Republic App. No. 45 of 1981 and Joseph Onyango Deny vs. Republic Mombasa App. No. 177 of 2001.

10. The respondent submits on 3 issues: whether the medical report corroborated the charge, whether the findings by the court contradicted the prosecution testimonies and shoddy investigations, and whether the sentence was harsh and degrading.

11. On the medical evidence, the respondent cites AML vs. Republic [2012] eKLR [2012] KEHC 2554 (KLR)(JV Juma, J), where it was stated that rape and defilement can be proved by way of oral evidence

and circumstantial evidence, and not necessarily by medical evidence. It is asserted that the medical examination, of PW1, happened within 24 hours of the incident, and Ekarot vs. Republic [2024] KEHC 4100 (KLR)(Musyoka, J), is cited. On contradictions and shoddy investigations, Munene vs. Republic [2018] eKLR [2018] KECA 186 (KLR) (Ouko, Sichale & Kantai, JJA) is cited, for the point that not every contradiction is fatal to the prosecution case, it has to be established that the same was substantial and fundamental to the main issues. On sentence, it is submitted that under section 8 of the *Sexual Offences Act*, upon conviction, the appellant was available to be sentenced to life in prison. CMM vs. Republic [2022] eKLR [2022] KEHC 2415 (KLR) (Onyiego, J) is cited, for the point that the appellant was lucky to escape life imprisonment, which is the sentence provided for the offence that he was charged with.

12. I will start by assessing the arguments made in the written submissions, and, after that, I will advert to any that are in the petition of appeal, which have not been submitted on.

13. The first issue is about the charge being defective. I note that the respondent has not submitted on it. The charge reads: "Defilement contrary to section 8(2) of the Sexual Offence Act." Section 8(2) does not define or create an offence, but prescribes the sentence, and it provides that "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." The practice is that an accused person is charged under both the provision creating the offence and that prescribing the punishment. Both provisions must be cited. Omission of 1 of them would make the charge defective. The offence of defilement is created under section 8(1), which provides that "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement." That provision was missing in the charge facing the appellant, and that made that charge defective.

14. To support his case, the appellant has cited Sigalan vs. Republic [2004] 2 KLR. There is no such decision in that law report, but I have come across Sigilai & another vs. Republic [2004] 2 KLR 480 (Kimaru, J), and I believe that that was what he had in mind, for it is on defective charges. It stated there that a court may not, on its own motion, decide that omissions made in a charge are remediable by taking judicial notice of them. It was also stated that an accused person ought to be charged with an offence under a charge that is known in law. The offence charged ought to be disclosed and stated in clear and in an unambiguous manner, to enable the accused person plead to a specific charge that he can understand.

15. The omission to indicate, in the charge sheet, the provision creating the offence is, no doubt, a defect. What should be of concern is whether the defect would be curable, or whether it would be fatal. The current legal thinking, over that kind of defect, is guided by Article 159(2) of *the Constitution*, that courts ought to eschew technicalities. In Joseph Mwamuye vs. Republic [2012] eKLR (Meoli, J), for example, held that the failure to insert section 8(1), in the charge sheet, in the statement of the offence, was not fatal. It was observed that all the essential elements of the charge under section 8(1) had been disclosed, in that case, and that that was sufficient. It was noted that fair trial principles had been observed, to the extent that the appellant, in that case, was charged with a recognised offence, and the proper plea taking procedure was followed. It was asserted that technicalities of procedure, for framing a charge, should not override substantive justice.

16. A similar approach was adopted in Amedi Omurunga vs. Republic [2012] KEHC 3874 (KLR)(Meoli, J), where the appellant had been charged under the punishment section, without reference being made to the provision creating the offence. The court was of the view that the irregularity did not imperil the appellant, nor occasion failure of justice. See also Mutinda Mwai Mutana vs. Republic [2011] KEHC 3174 (KLR) (Odero, J). It was observed, in Amedi Omurunga vs. Republic [2012] KEHC 3874 (KLR) (Meoli, J), that the appellant had a chance to raise the issue on trial, but he did not. In any case, he was

well aware of the charge against him and its particulars, and that he participated in the trial, and no miscarriage of justice was occasioned.

17. The courts have emphasised that the issue should be with sufficiency of the particulars, in terms of whether there is adequate disclosure of the case that the accused person faces. In Frank Ochieng Otieno vs. Republic Kisumu CACRA No. 363 of 2011 (unreported), it was said that it would be an issue of whether the irregularity would cause prejudice, and whether the defect in the charge was resolvable or curable under section 382 of the Criminal Procedure Code, which insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. In that case, the trial court noted that the appellant had not noticed the defect at trial, and, if he did, he did not complain about it.

18. In Alexander Likoye Malika vs. Republic [2015] eKLR [2015] KECA 764 (KLR)(Maraga, Mwera & Kantai, JJA), the defect was the narrative in the charge sheet not being aligned to the exact wording of the section creating the charge, and the court was of the view that the narrative was sufficient, as it did not lead to a situation where the appellant did not understand the charge. In Robert Mutungi Muumbi vs. Republic [2015] KECA 584 (Makhandia, Ouko & M'Inoti, JJA), the court emphasised that defects in the charge may be overlooked, so long as there was sufficiency of the particularity of the charge. It was observed, for the purposes of that case, that the offence had been disclosed, the particulars of the offence had been given, where the offence was alleged to have had been committed had been disclosed, and so were the name and age of the victim. It was held that that was sufficient, for concluding that the appellant and his counsel were well aware of the charge that he confronted.

19. So, what is the case here? As noted above, the omission to cite the provision creating the offence was a defect in the charge. However, that omission was not fatal. Firstly, the offence that the appellant faced was disclosed, as defilement. Secondly, the citation of section 8(2) was a pointer that the victim was a minor of tender years. Thirdly, the particulars of the charge were clearly set out, in terms of when and where the offence was allegedly committed, and the name and age of the victim. The particulars spelt out were sufficient, to disclose the case that confronted the appellant, for him to understand it, for the purposes of preparing his defence. The omission, to cite the provision creating the offence, was not fatal, and the proceedings conducted by the trial court could not be vitiated on that account.

20. The second issue, flagged by the appellant, relates to unfairness of the trial, in terms of non-compliance with Article 50(2)(g)(h) of *the Constitution* of Kenya. Article 50 of *the Constitution* carries fair trial principles, which Kenyan courts are required to observe, particularly in criminal cases. The non-compliance, the appellant points at, relates to failure to inform him of his right to legal representation, where he is entitled to choose an Advocate of his own choice, and, where he is financially handicapped, an Advocate to be availed to him at State expense.

21. The charge that the appellant faced was very serious, in the sense that it exposed him to a harsh sentence, were he to be convicted, and that is life in prison. He, however, got away with a light sentence, given the charge he faced, 20 years in prison, which is still a considerable period of time to be denied the liberty or freedom of movement. Not much was disclosed about his background, but it would appear that he is an ordinary citizen, of probably modest education. The constitutional safeguards for a fair trial, in Article 50(2), were meant to protect such individuals, who found themselves facing very serious charges, so that the trial court would go out of its way, to ensure that he received a fair trial, and so that he did not find himself at sea, in complex proceedings that were strange to him, and which he was expected to navigate comfortably. Given the gravity of the charges, and the constitutional demands that *the Constitution* has placed on the courts, there is a duty for the court to ensure that it scrupulously records the proceedings, with an eye to documenting compliance with Article 50(2).

22. I have stated in other cases, similar to this one, that the paradigm has shifted, with respect to the way the plea-taking exercise is carried out. The promulgation of *the Constitution* of Kenya, in 2010, meant that the trial courts had to change the way the exercise is conducted, to ensure that the record reflects clearly that the constitutional prescriptions were complied with. That is the only way of keeping track of compliance with *the Constitution*, so far as Article 50(2) is concerned. In the absence of a clear record, indicating compliance, except for what appears on the face of it, such as cross-examination, it would be safe to assume that there was no compliance.

23. Article 2 of *the Constitution* makes *the Constitution* the supreme law in Kenya. All other laws, and the processes founded on them, are subordinate to it, and draw their legitimacy from it. The provisions and prescriptions of *the Constitution* cannot be subordinated to the other laws and processes. What *the Constitution* commands ought to be complied with, otherwise, by dint of Article 2(4) thereof, any act, which is tainted by non-compliance, would be invalid and a nullity. That would include a trial where the prescriptions in Article 50(2) are either not honoured, or are taken for granted. The result would be that there was no fair trial, for *the Constitution* would not have been complied with, and the said trial would be invalid and a nullity, and should be vitiated.

24. The right to legal representation is stated in Article 50(2)(g)(h) of *the Constitution* and section 43 of the *Legal Aid Act*, Cap 16A, Laws of Kenya. Article 50(2)(g) is about the right to choose and to be represented by an Advocate, and to be informed of the right promptly. Ideally, the proper time to be informed of the right to choose an Advocate of one's choice, to conduct the defence, should be before plea is taken, for the advice by the Advocate would be critical, on how the accused person is to plead. *The Constitution* places a duty on the trial court to inform the accused person of this right to legal representation of his choice at the trial, and to do so promptly. Failure to comply with this prerequisite, would render the trial unfair. It is a constitutional command, and the trial court is bound to comply. The record before me indicates that the right of the appellant, to be represented in the proceedings, by an Advocate of his own choice, was not raised, by the trial court, the duty bearer, under Article 50 of *the Constitution*, at any stage of the proceedings. It did not come up at the arraignment on 14th October 2016, and it did not arise thereafter. The trial court did not comply with Article 50(2)(g) of *the Constitution*, and the trial of the appellant was unfair to that extent.

25. Article 50(h) is about the right to have an Advocate assigned to the accused person, by the State and at State expense, if substantial injustice would otherwise result. This right, like that under Article 50(2)(g), should be communicated promptly to the accused. With regard to when the right ought to be communicated, ideally, it ought to be at the time of arraignment, particularly before plea is taken, so that the accused can benefit from legal advice on how to plead to the charge. In this case, the trial court did not inform the appellant of this right at arraignment, neither was it adverted to thereafter. The duty is imposed by *the Constitution*, on trial courts, and the omission to inform the appellant of this right rendered the trial unfair.

26. Would substantial injustice have occurred in this case, to require an Advocate being allocated to the appellant by the State and at State expense? At the time the appellant herein was being arraigned in court, on 14th October 2016, he was exposed to being sentenced, upon conviction, to life imprisonment. That would be a considerably lengthy time to spend in prison. Exposure to such sentence would require that an accused person be subjected to a trial where there is a vigorous scrutiny of the evidence being adduced, and strict observance of the rules of procedure.

27. The object of the *Legal Aid Act* is stated in the preamble, to be "An Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of *the Constitution* to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and

for connected purposes." So, the *Legal Aid Act* is meant to operationalize Article 50(2)(g)(h) of *the Constitution*. Article 50(2)(g)(h) of *the Constitution* and the *Legal Aid Act* are about access to justice, by providing legal aid services to indigent persons in Kenya. It is about inclusion, non-discrimination and protection of marginalized groups, according to sections 3 and 4 of the *Legal Aid Act*. Section 43 of the *Legal Aid Act* imposes duties on the court, before whom an unrepresented person is presented, to comply with Article 50(2)(g)(h) of *the Constitution*, by informing that person of his right to legal representation of his own choice; and where substantial injustice is likely to arise, to inform him of his right to be assigned an Advocate by the State; and where the accused requires legal aid, or is found to require such aid, to inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the *Legal Aid Act*, that in determining whether substantial injustice is likely to occur, the court ought to take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend himself.

28. Informing an accused person of their rights, under Article 50(2)(g)(h) of *the Constitution*, and assessing whether the accused person requires legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. It should be noted that the rights under the *Legal Aid Act* should even be invoked right after the arrest of the suspects, and before their presentation in court, because the *Legal Aid Act* also operationalizes Article 49 of *the Constitution*, on the rights of an arrested person, as section 42 of the Act provides for a person in lawful custody, and casts a duty on the officer in charge of the custodial facility, where the person is held, to inform the person of availability of legal aid, and to facilitate applications by a person who may wish to access such legal aid. These rights are constitutional imperatives, commanded by *the Constitution*. Trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for non-compliance with *the Constitution*.

29. Were these constitutional fair trial prerequisites applicable in this case? The offence, the subject of these proceedings, was allegedly committed in 2016. *The Constitution* of Kenya, 2010, commenced on 27th August 2010. It would mean that, as at 2016, when the appellant was being arraigned in court, *the Constitution* 2010 was in application, and the court, before whom he was produced, was bound by Article 50(2)(g)(h) of *the Constitution*. The said court was obliged to comply with Article 50(2)(g)(h) of *the Constitution*, to inform the appellant of his right to legal representation of his own choice, and the right to legal aid from the State, in the event that he was indigent. Similarly, the *Legal Aid Act*, was in place, as it was operationalised on 30th May 2016, before the offence, the subject of that trial was allegedly committed on 12th October 2016, and the trial court was, therefore, bound to comply with it. The duty, on the court, was to assess whether the appellant was at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charge that he faced, and the sentence he was liable to be given, in the event of conviction. That was not done.

30. As the fair trial principles in Article 50(2)(g)(h) of *the Constitution* were not complied with, the appellant herein was subjected to an unfair trial. Article 2(4) of *the Constitution* provides for what happens whenever some act violates or contravenes *the Constitution*. It states that "... any act or omission in contravention of this Constitution is invalid." The omission or failure, herein, to comply with Article 50(2)(g)(h) of *the Constitution* amounted to a contravention of that provision, and of *the Constitution*, and rendered the entire trial invalid. The failure to comply with those provisions meant that the objectives of *the Constitution*, and of the Legal Act, which operationalises it, were not met, in terms of making justice accessible to all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

31. I am alive to the argument that the *Legal Aid Act* has not been fully operationalised, as the National Legal Aid Service has either not been set up, or it has not been fully funded to take on the role of providing legal aid to the indigent and the marginalised. That could be the case. However, the *Legal Aid Act* and the National Legal Aid Service are about operationalising Article 50(2)(g)(h) of *the Constitution*. *The Constitution* was promulgated in 2010, and it should be a shame that in 2024, some 14 years later, some of its Articles are yet to be made operational or effective. It would be more shameful that these Articles are meant to cushion the most vulnerable in society, and the failure to operationalise them would suggest lack of interest in the welfare of the marginalised, and contempt for social justice. That lack of operationalisation should not be an excuse for not demanding compliance with *the Constitution*. *The Constitution* spoke, in 2010, and the courts have no option but require total compliance with what it commands.

32. The discussion above clearly demonstrates that some of the constitutional fair trial rights were not honoured and upheld, in the trial the subject of this appeal, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. The omission to comply with *the Constitution* sounds a death knell for any trial, given that *the Constitution* is the supreme law in Kenya. Whatever it commands must be honoured and complied with. Constitutional provisions are not decorative. They have to be complied with. Failure to comply with them renders useless whatever the purported act. Article 2(4) of *the Constitution* renders invalid any act or omission which amounts to a non-compliance with provisions of *the Constitution*. The non-compliances that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted against the appellant in Busia CMCSOC No. 95 of 2016. That would mean that the outcome of those proceedings was invalid and a nullity.

33. The promulgation of *the Constitution* of Kenya, 2010, completely changed the configuration for plea taking, as I have indicated above. The paradigm shifted, which is something that courts, presiding over a plea taking exercise, should come to terms with. Previously, it was enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. Article 50 has added a host of other things, that the court taking plea, must do or observe. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or non-compliant with *the Constitution*. Bond is now available for all offences, to be denied only for compelling reasons. Advance disclosure of the case by the prosecution is now a constitutional requirement. *The Constitution* has done away with certain aspects of the presumption that everyone knows the law, and imposes a duty, on the court, presiding over plea-taking, to inform the accused of their legal rights, with respect to the right to be represented by an Advocate of their own choice, and, where the accused is indigent, to inform them of their right to an Advocate paid for by the State, where their case meets certain conditions. The plea taking exercise is now more loaded. The court has to go the extra mile, particularly in the more complex and serious offences, and assess whether the accused person, before it, is indigent or not, whether he or she has capacity to defend himself or not, or whether he needs an Advocate paid for by the State or not, and, if he does, set in motion the process for him getting such an Advocate.

34. The next issue, submitted upon by the appellant, is about the medical evidence not linking him to the offence. That argument is, no doubt, informed by section 36(1) of the *Sexual Offences Act*, which empowers the court to direct a person, charged with an offence under the Act, to provide samples for tests, including for deoxyribonucleic acid (DNA) testing, to establish linkage between the accused person and the offence. However, the courts, in a long line of cases, have held that that provision is not mandatory, and have stated the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved. The law provides, at section 124 of the

Evidence Act, Cap 80, Laws of Kenya, that defilement and rape are not to be proved only by medical evidence, and the testimonies of what transpired, from the victims, alone, without any corroborative evidence, would be adequate proof, if the trial court found the accounts truthful and reliable. In view of that, that ground would have no basis. See Robert Mutungi Muumbi vs. Republic [2015] KECA 584 (Makhandia, Ouko & M'Inoti, JJA), Hadson Ali Mwachongo vs. Republic [2016] KECA 521 (KLR)(Makhandia, Ouko & M'Inoti, JJA), Erick Onyango Ondeng' vs. Republic [2014] KECA 523 (KLR)(Githinji, Musinga & M'Inoti, JJA) and James Charo alias Kidero vs. Republic [2022] KECA 13 (KLR)(Musinga, Kairu & Kantai, JJA).

35. In George Kioji vs. Republic Nyeri CACRA No. 270 of 2012, the court stated, on that subject:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

36. The appellant submits next about the evidence being contradictory, inadequate and doubtful. I have gone through the record, and noted the inconsistencies alluded to by the appellant. They relate to the testimonies of PW2 and PW4. PW2 testified that she took PW1 to Lwanya Hospital, but they were advised to go to a private hospital. She did not indicate the private hospital that she went to, but she presented documents from Nasewa Health Centre. It is not clear whether that was the private hospital that she alluded to. Other than presenting those documents, she did not indicate whether or not PW1 was treated at that health centre. It would appear that that health centre was a public facility. PW4 produced the treatment notes from Nasewa Health Centre that PW2 had presented. Yet, he, PW4, testified that PW1 was presented at Khunyangu Hospital, where he worked, for examination, treatment and P3 filling. PW2 did not mention Khunyangu Hospital. So, which was which? Where was PW1 actually treated? Where was PW4 working, Nasewa Health Centre or Khunyangu Hospital? Was he even the maker of any of the documents that he produced? In view of such inconsistencies, how much weight should have been given to these medical records?

37. The Criminal Procedure Code has not dealt directly with the question of inconsistencies and contradictions, but the courts have interpreted section 382 thereof, to say that whether inconsistencies or contradictions are to affect the decision will depend on whether they are so fundamental as to cause prejudice to the appellant, or they are so inconsequential as to have no effect to the conviction and sentence. In Joseph Maina Mwangi vs. Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), it was said :

> " 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."

38. Similar sentiments were expressed in Twehangane Alfred vs. Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ. Engwau and Byamugisha, JJA) where it was said:

> "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."

39. And in Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007(unreported), 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 minor, or whether they go to the root of the matter."

40. It was said in John Cancio De SA vs. VN Amin [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ and Lucie-Smith Ag CJ):

> "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."

41. And in Philip Nzaka Watu vs. Republic [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) , it was said that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether

discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

42. The inconsistencies between the testimonies of PW2 and PW4, with relation to the medical facility where PW1 was examined and treated, and the documents that both referred to in their testimonies, to my mind, should have raised concerns in the mind of the trial court. The court was handling a criminal matter, where the standard of proof was beyond reasonable doubt, and in respect of a charge that exposed the appellant to a long period of time in jail. There was a duty to closely examine the testimonies given by the witnesses, and the documents relied on. A doubt should have arisen, on the credibility of the medical evidence. The documents placed on record were not aligned to the medical facilities allegedly visited by PW1 and PW2, and where PW4 alleged he worked. Of course, that may not mean much, in view of the discussions above, around section 36 of the *Sexual Offences Act* and section 124 of the *Evidence Act*, and the decisions in Robert Mutungi Muumbi vs. Republic [2015] KECA 584 (Makhandia, Ouko & M'Inoti, JJA), Hadson Ali Mwachongo vs. Republic [2016] KECA 521 (KLR)(Makhandia, Ouko & M'Inoti, JJA), Erick Onyango Ondeng' vs. Republic [2014] KECA 523 (KLR)(Githinji, Musinga & M'Inoti, JJA) and James Charo alias Kidero vs. Republic [2022] KECA 13 (KLR)(Musinga, Kairu & Kantai, JJA). However, it should have an impact on the overall credibility of the evidence tendered, and the manner the case was generally handled.

43. The respondent submits on some of the issues raised by the appellant in his written submissions, which I have disposed of above. However, there are 2 issues that the appellant has not addressed, which the respondent has addressed.

44. One is on the investigations being shoddy. I have said previously, and I will say it again here, that I do not think that it is the role of the court to audit how investigations in a criminal case it handles were conducted or handled. The court is mainly concerned with the prosecution, with the material placed on record by the prosecution, by way of the testimonies by the witnesses, the documents they produce, and the exhibits that they might produce. Whether the detectives and investigators did a good or shoddy job, of the investigations, would be neither here nor there. A trial cannot be vitiated on account of shoddy investigations. What matters would be the weight of the evidence presented by the prosecution, whether or not it was gathered through shoddy investigations.

45. The other issue is around the sentence. I do not quite understand why the respondent has raised it, as the appellant did not raise it, neither in his petition of appeal, nor in his written submissions. Anyhow, I shall have to address it, now that the respondent has raised to it.

46. A conviction, for defilement of a minor of 3 years, attracts a mandatory sentence of life imprisonment, according to section 8(2) of the *Sexual Offences Act*. Mandatory and minimum sentences for sexual offences were declared unconstitutional, in Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J). However, these 2 decisions are no longer good law. The Supreme Court has pronounced itself on them, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where it was declared that the minimum mandatory sentences, provided by certain laws, remain lawful and constitutional. I am not sure where the trial court was influenced by Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), to hand down the sentence that it did, but, going by section 8(2) of the *Sexual Offences Act*, the appellant should have been sentenced to life imprisonment. The respondent has not cross-appealed, and has not even invited me to consider interfering with the sentence imposed.

47. In view of everything, that I have discussed above, it is my conclusion that the appeal herein is merited. I shall proceed on the basis the trial was unfair to the appellant, as certain constitutional demands were not met, in terms of the trial court failing to do that which *the Constitution* demanded of it. That would mean that there was a mistrial. I hereby declare one, and order a retrial. I, consequently, quash the conviction of the appellant, in Busia CMCSOC No. 95 of 2016, on 24th November 2020, and set aside the sentence that was imposed on him, on 22nd December 2020. He shall be set free from prison custody, and handed over to the police, for the purpose of being presented before the Chief Magistrate's Court, at Busia, for the retrial. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 19TH DAY OF DECEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. George Andefu Tom, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.