



**WK (Father and Next Friend to the Minor Complainant ACB) v TKY & another (Criminal Revision E148 of 2024) [2025] KEHC 1578 (KLR) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1578 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL REVISION E148 OF 2024  
RE ABURILI, J  
FEBRUARY 4, 2025**

**BETWEEN**

**WK ..... APPLICANT  
FATHER AND NEXT FRIEND TO THE MINOR COMPLAINANT ACB**

**AND**

**TKY ..... 1<sup>ST</sup> RESPONDENT  
OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

*(Revision application arising from the ruling and order in Tamu Senior Principal Magistrate’s Court Sexual Offences Case No. E007 of 2024 delivered on 28th October, 2024 by Hon M. Olonyi, Resident Magistrate)*

**High Court in the capacity of a review court sets aside age assessment done by the Magistrates Court that was obtained via presentation of a fake birth certificate**

*The accused owing to a fraudulent birth certificate and an age assessment report from a clinical officer that relied on the fraudulent certificate was age assessed as below the age of 18 years old in a defilement charge. Aggrieved the complainants father filed for review with evidence from the school of the accused, and a radiologist. On review the High Court set out the circumstances in which it could review decisions from the Magistrates Court. The impugned ruling of the Resident Magistrate at Tamu in Tamu SPM SO Case No E007/2024 made on October 28, 2024 allowing the accused persons’ plea of juvenility was reviewed and set aside.*

Reported by John Ribia

**Criminal Procedure Law** – proof of age - age assessment – age assessment of an accused person – where the accused was charged of defilement – where the accused had successfully pleaded juvenility at the trial court – where on review the legality of the birth certificate used in age assessment was contested - uncertainty of the accused’s age - whether age assessment of an accused person in a defilement case that was obtained via a birth certificate that was forged could be deemed to be valid - whether the court could rely on documentary evidence such as school records



or reports from the accused's school to determine age – Criminal Procedure Code (cap 75) sections 362, 363, and 364; Sexual Offences Act (cap 63A) section 8(1) and (4); Victim Protection Act (cap 79A) section 4(2), and 9(3).

**Law of Evidence** – expert witness – age assessment – clinical officer's age assessment report vis-à-vis the report of a diagnostic radiologist – where there was evidence that the birth certificate was fabricated - whether the age assessment report of a clinical officer that determined that accused person was under the age of 18 years old could be deemed to be valid in the face of evidence from a diagnostic radiologist that determined by use of an x-ray of the wrist joints of the accused person, he was certainly above 18 years old - Criminal Procedure Code (cap 75) sections 362, 363, and 364.

### **Brief facts**

The proceedings of the Magistrates Court indicated that an application was made by the defense for the accused person to be treated as a minor on account of the birth certificate entry number 062xxxxxxx allegedly issued to the accused on January 24, 2018 by the District Registrar of Births, Nyando, showing that the accused was born on April 5, 2007, as well as the age assessment report made by the clinical officer as evidence of such minority or juvenility. The trial court allowed the application, after an age assessment was done on the accused person by the clinical officer which revealed that the accused person was approximately 17 years of age as at the date the alleged defilement took place. The trial court was persuaded that the birth certificate produced in court was sufficient proof of the age of the accused.

The complainant on the other hand was of a different view and asked the court to investigate the authenticity of both the birth certificate as produced for the accused and the age assessment report made by the clinical officer. The application for revision was filed by the father to the complainant in the trial court, seeking revision of the order of the trial court, seeking for the accused to be treated as an adult.

### **Issues**

- i. Under what circumstances would the High Court review a decision of the Magistrate's Court?
- ii. Whether age assessment of an accused person in a defilement case that was obtained via a birth certificate that was forged could be deemed to be valid.
- iii. Whether the age assessment report of a clinical officer that determined that the accused person was under the age of 18 years could be deemed to be valid in the face of evidence from a diagnostic radiologist that determined by use of an x-ray of the wrist joints of the accused person that he was above 18 years old.
- iv. Whether, in a defilement case where the court was uncertain about the accused's age, it could rely on documentary evidence such as school records or reports from the accused's school to determine their age.

### **Held**

1. The revisionary jurisdiction of the High Court was provided for under Article 165 (6) & (7) of the Constitution. The jurisdiction in criminal matters was expounded under sections 362 to 364 of the Criminal Procedure Code where the court had jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
2. In the interests of justice, the High court routinely exercises revision over subordinate courts. However, the revisionary supervisory jurisdiction of the court though similar to appeals, should not be confused with an appeal and neither was the jurisdiction and power to be construed to mean that the High Court could superintend over decisions of the subordinate courts. Revisionary power was special supervisory power vested in the High Court by sections 362 to 364 of the Criminal Procedure Code. It was different and distinct from judicial review jurisdiction where the latter was one of the remedies that the High Court had power to grant in the exercise of its jurisdiction under the Bill of Rights and the Fair Administrative Action Act.



3. There was no right of appeal from the decision of the Magistrate Court determining that the age of the accused had been established by production of the birth certificate hence the only remedy for the victim of the alleged offence was to invoke revisionary powers of the High Court. The law allowed a High Court Judge to exercise revisionary powers over a subordinate court to certify the correctness, legality, propriety or procedural confinements of the lower court's proceedings. The court had jurisdiction to revise the decision issued by the subordinate court in the Sexual Offences Case No E007 of 2024.
4. Section 364 of the Criminal Procedure Code empowered the court to exercise the revisionary powers under sections 354, 357 and 358 of the Criminal Procedure Code, as that of an appellate court when considering any revision application. The principles which would guide a court when applying section 362 included:
  1. where the decision was grossly erroneous;
  2. Where there was no compliance with the provisions of the law;
  3. Where the finding of fact affecting a decision was not based on evidence or it was a result of misleading or non-ready of the evidence on record;
  4. Where material evidence on the parties was not considered;
  5. Where judicial discretion was exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of a lesser offence.
5. Jurisdiction of the High Court on revision was to correct manifest irregularities and illegalities.
6. Even assuming that the accused was born on April 6, 2005 as per his statement of inquiry, which was annexed to his replying affidavit sworn by his father, from April 6, 2005 to June 2023 and September 2023, the period within which he was alleged to have defiled the complainant, he was already 18 years and 2 months old, such that by the time he was being examined for age assessment in August 2024 upon being arrested and charged in Court on April 18, 2024, he was over 19 years old.
7. The birth certificate produced by the accused person remained to be questionable as the particulars given, among other particulars were all fabrications and impositions. The accused and his father fabricated a birth certificate to hood wink the court, the prosecutor and his advocate into believing that he was a minor when he was not, for purposes of the sexual offence that he was accused of committing with a minor.
8. It was highly questionable that the age assessment presented by the clinical officer at the trial court was credible considering the evidence from the birth certificate. The age assessment report which was much hyped by the accused and the prosecution was no doubt inconsistent and contradictory with what the radiologist's report revealed that by the x-ray of the wrist joints of the accused person, he was certainly above 18 years old because all his wrists up to the hand level were fully fused.
9. The Clinical Officer testified on oath that she was not an expert in interpreting radiology reports but could only read them. She further stated that the report of the diagnostic radiologist remained to be credible over hers the clinical radiologist was more specialized than her in age assessment. The testimony and age assessment could not be relied upon to determine the age of the accused person and neither can the birth certificate produced in court by the accused which had been fabricated to reduce the age of the accused person to fit in the age of minority so that should he be found culpable of defilement, he would not face the mandatory prison term under section 8(4) of the Sexual Offences Act.
10. The accused's plea of juvenility had no substance. He was no doubt an adult as at the time of the alleged offence. The affidavit sworn by the accused person's father was equally full of falsehoods as far as the age of the accused was concerned and all these lamentations of violation of rights did not hold any water. No such rights were or are being violated by this Court carrying out a hearing as was espoused in the law to establish the truth, not the truth of the accused having committed the offence of defilement as charged, but whether by his production of fabricated documents in judicial proceedings, reducing his age from an adult to that of under 18 years, he was, in fact, obstructing justice for the



- victim complainant so that should the accused be found to have committed the offence, he would not be subjected to the penal consequences under section 8(4) of the Sexual Offences Act.
11. Criminal process was not all and only about the fair trial of the accused; there was also the interest of the complainant victim of the criminal offence. Section 4(2)(b) of the Victim Protection Act provided that every victim was, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her was taken. The victim of the alleged offence had rights too, rights which must be protected.
  12. The particulars in the birth certificate which the accused person alleged to be true could not be traced in the registers of births registered and produced in the court. That questioned the veracity of the birth certificate produced by the accused person. The same remained fabricated and hence could not be used as a credible document to show proof of age of the accused person neither could the age assessment report by the clinical officer be used.
  13. The documents extracted from the accused's school would have placed him at the age 22 as at the date when he allegedly committed the offence. Section 229 of the Children's Act provided for determination of a child's age in the marginal notes and provided that when the age of the child was uncertain the court could use documents such as baptismal certificates and school registration forms/reports or other information of a similar nature to determine the age. The report by the school that was not controverted was that the accused was a student at the school. The same school provided a report to show that the complainant was 16 years old when she was defiled.
  14. Where there was doubt regarding age of the accused person, it was the duty of the trial Magistrate to make further inquiries to establish the truth and not to conclude that there was a birth certificate proving age, when the credibility and genuineness of the birth certificate had been questioned. Section 229 of the Children's Act imposed the duty on the trial court to make such inquiries using the means stated. The trial court did not comply with the provisions of the law.

*Decision of trial court reviewed and set aside.*

### **Orders**

- i. *The impugned ruling of the Resident Magistrate at Tamu in Tamu SPM SO Case No E007/2024 made on October 28, 2024 allowing the accused persons' plea of juvenility was reviewed and set aside.*
- ii. *The order admitting the fabricated birth certificate entry No 0621xxxxxxx purportedly issued on July 27, 2024 at Nyando Civil Registration of Births and Deaths Office and filed by the accused in court as evidence of his age as well as the age assessment report dated August 2, 2024 done by Nancy Wendot, Kericho District Hospital and stamped by Kericho County Referral Hospital was revised and set aside and the said documents were hereby expunged from the court record on account of being fabrications.*
- iii. *The accused person herein TKY who pretended to be a minor was an adult and was an adult as at the time that he was alleged to have committed the offence of defilement against the complainant.*
- iv. *The accused person TKY, being an adult, was to be tried as an adult in the proceedings pending before the lower court.*
- v. *The birth certificate entry No 062xxxxxxx purportedly issued on July 27, 2024 at Nyando Civil registration of Births and Deaths Office was found to be a fabricated document with imposition of the accused person's name, his parents' names, a date of birth and date of issue, among other entries therein and could not be relied on by the court in determining the age of the accused TKY.*
- vi. *Directive issued that the Directorate of Criminal Investigations, Kisumu County to promptly investigate the circumstances under which the accused person TKY and his father SKM, the deponent of the affidavit sworn on November 24, 2024 in reply to the application for revision, obtained the fabricated birth certificate which they filed into court to hood wink the prosecution, the defence counsel and the court into believing that it was the birth certificate for TKY and should evidence of culpability be found, charge the two with relevant offences should it be found that they participated in the deceit, fabrication and swearing of the aforesaid false affidavit which was filed into this court, in defence of the fabricated birth certificate.*



- vii. *The case shall now be transferred from Tamu Law Courts to Nyando Law Courts for hearing and final determination by the Senior Principal Magistrate at Nyando. Accordingly, the pro bono advocate Mr. Nyameino was discharged on account that he came into the matter believing that the accused was a minor, to the contrary, and the accused person was at liberty to engage an advocate of his own choice at his cost or apply to the National Legal Aid Board to accord him an advocate for legal representation.*
- viii. *No orders of costs.*
- ix. *This file was to directly be transferred to Nyando Law Courts by the Deputy Registrar of the instant court with a copy of the judgment being served on the SPM's Courts at Tamu and Nyando Law Courts and the ODP regional Office at Kisumu respectively.*
- x. *The exhibits/ original registers of births produced in evidence in the instant court shall be securely returned to the Civil Registrar of Births at Nyando Sub County for safe keeping and shall be available to the DCI for investigation purposes.*
- xi. *File closed.*

## Citations

### Cases

#### Kenya

1. *Director of Public Prosecutions v Samuel Kimuchu Gichuru & another* Criminal Revision 926 of 2011; [2012] KEHC 5422 (KLR) - (Explained)
2. *Mukuru v Republic* Criminal Revision E149 of 2023; [2024] KEHC 3764 (KLR) - (Explained)
3. *Republic v Everlyne Wamuyu Ngumo* Criminal Case 138 of 2016; [2016] KEHC 3584 (KLR) - (Explained)
4. *Republic v Simon Wambugu Kimani & 20 others* Criminal Revision 1 of 2015; [2015] KEHC 5499 (KLR) - (Explained)
5. *Rutto, Wesley Kiptui & another v Republic* Criminal Revision 2 of 2017; [2017] KEHC 6909 (KLR) - (Explained)

#### India

1. *Parag Bhati v State of Uttar Pradesh* [2016] 12 SCC 744 - (Explained)
2. *Sanjeev Kumar Gupta v State of Uttar Pradesh* AIR 2019 SUPREME COURT 4364, 2019 (12) SCC 370, AIR ONLINE 2019 SC 2189, 2020 (1) ALJ 201, (2019) 10 SCALE 9, (2019) 2 ALD(CRL) 958, (2019) 3 ALLCRIR 3097, (2019) 3 CRILR(RAJ) 1011, (2019) 3 MAD LJ(CRI) 538, (2019) 3 PAT LJ(R) 391, (2019) 3 RAJ LW 2046, (2019) 3 RECCRIR 918, (2019) 75 OCR 927, (2020) 110 ALLCRIC 366, (2020) 205 ALLINDCAS 73, AIR 2019 SC( CRI) 1607 - (Explained)
3. *XYZ v Abhisheik & another* Criminal Appeal Nos 1408-1409 of 2022 (Arising out of SLP(Cr) Nos 9992-9993 of 2016) - (Mentioned)

#### Malaysia

*Public Prosecutor v Muhari bin Mohd Jani and another* [1996] 4 LRC 728, 734-5 - (Explained)

### Texts

The Judiciary of Kenya (2018), *Criminal Procedure Bench Book* Nairobi: The Judiciary of Kenya

### Statutes

#### Kenya

1. Children Act (cap 141) section 229 (Interpreted)
2. Constitution article 50(2) (k); 157; 165(6), (7) - (Interpreted)
3. Counter-Trafficking In Persons Act (cap 61) In general - (Cited)
4. Criminal Procedure Code (cap 75) section 362, 363, 364 - (Interpreted)
5. Fair Administrative Action Act (cap 7L) In general - (Cited)
6. Narcotic Drugs And Psychotropic Substances (Control) Act (cap 245) In general- (Interpreted)



7. Prevention of Organised Crimes Act (cap 59) In general - (Cited)
8. Prevention of Terrorism Act (cap 59B) In general - (Cited)
9. Proceeds of Crime And Anti-Money Laundering Act (cap 59A) In general- (Cited)
10. Sexual Offences Act (cap 63A) section 8(1); 8(4) - (Interpreted)
11. Victim Protection Act (cap 79A) section 4(2); 9(3) - (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

### **Introduction**

1. In a Court of Justice, both the parties know the truth, it is the judge who is on trial. This statement makes me now understand why in criminal cases, the accused person must at all times be presumed innocent until proven guilty. Further, no person should ever be subjected to mob injustice or the court of public opinion as to their guilt, for, things aren't always what they look like.
2. The accused person alleged to be a minor is TKY, the 1st respondent herein. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on diverse dates between June 2023 and September, 2023 in Kipkelion Sub County within Kericho County, he intentionally caused his penis to penetrate the vagina of ACB a child aged 16 years. He also faced an alternative charge of committing an indecent act with the same minor, the complainant in the main charge by touching her buttocks, anus, breasts, and vagina.
3. The 1st respondent who was unrepresented took plea before the trial court at Tamu Law Courts on April 19, 2024 following his arrest on the previous day on April 18, 2024, according to the signed charge sheet dated April 19, 2024. He pleaded not guilty to the charge. The plea was taken before Hon MN Olonyi, Resident Magistrate
4. The 1st respondent was also granted surety bond of Kshs 200,000 and an order made for him to be supplied with witness statements and documents which the prosecution intended to rely on at the trial. He was also informed, quite promptly, of his right to legal representation upon which, hearing and mention dates were given.
5. On the first hearing date, the prosecutor was unable to proceed as she was overwhelmed with matters since her colleague who was new was attending an induction course. The 1st respondent who was still in remand asked for reduction of bond and the trial magistrate granted his request by reducing the surety bond from Kshs 200,000 to Kshs 100,000.
6. On May 27, 2024, the 1<sup>st</sup> respondent's bond was approved and he was released from custody, on bond pending trial.
7. When the matter came up for hearing on July 30, 2024, the 1st respondent did not appear and therein lies the beginning of the problem, leading up to the matter reaching this court by way of revision. A warrant of arrest was issued against him and a mention dated given for August 14, 2024. However, later at 1002? sic hours, as recorded by the trial court, the 1st respondent appeared with his advocate Mr Nyameino who was coming on record for the first time and the advocate addressed the court and stated that he had learnt that the accused was a minor and that he had a birth certificate for the accused, first issued on January 24, 2018. That he had a replacement of the birth certificate lost through arson.



- He requested the court to refer the accused whom he was calling a minor, for age assessment. Counsel submitted that the accused was aged 16 years and some months.
8. Ms Shimoli prosecution counsel then submitted that at registration, the accused had stated that he was aged 18 years. She nonetheless agreed that the accused be taken for age assessment to verify his age before the case could proceed for hearing. The accused person then said that he was born in April 2007.
  9. The trial court then directed that the accused be taken for age assessment at Kericho County Referral Hospital and his warrant of arrest was lifted. Mr Nyameino also prayed that the child subject of the alleged defilement be taken for DNA analysis with the accused to determine paternity and the order was made with the concurrence of Ms. Shimoli the Prosecution Counsel that the DNA be carried out at Kisumu Government Chemist.
  10. On September 2, 2024, the reports on age assessment and the paternity test results had been filed in court and counsel for the prosecution asked for a hearing date. Mr Nyameino told the court that the age assessment report showed that the accused was aged 17 years and that his age tallied with the birth certificate entry No 062xxxxxx and that the DNA was also positive on the paternity of the child subject of the defilement charge against the accused. He also asked to be appointed as a pro bono advocate and an order to that effect was made.
  11. On the subsequent date when the matter was due for hearing on September 30, 2024, Mr Gweth advocate came on record representing or watching brief for the complainant. He raised the issue of the age of the accused person as assessed and stated that they had another report from the same hospital where the accused was assessed, showing that he was below (sic) 18 years. This revelation, which must have been that the report showed the accused was above and not below 18 years, considering the submissions that followed, led to lengthy submissions by Mr Nyameino who submitted in protest saying that the issue of the accused person's age had been resolved when he moved the court on July 30, 2024. He submitted, quite heatedly that it appeared as if the accused's samples were taken without his consent after he was examined and a report on his age determined to be 17.
  12. Further, that the accused was a minor and therefore the offence though committed, both parties were minors. He prayed that the makers of the documents showing different age of the accused be called to be examined. Ms Shimoli prayed for summons to issue to both the Clinical Officer and the Radiologist who made the two contentious reports from the same Hospital, CO Nancy Wendot and Dr Nuru Mbarak respectively.
  13. The investigating Officer, Mr Simiyu then told the court that he took the accused to Kericho, went to the Clinical Officer Nancy who did the age assessment, scrutinized the results from the radiologists and issued a report which had been filed in court while the other report was brought later by the complainant's father and handed to the Investigating Officer. The court issued summons to the two medical personnel to appear in court who appeared virtually on October 9, 2024 but the court was engaged in a staff meeting hence they logged out.
  14. On the subsequent date which was on October 28, 2024, a different prosecution counsel, now Ms Langat appeared and it seems as if she had not been properly briefed by her colleague Ms Shimoli so she concluded that the accused was a minor according to the age assessment report filed in court, as at the time that he allegedly committed the offence. She asked the court to proceed with the hearing.
  15. Mr Nyameino counsel for the accused had no objection but this position taken by the prosecutor and the accused person's advocate shocked Mr Gweth counsel for the complainant. He submitted that where there was an issue raised on age of the accused, it had to be determined first, by the trial court before a hearing as required under section 229 of the *Children's Act* relating to matters children



in conflict with the law and the right to legal representation by the complainant. Further, that the complainant stood to be prejudiced if the accused was tried as a minor before his age was verified.

16. Ms Langat prosecution counsel maintained her stance and stated that she had powers to prosecute under article 157 of the *Constitution*, that she was competent and qualified to prosecute and was perturbed by the position taken by Mr Gweth in the matter.
17. Mr Nyameino for the 2<sup>nd</sup> respondent accused submitted that the filed birth certificate had not been disputed and that an age assessment had been done showing the accused was aged 17 years and the offence had been committed in March 2023, which fact the investigating officer had confirmed by stating that the accused was aged about 18 years at the time since he was not sure. Counsel submitted that the matter was an open and shut issue and that the child was conceived and born to two minors following what now appeared to be an admission on behalf of the accused that he indeed defiled the complainant only that his defence was that of being a minor as defined in law. (Plea of juvenility).
18. Mr Nyameino further submitted that Mr Gweth was not an investigator in the matter and that the case should proceed, his client having been at Kodiaga for 6 months and was not an adult and he could not raise bail. Counsel urged the court to protect both the accused and the complainant victim's rights.

### **The impugned ruling**

19. Vide a ruling delivered on the spot following the heated arguments by both counsel for the accused and the victim complainant as well as the prosecution counsel, the trial magistrate found that there was a birth certificate produced by the prosecution showing the age of the accused and that the age of the accused was not challenged by any other evidence to show that the birth certificate was procured fraudulently or that a mistake was made in the registration. Further, that in such cases where there is doubt, it should be resolved in favour of the accused person minor.
20. According to the trial court, no prejudice will be suffered by the complainant if the case proceeds with the accused being treated as a minor. Additionally, that the court appreciated the role of watching brief by counsel for the complainant but that that role does not supersede the prosecution's powers of the DPP. The trial magistrate therefore took judicial notice of the birth certificate provided to court and concluded that the subject was a minor and directed the case to proceed as such.
21. That ruling is what prompted the complainant through her father the applicant herein to approach this court by way of an application for revision, challenging the orders of the trial court to treat the accused as a minor on the basis of the birth certificate filed in the trial court, which birth certificate the complainant had raised issues with, in comparison with the two contradicting age assessment reports.
22. The application dated November 6, 2024 is brought under the provisions of sections 362 and 364 of the *Criminal Procedure Code* which grants the High Court powers to exercise revisionary powers in criminal matters pending or determined by the Magistrate's Courts. The application is further brought under the provisions of sections 4(2), 9(3) of the *Victims Protection Act* and articles 157, 165(6) and (7) of the *Constitution*.
23. The applicant seeks out this court to exercise supervisory jurisdiction of the court over subordinate courts, to call into this court, examine the proceedings and orders of the trial court made vide the impugned ruling, in order to satisfy itself and pronouncing itself as to the correctness, legality and propriety of the proceedings in question and the orders made on 28/10/2024.
24. The court is also urged to direct the prosecution counsel having the conduct of the case to produce all documents supplied to her by the investigating officer regarding the contradictions in the age of the accused including the radiology report dated August 2, 2024, 2020 KCPE Result Slip for [Particulars



Withheld] primary School, his School Selection Form and letter from [Particulars Withheld] Junior Secondary School dated June 19, 2024; that the court do vary and set aside the impugned orders and direct the two medical personnel who issued contradictory age assessment reports from Kericho County Referral Hospital, and who had been ordered to appear and testify in the case before the trial court on the question of age of the accused; and that the orders be varied and set aside and the authenticity of the birth certificate produced be verified by its maker.

25. The grounds upon which the application is predicated are set out on the face of the application and which I have essentially reproduced in the background in formation above and supported by the affidavit sworn by the applicant annexing the documents referred to in the body of this judgment. Of keen interest is that the accused and the victim used to school in the same institution, [Particulars Withheld] primary School and that while the victim was in JSS Grade 8 in 2024, the accused registered for KCPE in 2021 Index number 285xxxxxxx and his year of birth is stated as 20/12/2001 as shown by the letter certified by the Deputy Head Teacher of [Particulars Withheld] Primary School and [Particulars Withheld]Kapias Junior Secondary School.

### **Summary of evidence adduced in this court on the revision application**

26. When the matter was brought before me for directions inter partes, I found it necessary to first summon the Civil Registrar of Births and Deaths, where the controversial birth certificate was allegedly issued to appear in court and produce Registers of Births relating to the period when the accused was allegedly born and or was allegedly registered as having been born and the entries made in the Births Register. I also directed the two medical personnel from Kericho County Referral Hospital to appear in court and clarify on the two age assessment reports filed in court on the accused. The Assistant Civil Registrar of Births was also summoned to attend court after it emerged that the signature appearing on the birth certificate filed by the accused person in court was hers and they all testified on oath.
27. Four witnesses testified in court and produced exhibits in support of the application. The 1<sup>st</sup> respondent relied on the affidavit sworn by his father. The evidence was as follows:
28. PW1, Victor Ochieng Omollo, the Sub- County Civil Registrar of Births and Deaths of Nyando testified that the entry number in the birth certificate produced by the accused person 062xxxxxxx belonged to another person, a minor, by the name Victor Omondi Simbiri, who was born in the year 2006, which was issued to him on February 23, 2018. He produced B1, the Birth Register which is used by their office to identify one's birth in the Register. He stated that there could not be more than one entry number issued by the same office and hence concluded that the birth certificate filed in the trial court by the accused person was probably forged.
29. Upon being recalled, the Sub- County Civil Registrar testified and produced the originals of the birth registers for January 24, 2018, having 199 entries, and the 3 birth volumes containing 250 entries between April and May 2007 and the period between December 2001 and January 2002 but all did not have the name of the person of Thomas Kiplimo Yego, the 1<sup>st</sup> respondent alleged minor herein.
30. PW2, Nancy Wendot, a Senior Clinical Officer at Kericho District Hospital testified that she conducted the age assessment of the accused person on August 2, 2024 based on the court order which revealed that the accused person was approximately 17 years old. She stated that the accused person's wrist joints bones were borderline while that of an ideal adult were supposed to be fused. On cross examination, she stated that she was not specialized to interpret radiology reports but could only read them and that Dr Nuru, a radiologist was more specialized to give a report on the age assessment.
31. PW3, Dr Nuru Chebet Mbarak, a diagnostic radiologist with a Master's degree in radiology from the University of Nairobi and based at Kericho County Referral Hospital, with 13 years' experience



- testified that she conducted an age assessment on the accused person on August 2, 2024 after receiving requests of x-rays plus reports through the hospital portal system. She stated that she was sure that TKY was above the age of 18 years old and that his bones had been fully fused all the way from the fingers to the wrist area. She further stated that her report was the most accurate compared to the alternate report issued by the Clinical Officer from the District Hospital.
32. She stated that the report was uploaded by radiographers who are technicians for her as the expert to read and interpret the tele radiologist system which produced images of two wrists and long bones and that they assess the age using the non-dominant hand. She identified the copy of the report that she did on the accused. On being questioned by Mr Nyameino counsel for the accused, she stated that the reports are generated by system and that she did not physically interact with the accused or investigating officer.
  33. PW4, Beatrice Akoth Ochieng, the Assistant Civil Registrar, Civil Registration Services, Nyando testified that the counter application number of 6050 of December 28, 2023, in the birth certificate in question does not correspond to the particulars in the register of births, as produced, which reveals that it belongs to Vivian Atieno as the true applicant. Further, she stated that the birth certificate number produced by the accused person had a different counter application number with the date on which the birth certificate number was issued which was against their policy.
  34. The 1<sup>st</sup> respondent/ accused relied on the replying affidavit sworn by SKM, the father to the accused wherein he relied on the questioned birth certificate and age assessment report done by Nancy Wendot as proof of age of the accused and maintained that the minor was born on April 5, 2007.
  35. He also deposed that it was an intrusion into the privacy of a minor to conduct an age assessment on him by Dr Nuru without his consent hence the evidence was illegally obtained and that even the documents from school were intrusive of the minor hence contrary to article 50(2)(k) of the Constitution, and that the complainants were orchestrating a witch hunt of the accused and in the end, violate his rights. He annexed a statement under inquiry recorded by the accused to the investigators wherein he stated that he was aged 18 years old and on page 2 at the end, he stated that he was born on April 6, 2005.
  36. The deponent further raised concerns of how the accused was being exposed so much with intrusion including the production of his school selection records thereby violating his right to dignity, yet nothing about the complainant victim was being aired publicly. Further, that the sources of the documents is questionable and unknown and that the complainant cannot become the investigator, prosecutor and the jury in its own case. That the applicant seeks to exercise and usurp powers of the ODPP to independently prosecute the cases as stipulate in article 157 of the Constitution. Additionally, that the documents in question were not disclosed during pretrial.
  37. That the decision to choose what documents to rely on in a prosecution was solely in the discretion of the prosecution and that the applicant cannot challenge that decision except by way of judicial review, not the present veiled application.
  38. The deponent further contended that the police are the ones vested with the power to investigate and hand over to the prosecution for prosecution and that in this case, the investigating officer established that the accused was about 18 years old in 2024 since the alleged offence occurred in 2023 when the accused was aged 17 years as per the statement under inquiry annexed.
  39. That although this court has power to call for the record and examine it, it should protect the dignity of the offender and ensure expedition in the hearing and determination.



40. Finally, it was deposed that the application dated November 8, 2024 is bad in law, an affront to the rights of the minor offender hence it should be dismissed with costs.

### **Analysis and Determination**

41. I have considered the application and the oral and affidavit as well as the documentary evidence adduced by both sides, the applicant/ complainant and the 1<sup>st</sup> respondent/accused in the lower court with each being represented by their respective fathers and advocates. The following two main issues flow for determination, from the evidence:
- i. Whether the court has jurisdiction to hear this revision matter;
  - ii. Whether the ruling of the magistrate's court should be revised by this court and if so, on what terms.

### **Whether the Court has jurisdiction to hear this matter**

42. The revisionary jurisdiction of the High Court is provided for under article 165(6) & (7) of the Constitution of Kenya 2010. The article stipulates:
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
43. The said jurisdiction in criminal matters is expounded under sections 362-364 of the Criminal Procedure Code where the court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
44. In R v Simon Wambugu Kimani & 20 others, High Court at Garissa, Criminal Revision 1 of 2015, it was held that it is in the interests of justice that the High court routinely exercises revision over subordinate courts.
45. However, the revisionary supervisory jurisdiction of this court though similar to appeals, should not be confused with an appeal and neither is the jurisdiction and power to be construed to mean that this court can superintend over decisions of the subordinate courts. Revisionary power is special supervisory power vested in this court by sections 362 to 364 of the Criminal Procedure Code, it is different and distinct from judicial review jurisdiction which latter is one of the remedies that this court has power to grant in the exercise of its jurisdiction under the Bill of Rights and the Fair Administrative Action Act.
46. In Wesley Kiptui Rutto & another v DPP, Kabarnet KBT HCCr Revision No 2 of 2017, the learned Judge, Mureithi J dealt with the question of scope of revision powers of the court, and held as follows:

“The power of revision

Sections 362 and 364 of the Criminal Procedure Code provide as follows:

“362. Power of High Court to call for records



The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

363. ...

364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296(2) of the Panel Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.



- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”
47. In *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR, Bwonwonga, J applying section 364(5) of the *Criminal Procedure Code* revised an order for the release of a motor vehicle which the Director of Public Prosecutions (DPP) claimed was an exhibit in the case holding that the DPP had no right of appeal from such an order and it was, therefore, revisable in accordance with section 362 of the *Criminal Procedure Code*.
48. In this case, there is no right of appeal from the decision of the trial Magistrate determining that the age of the accused had been established by production of the birth certificate hence the only remedy for the victim of the alleged offence is to invoke revisionary powers of this court.
49. In *Director of Public Prosecutions v Samuel Kimuchu & another* [2012] eKLR Odunga, J stated that the revisionary power exists in interlocutory and final orders and held that-
- “From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or in any other order. Accordingly, I join Ochieng, J in *Livingstone Maina Ngare’s* case (*supra*) in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety.”
50. In the Malaysian case of *Public Prosecutor v Muhari bin Mohd Jani and another* [1996] 4 LRC 728, 734-5 cited in *DPP v Samuel Kimuchu, supra*, that –
- “The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.... If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion.... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.
51. The application for revision was filed by WK the father to the complainant in the trial court, seeking to revision of the order of the learned trial Magistrate, to the effect that the accused person, Thomas Kiplimo Yego be deemed a minor in the hearing and determination of the primary suit SO Case No E007 of 2024 in line with the Birth Certificate which had been produced before the court and in directing that the matter shall proceed against the accused person as a minor, in view of the said birth Certificate.



52. As stated above, in *extenso*, the law allows a High Court Judge to exercise revisionary powers over a subordinate court to certify the correctness, legality, propriety or procedural confinements of the lower court's proceedings. It is therefore clear that this court has jurisdiction to revise the decision issued by the subordinate court in the sexual offences case No E007 of 2024.

### **Whether the ruling of the subordinate court should be revised**

53. As earlier stated, article 165(6) & (7) of the *Constitution* as read with section 364 of the *Criminal Procedure Code* empowers the court to exercise the revisionary powers under sections 354, 357 and 358 of the *Criminal Procedure Code*, as that of an appellate court when considering any revision application. The same includes the discretion to examine the record of the lower court on its own motion or decide to hear the parties.
54. In *Mukuru v Republic* (Criminal Revision E149 of 2023) [2024] KEHC 3764 (KLR) (18 April 2024) (Ruling) LW Gitari J stated as follows and I agree:

“This supervisory jurisdiction is expounded unclear section 362 and 364 of the *Criminal Procedure Code*, (*supra*). In a persuasive decision by Justice Odunga (as he then was) in *Joseph Nduvi Mbuvi v Republic* (2019) eKLR, the Judge stated:-

“In my considered view the object of revisional jurisdiction of the High Court is to enable the High Court in appropriate cases whether during the pendency of the proceedings in the sub-ordinate courts or at the conclusion of the proceeding to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing should be proceeded with. In other words, the High Court revisionary jurisdiction includes ensuring that where the proceedings in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

It has also been held that the principle which will guide a sub-ordinate Court when applying section 362 (*supra*) include-

- a. Where the decision is grossly erroneous
- b. Where there is no compliance with the provisions of the law.
- c. Where the finding of fact affecting a decision is not based on evidence or it is a result of misleading or non-ready of the evidence on record.
- d. Where material evidence on the parties is not considered
- e. Where judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of a lesser offence see *Prosecutor v Stephen Lesinko* (2018) eKLR, Nyakundi J.

Thus, jurisdiction of the High Court on revision is to correct manifest irregularities and illegalities.”



55. A perusal of the proceedings of the lower court indicate that an application was made by the defense for the accused person to be treated as a minor on account of the Birth certificate entry number 062xxxxxxx allegedly issued to the accused herein on January 24, 2018 by the District Registrar of Births, Nyando, showing that the accused was born on April 5, 2007, as well as the age assessment report made by Nancy Wendot of Kericho District Hospital dated August 2, 2024 again at the request of the defence counsel, as evidence of such minority or juvenility. The trial court allowed the application, after an age assessment was done on the accused person by PW 2, Nancy Wendot, which revealed that the accused person was approximately 17 years of age as at August 2, 2024. The trial Magistrate was persuaded that the birth certificate produced in court was sufficient proof of the age of the accused. The complainant on the other hand was of a different view and asked the court to investigate the authenticity of both the birth certificate as produced for the accused and the age assessment report made by the Clinical Officer from Kericho District Hospital.
56. This court called for the trial court record in exercise of its supervisory jurisdiction under article 165(6) of the *Constitution* and it proceeded to hear and examine 4 witnesses who testified and produced evidence with regard to the said birth certificate which was produced by the accused person and two age assessment reports that were generated from the age assessment on the accused person. The Civil Registrar of Births and his Assistant produced birth registers covering all the period that the accused alleged that he was born as contained in the questioned Birth certificate, in the school register where he was a pupil in class 8 and in his statement under inquiry to the police during investigations into the alleged defilement of the complainant.
57. The testimony of PW1, the Nyando Sub- County Civil Registrar of births and deaths at Nyando Sub-County and his Deputy revealed that the entry number 062xxxxxxx on the birth certificate produced by the accused person belonged to another person, a minor by the name VOS. The said entry number in the alleged accused person's birth certificate after careful examination of all the birth registers between April and May 2007 when the accused is alleged to have been born and the period between December 2001 and January 2002 covering 20/12/2001, the date that the accused had given to his school as his date of birth annexed by the complainant's father, is an entry number on the register of birth for VOS who was born on August 2, 2006 and not the date of birth contained on the questioned birth certificate. That latter birth was registered on February 23, 2018 and not January 1, 2018, the date of registration on the questioned birth certificate produced by the accused.
58. Even assuming that the accused was born on April 6, 2005 as per his statement of inquiry, which was annexed to his replying affidavit sworn by his father, from April 6, 2005 to June 2023 and September 2023 the period within which he is alleged to have defiled the complainant, he was already 18 years and 2 months old, such that by the time he was being examined for age assessment in August 2024 upon being arrested and charged in court on April 4, 2024, he was over 19 years old.
59. In consideration of the above clear evidence, the birth certificate produced by the accused person remains to be questionable as the particulars in it being his name, date of birth, his parents' names, date of registration and CA No 650/XXXXXXXXXX as given, among other particulars therein are all fabrications and impositions.
60. My conclusion therefore is that the accused and his father fabricated a birth certificate to hood wink the court, the prosecutor and his advocate into believing that he was a minor when he is not, for purposes of the Sexual offence that he was accused of committing with a minor.
61. Therefore, despite the age assessment report of PW2, Nancy Wendot revealing that the accused person was approximately 17 years old in 2024 August meaning he was about 16 years old when he allegedly committed the offence in June 2023, the birth certificate that the accused produce din court betrays



- him. More so, from the evidence of Dr Nuru, the diagnostic radiologist, it is highly doubtful that the age assessment report done by Ms Nancy Wendot is credible.
62. That age assessment report which was much hyped by the accused and the prosecution was no doubt inconsistent and contradictory with what the radiologist's report reveals i.e. that by the x-ray of the wrist joints of the accused person, he was certainly above 18 years old because all his wrists up to the hand level were fully fused.
63. The Clinical Officer, Ms Wendot further testified on oath that she was certainly not an expert in interpreting radiology reports but could only read them. She further stated that the report of Dr Nuru Mbarak remains to be credible over hers as Dr Nuru was more specialized than her in age assessment.
64. Based on the above testimony, it is certain that the testimony and age assessment done by Nancy Wendot cannot be relied upon to determine the age of the accused person and neither can the birth certificate produced in court by the accused, which I find, without hesitation, to have been fabricated to reduce the age of the accused person to fit in the age of minority so that should he be found culpable of defilement, he would not face the mandatory prison term under section 8(4) of the [Sexual Offences Act](#).
65. Therefore, although the accused person through his father pretended to call himself a minor and lamented of how his rights as a minor were being violated and how he was being embarrassed and his dignity violated and or that his right under article 50(2)(k) of the [Constitution](#) were being violated, that plea of juvenility has no substance. He was no doubt an adult as at the time of the alleged offence.
66. It follows, therefore, that the affidavit sworn by the accused person's father is equally full of falsehoods as far as the age of the accused is concerned and all these lamentations of violation of rights do not hold any water. No such rights were or are being violated by this court carrying out a hearing as is espoused in the law cited above to establish the truth, not the truth of the accused having committed the offence of defilement as charged, but whether by his production of fabricated documents in judicial proceedings, reducing his age from an adult to that of under 18 years, he is, in fact, obstructing justice for the victim complainant so that should the accused be found to have committed the offence, he would not be subjected to the penal consequences under section 8(4) of the [Sexual Offences Act](#).
67. Criminal process is not all and only about the fair trial of the accused; there is also the interest of the complainant victim of the criminal offence as attested to the emerging judicial system of recognition of the victim's interest by such article 50(9) of the [Constitution](#) which empowers Parliament to enact legislation providing for the protection, rights and welfare of victims of offences, as implemented by the [Victim Protection Act](#) No 17 of 2014, particularly section 4(2)(b) thereof) and the very provision for victim impact statements in criminal proceedings. (See Part X of the [Judiciary Criminal Procedure Bench Book, 2018](#), at pp 93-4.
68. Section 4(2)(b) of the [Victim Protection Act](#), 2014 which provides as follows:
- “(2) Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—
- (a) ....;
- (b) Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken.”
69. The victim of the alleged offence has rights too which must be protected. PW3, Dr Nuru Mbarak's testimony reveals that the age assessment done on the accused person found him to be above 18 years



- old. She stated that she was certain that her report was accurate as compared to the alternate report issued by the clinical officer, Ms Nancy Wendot and the latter agreed with the finding by Dr Nuru.
70. PW4, Beatrice Akoth Ochieng the Assistant Sub County Civil Registrar’s testimony corroborated that of PW1 in revealing that the particulars in the birth certificate which the accused person alleged to be true cannot be traced in the registers of births registered and produced in this court. This therefore questions the veracity of the birth certificate produced by the accused person.
71. I reiterate that the evidence adduced by the witnesses in court is clear and overwhelming as to the veracity of the birth certificate produced by the accused person. This therefore means that the same remains fabricated and hence cannot be used a credible document to show proof of age of the accused person. Similarly, the age assessment report by Nancy Wendot cannot be relied upon to determine the age of the accused person.
72. What then remains for the accused person are his own other documents where he told the investigator that he was born on April 4, 2005 which makes him 18 years and 2 months as at June 2023 when he allegedly committed the offence, even assuming that the documents extracted from his school at [Particulars Withheld] Primary School that he was born on 20/12/2001 which would have placed him at age 22 as at the date when he allegedly committed the offence, were allegedly illegally obtained. But, in essence, was that evidence illegally obtained? To answer this question which is very important as far as fair trial is concerned, section 229 of the *Children’s Act* provides for determination of a child’s age in the marginal notes and proceeds as follows:
- “ 229. If the age of a child is uncertain, the magistrate shall estimate the child’s age based on—
- (a) a previous determination of age by a magistrate under this Act or any other written law;
  - (b) statements made by a parent, guardian or any other person likely to have direct knowledge of the age of the child, or a statement made by the child in that regard;
  - (c) a baptismal certificate, school registration form or school report, or other information of a similar nature;
  - (d) an estimation of age made by a medical practitioner; or
  - (e) a report of a social worker, children officer and or other authorized officer in that regard.”[emphasis added]
73. In this case, the report by the School’s administration, and there was no contrary evidence that the 1<sup>st</sup> respondent was an ex-student of the [Particulars Withheld] Primary School, clearly shows that the person of TKY Index 039 was a student in that school.
74. The above provision is clear that a document such as the school registration form, or school report or other information of similar nature can be used to determine the age of a person where there is doubt as to the age of a person said to be a child.
75. The registration form issued by the Deputy Head Teacher of [Particulars Withheld] Primary School Mr. Paul Chepwony and duly stamped with the school’s stamp and dated August 9, 2024 and from the said registration form for selection of Secondary Schools, the accused person’s date of birth is stated to be 20/12/2001. The place of birth is left blank which lends credence to the evidence by the Civil



- Registrar of Births for Nyando, PW1 and his deputy that there was no such birth certificate issued to the accused and if it was, why did the accused not present it to the school to be captured accurately, the same way he boldly unleashed it to the trial court and this court?
76. The same [Particulars Withheld] Primary School also issued a report under section 229(c) of the *Children's Act* showing that the complainant herein AC was born on 3/1/2008 and the birth certificate number is given, meaning she was 16 years old when she was allegedly defiled. Thus, the accused and the victim schooled in [Particulars Withheld] Primary School.
77. I am therefore in agreement with the complainant's counsel Mr Gweth, that where there is doubt regarding age of the accused person, it was the duty of the trial Magistrate to make further inquiries to establish the truth and not to conclude that there was a birth certificate proving age, when the credibility and genuineness of the said birth certificate had been questioned. Section 229 of the Children's Act imposes this duty on the trial court to make such inquiries using the means stated therein as cited above. The trial court did not comply with the above provisions of the law.
78. Having said so much about the fabricated birth certificate produced by the accused to prove his age and his plea of juvenility, the other question is whether there has been such plea before in any court of law.
79. I have searched in Kenya and found none of such a case. However, the Supreme Court of India dealt with a similar case in a similar scenario arose in the Indian Supreme Court Criminal Appellate Jurisdiction Criminal Appeal Nos 1408-1409 of 2022 (Arising out of SLP(Crl) Nos 9992-9993 of 2016) between *XYZ v Abhishek & another*.
80. In the above case, whose facts are in pari materia with the instant case. The facts, briefly stated, were that the appellant, who was the victim and a minor at the time of commission of the offence against her, alleged that she had been subjected to gang rape by the first respondent and other persons.
81. During the course of the investigations, the first respondent (accused) was arrested along with other accused alleged to be involved in the commission of the offences. On August 6, 2015, the first respondent was produced before the Court of the Judicial Magistrate First Class, Satna. The first respondent took the plea that he was a juvenile under the Juvenile Justice (Care and Protection of Children) Act, 2000<sup>4</sup> on the date of the alleged offence. The counsel appearing on his behalf filed an application for bail, together with a certificate purported to have been issued by the Madhyamik Siksha Mandal, Madhya Pradesh pertaining to the appearance of the first respondent at the high school examination. The certificate indicated that the date of birth of the first respondent was 30 January 1999. The JMFC conducted an inquiry and found that the certificate produced by the first respondent was fabricated. Therefore, the JMFC directed the police to register FIR No 292/2015 dated August 20, 2015 in PS Civil Lines, Satna under sections 193, 465, 466, 468, and 471 of IPC against the first respondent for intentionally using fabricated documents in judicial proceedings.
82. The 1<sup>st</sup> respondent filed for revision. The appeals arose from the judgments of a Single Judge of the High Court of Madhya Pradesh dated August 22, 2016 in Criminal Revision No 278 of 2016 and Misc Criminal Case No 5495 of 2016. The High Court, while allowing a revision against the decision of the 4th Additional Sessions Judge, Satna dated December 21, 2015 came to the conclusion that the first respondent was a juvenile on the date of the alleged defilement incident.
83. On appeal to the Supreme Court, it was held for the reasons given, that the High Court had erred in its findings and that the plea of juvenility of the first respondent is based on fabricated documents.
84. The extract from the birth register of the accused was found to be interpolated and there were no signatures of a competent officer on the corrections and overwriting. Due to the non-availability of a document confirming the age of the first respondent, the 4th Additional Sessions Judge sought the



opinion of the District Medical Board in accordance with rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, which examined the first respondent. The District Medical Board opined that the approximate age of the first respondent was between 17 to 21 years based on medical evidence and literature. The 4th Additional Sessions Judge calculated the approximate age of the first respondent as 19 years. Thus, the 4th Additional Sessions Judge came to the conclusion that the first respondent was not a juvenile on the date of the incident. In doing so, the court ordered for the production of the original Birth Registers pertaining to the birth certificate of the 1<sup>st</sup> respondent/accused person and the findings were that the registration or entry number 1545 dated 18/4/2002 submitted to court by the accused could not be found marked in the register of births. The last entry was 1544 and the registration booklet and the issuing register for the following month of May 2002 was also not available.

85. The above case is on all fours with the case before me with minimal differences.
86. Other cases cited in the above case include *Parag Bhati v State of Uttar Pradesh* (2016) 12 SCC 744, where a two-judge bench of the Supreme Court of India held that an enquiry for the determination of the age of a juvenile is permissible if there is any doubt or a contradictory stand is being taken by the accused. In that case, the Board disregarded the date of birth of the accused recorded by the school on the ground that it was based on a forged transfer certificate. The court observed that courts should be wary of adopting a casual or cavalier approach while deciding the juvenility of an accused in circumstances where a grave and heinous offence is committed.
87. Again in *Sanjeev Kumar Gupta v State of Uttar Pradesh* (2019) 12 SCC 370 the Supreme Court of India was called upon to decide the credibility and authenticity of a matriculation certificate for the purpose of an age determination enquiry of the accused. The Court observed that the matriculation certificate provided by the Central Board of Secondary Education was purely on the basis of records maintained by the Senior Secondary School, where the accused was a student from Class 5 to Class 10. It emerged that the records maintained by the school were without any underlying documents. The court held that the plea of juvenility could not be accepted because there was clear and unimpeachable evidence as to the date of birth of the accused which had been recorded in the records of another school.
88. The above cited cases are similar to the case before me.

### **Final Order**

1. Accordingly, in view of all the above analysis, I hereby revise and set aside the impugned ruling of the Resident Magistrate at Tamu in Tamu SPM SO Case No E007 /2024 made on October 28, 2024 allowing the accused persons' plea of juvenility.
2. The order admitting the fabricated birth certificate entry No 0621xxxxxxx purportedly issued on July 27, 2024 at Nyando Civil registration of Births and Deaths Office and filed by the accused in court as evidence of his age as well as the age assessment report dated August 2, 2024 done by Nancy Wendot, Kericho District Hospital and stamped by Kericho County Referral Hospital is hereby revised and set aside and the said documents are hereby expunged from the court record on account of being fabrications.
3. I hereby find and hold that the accused person herein TKY who pretended to be a minor is an adult and was an adult as at the time that he is alleged to have committed the offence of defilement against the complainant ACB/applicant herein.
4. I order that the accused person TKY, being an adult, shall be tried as an adult in the proceedings pending before the lower court;



5. The birth certificate entry No 062xxxxxxx purportedly issued on July 27, 2024 at Nyando Civil registration of Births and Deaths Office is found to be a fabricated document with imposition of the accused person's name, his parents' names, a date of birth and date of issue, among other entries therein and cannot therefore be relied on by the court in determining the age of the accused TKY.
6. As requested by the Principal Prosecution Counsel, Mr Marete on behalf of the ODPP during the hearing of this matter, I direct the Directorate of Criminal Investigations, Kisumu County to promptly investigate the circumstances under which the accused person TKY and his father SKM, the deponent of the affidavit sworn on November 24, 2024 in reply to the application for revision herein, obtained the fabricated birth certificate which they filed into court to hood wink the prosecution, the defence counsel and the court into believing that it was the birth certificate for TKY and should evidence of culpability be found, charge the two with relevant offences should it be found that they participated in the deceit, fabrication and swearing of the aforesaid false affidavit which was filed into this court, in defence of the fabricated birth certificate.
7. That in view of the circumstances surrounding this case where the court, the prosecutor and the defence counsel were duped into believing that the accused TKY was a minor and documents produced by the accused were genuine, the case shall now be transferred from Tamu Law Courts to Nyando Law Courts for hearing and final determination by the Senior Principal Magistrate at Nyando. Accordingly, the pro bono advocate Mr Nyameino is discharged on account that he came into this matter believing that the accused was a minor, to the contrary, and the accused person is at liberty to engage an advocate of his own choice at his cost or apply to the National legal Aid Board to accord him an advocate for legal representation.
8. No costs are ordered.
9. This file shall directly be transferred to Nyando law Courts by the Deputy Registrar of this Court with a copy of this judgment being served on the SPM's courts at Tamu and Nyando Law Courts and the ODPP regional Office at Kisumu respectively.
10. The exhibits/ original registers of births produced in evidence in this court shall be securely returned to the Civil Registrar of Births at Nyando Sub County for safe keeping and shall be available to the DCI for investigation purposes.
11. This file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY VIA MICROSOFT TEAMS  
THIS 4TH DAY OF FEBRUARY, 2025**

**R.E. ABURILI**

**JUDGE**

