Ekesa v Republic (Criminal Appeal E017 of 2023)
[2025] KEHC 2591 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E017 OF 2023

WM MUSYOKA, J

MARCH 14, 2025

BETWEEN

BENJAMIN EKESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate, CM, in Busia CMCSOC No. 48 of 2019, of 9th August 2023)

JUDGMENT

1. The appellant, Benjamin Ekesa, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(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 29th March 2019, at Nambale Sub-County, within Busia County, he unlawfully and intentionally caused his penis to penetrate the vagina of GB, a child aged 12 years. The appellant denied the charges, and a trial ensued, where 3 witnesses testified.

2. The first 2 witnesses testified before Hon. Mrs. Ambasi, CM, but it was not recorded that they testified as PW1 and PW2. The 3rd witness testified before Hon. Nyaloti, and was recorded as PW2.

3. The complainant, GB, testified first. She identified the appellant by name, and stated that she met him on her way to the shops, and he claimed that he had a gift for her. He led her to a shop, where he defiled. She informed Michelle, who then informed her grandmother, and the complainant was taken to hospital. A report was made at the police station. She knew the appellant prior, as he used to come to their home.

4. The second witness, GMO, was the grandmother of the complainant. She testified that on the material date, 29th March 2019, which was a Friday, GB did not come home for lunch, and when she eventually

came, she started crying after GMO enquired as to why she did not come home for lunch. GB did not tell her about any incident. She did not disclose to GMO about the ordeal until Wednesday of the following week, when she disclosed that the appellant had defiled her on 29th March 2019. She complained of pain while urinating and defecating. She was taken to hospital, and later a report was made to the police. According to GMO, the defilement happened on 23rd March 2019.

5. PW3, Rose Barasa, was the clinical officer who allegedly examined and treated the complainant. She said that GB complained of pain in passing urine and during long call. There was a whitish discharge, which turned out not to be spermatozoa, but a normal discharge. The hymen was broken, but it was not established when that happened. Her findings were that there was nothing significant, given that the complainant had visited the hospital a week after the alleged incident. She noted no bruises around the orifice.

6. The appellant was put on his defence, vide a ruling that was delivered on 6th March 2023. He made a sworn statement, on 10th May 2023, and called no witness. He denied the charges.

7. In its judgement, delivered on 9th August 2023, the trial court, Hon. Nyaloti, CM, found the appellant guilty, as all the elements of the offence had been positively proved. The appellant was sentenced to serve 20 years imprisonment.

8. He was aggrieved, and brought the instant appeal, revolving around the charge being defective; the sentence being harsh and excessive; the evidence being insufficient and contradictory; the age of the complainant not being established; the medical evidence not supporting the charge; crucial witnesses not being called; evidence of the witnesses of the defence being excluded; and failing to comply with rules on voir dire examination.

9. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions.

10. On the charge being defective, the appellant argues that he was charged under section 8(2) of the *Sexual Offences Act*, which covers a minor victim of up to 11 years, yet the complainant was aged 12, which meant that the charge was not attuned to the particulars of the offence. He cites Jason Akumu Yongo v Republic [1983] eKLR (Potter, Hancox JJA & Chesoni Ag JA), Iosefa v Uganda [1969] EA 236, Sigilai vs. Republic [2004] 2 KLR 480 (Kimaru, Ag J) and Isaac Omambia v Republic [1995] eKLR (Akiwumi, Tunoi & Shah, JJA). On the sentence, it is argued that the same was harsh, given that the sentence should not have been based on the main charge, as it was defective, but on the alternative charge. It is also submitted that the scene of the crime was also unclear, for although the charge talked of Nambale, there was, in the testimonies, a reference to Tanga Kona. On the age of the complainant, it is submitted that the document produced was a birth certificate application form. Mwangi v Republic [2021] KECA 345 (KLR) (Musinga, Nambuye & Kantai, JJA) is cited.

11. On the evidence being contradictory, the appellant points at the issue of the complainant bearing the pain of defilement for 6 days without anyone noticing, her sister having informed a man about hearing the complainant scream yet the complainant herself did not talk about screaming, the discrepancy between the testimonies of GB and GMO on whether the complainant had been sent to the shops that day, whether the shop was closed, the issue of Tanga Kona, among others. On the shortcomings of the medical evidence, he submits on whether penetration could only proved by the fact of a broken hymen, and cites Benard Ndegwa Maina v Republic [2020] eKLR [2020] KEHC 1890 (KLR) (Maina, J), PKW v Republic [2012] eKLR [2012] KECA 103 (KLR) (Rawal & Maraga, JJA) and Ongaga v Republic [2024] KEHC 3629 (KLR)(Okwany, J). There is also reference to the absence of bruises and spermatozoa. On voir dire, it is submitted that the record is not clear on what transpired, and, therefore, concluded that voir dire examination was not properly done.

12. The written submissions are aligned to the grounds of appeal, and I shall, therefore, determine the appeal based in the issues identified by the appellant, and any other that would emerge from the analysis of the material before me.

13. The first issue is about the charge being defective. The charge is founded on section 8(2) of the *Sexual Offences Act*. That provision prescribes the sentence, upon conviction for defiling a minor whose age is 11 and below. It reads as follows, 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 particulars of the offence are not aligned to charge, for the victim of the offence was not, according to the particulars, a minor of 11 and below, but "aged 12 years." Where the minor victim is above 11 years, the charge should not be brought under section 8(2), but under the provision covering the age of that victim. In this case, the victim was aged 12, according to the particulars, and the charge should have been brought under section 8(3), which provides that a "... person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

14. The particulars of the offence are meant to expound on the charge, and they are the basis upon which evidence is to be adduced, for they give the background of the facts upon which the charge if founded. The evidence to be adduced to prove the charge are founded on these particulars, and, therefore, the said particulars must be attuned or aligned to the charge. The charge should not say one thing, while the particulars are saying something different. The facts presented, as evidence, should be based on the particulars, and should seek to prove the charge laid. If there is a disconnect between the charge and the particulars, then the charge would be defective. Evidence led, based on particulars that are not aligned to the charge, would amount to proving a charge that is not laid against the accused person. In this case, the charge was laid under section 8(2), yet the offence disclosed in the particulars was not that provided for in section 8(2), but that under section 8(3). The evidence that was led or adduced supported the particulars, that the complainant was aged 12, and not 11, and, therefore, the facts proved the case under section 8(3), which was not charged, instead of that under section 8(2), which was charged. The appellant was, accordingly, convicted on a defective charge.

15. The document, which carries both the charge and the particulars of the offence, is known as the charge sheet. The contents of the charge sheet collectively form the pleadings in criminal cases, and it is on the basis of the contents of the charge sheet that criminal proceedings are conducted. It is trite that parties are bound by their pleadings. That would mean several things. One, the parties would be limited to leading or adducing evidence to support the allegations made in their pleadings, and they should not get outside their pleadings. Two, that any evidence, which is outside the pleadings, in terms of establishing the facts pleaded, would be useless, for being unnecessary. Three, the court should limit its determination of the matter to what is pleaded, and any facts or evidence, which would fall outside of what is pleaded, is for disregarding.

16. The primary pleading in the charge sheet is the charge. The particulars of the offence are secondary, as they merely seek to elaborate or expound on the charge. It is, therefore, subordinate to the charge, and it is for that reason that it should be the one which aligns to the charge, and not the other way round. The particulars are, in fact, part of the charge. Where there is no alignment or sync between the charge and the particulars then the charge would be defective. The cure for a defective charge is to amend it at any time before the prosecution case closes. The amendment could be that of the charge itself, or of the particulars of the offence, depending on the evidence in the possession of the prosecution.

17. In this case, no amendment was made of the charge. The required amendment was that of the charge itself, and not the particulars, for the facts in possession of the prosecution pointed to the minor being

aged 12 years rather than 11 years, and the charge should have been founded on section 8(3) rather than on section 8(2). the trial court did not address itself to the anomaly or discrepancy in the charge sheet, and it ploughed on as if there was no problem. It proceeded to convict and sentence the appellant based on the particulars of the offence rather than on the charge itself. The court was bound by the principal pleading in the charge sheet, the charge itself, which accused the appellant under section 8(2), on the premise that the minor victim was aged 11 or below. The trial court could only convict and sentence the appellant under section 8(2), so long as that charge had not been amended by the time the proceedings were concluded. It could not ignore that charge, and proceed as if it was not there, and act under the particulars of the offence, which the subordinate or ancillary to that charge.

18. Pleadings are filed by the parties. The principal pleadings are by he who originates the proceedings. They belong to them, and not to the court. Defective pleadings are curable, by amendment, before the prosecution closes its case. The court cannot act on his own motion, or suo moto, to amend pleadings. It must be moved by the owner or the filer of the pleadings. Where no move is made to have the pleadings amended, and discrepancies or anomalies in them are retained in the pleadings till conclusion of the trial, then the accused would be entitled to benefit from the resulting confusion. He cannot be convicted on such confused or messed up pleadings, and the court ought to acquit him, on the basis that the evidence adduced would not support the charge brought against him, or it should consider convicting him on an alternative charge, if there be one.

19. It follows, then, from that, that the conviction herein was not properly founded, and so was the sentence imposed, as the evidence adduced disclosed an offence other than the one disclosed in the provisions of the law under which the charge was brought. What the trial court should have done should have to acquit the accused of the charge of defilement. It could be that the offence disclosed the offence of defile of a minor, but certainly the minor defiled, according to that evidence, did not fall within the class targeted or envisaged by the provision cited in the charge, section 8(2), a minor of 11 or below. Upon acquitting the appellant, of the offence charged under section 8(2), the court should have considered convicting under the alternative charge, of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

20. Was there material upon which the appellant could be convicted under section 11(1)? The particulars alleged that he rubbed his penis on the vagina of the complainant. That would appear to differ from the evidence tendered by the complainant herself, that the appellant did in fact insert his penis into her vagina. She did not talk about him rubbing it on her vagina. However, that would not be fatal, for the offence would be established, where the penis of the accused would meet the vagina of the victim. A touch of the vagina by the penis would suffice. If the complainant is to be believed, that the appellant penetrated her vagina with his penis, that would suffice, for there would have been contact between the 2 sexual organs. Would medical evidence be necessary to establish such? I do not think so. A mere touch of the vagina, without penetration, would leave no mark or trace or evidence of that encounter, and the court would convict only based of what it perceives of the victim complainant, in terms of whether it considered him or her as truthful, according to section 124 of the *Evidence Act*.

21. On the sentence imposed being harsh, I do not think the appellant is on firm ground. As indicated above, if he were to be convicted under section 8(2), he would be sentenced to mandatory life imprisonment, for that is what is provided for under that provision. He was not. The curious thing is that the trial convicted him under section 8(2), yet the sentence imposed was not that provided for under that provision. The sentence imposed was 20 years imprisonment, but the court did not explain the sentence, in terms of indicating the provision on which it was imposing that sentence. One could be forgiven for speculating that that sentence was premised on section 8(3), which provides for a minimum of 20 years in prison for defiling a minor of 12 years. If that was the case, then the sentence

was not excessive or harsh, for that was the statutory sentence, where the victim was of the age of the complainant herein. It would not be harsh and excessive, if premised on section 8(2), for the sentence under that provision is mandatory life imprisonment.

22. Perhaps the court felt handicapped by the confusing jurisprudence lately on minimum mandatory sentences, with respect to sexual offences. The origin of the confusion is Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the Supreme Court appeared to lay down a general principle that mandatory sentences, generally, were unconstitutional. Then it pushed back after that, in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), where it sought to limit the principle it had set in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) to murder cases only, and to suggest that for that principle to apply to other offences, the parties would have to move the High Court, for declarations along the lines of Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).

23. As if to take the cue from Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), the High Court, 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), declared minimum and mandatory sentences, for the sexual offences created in the *Sexual Offences Act*, as unconstitutional. The Supreme Court has since pronounced Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J) to be bad law, in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ). The jurisprudence on this is in a state of flux, and the trial court may have been caught up in that. However, given that the conviction was based on a defective charge, the issue of the sentence may not be major issue.

24. The appellant submits that the scene of the crime was uncertain, on account of discrepancies or contradictions in the evidence. According to the particulars of the offence, the incident happened within Nambale township. He argues that there was a mention of Tanga Kona, and wonders whether the crime was allegedly committed at Nambale or at Tanga Kona. The complainant did not mention either Nambale or Tanga Kona, but testified that she was defiled at a shop operated by the appellant, belonging to his employer. It was the second witness, her grandmother, who referred to Tanga Kona, where she was reporting about what the appellant had allegedly asked the complainant to do, to collect some item at Tanga Kona. The appellant, in his defence statement, stated that he operated the shop at Nambale, and he knew the grandmother of the complainant, as she was his customer. Although he stated that he did not know the relationship between the 2, he went on to say that the complainant used to come to the shop with the grandmother.

25. What do I make of that? The complainant testified that she was defiled at a shop, operated by the appellant. The particulars of the offence stated that the defilement happened within Nambale. The appellant confirmed that he operated a shop within Nambale, and the complainant and her grandmother used to frequent that shop. He did not testify to operating 2 shops, one at Nambale and another at Tanga Kona. The remark, by GMO, ought not be given much weight, given that she did not say that the appellant operated a shop, nor that she saw him at a shop there. The overwhelming evidence would be that the shop operated by the appellant was at Nambale, which tallies with what is stated in the particulars of the offence.

26. The other argument is that the age of the complainant was not sufficiently proved. The particulars of the offence claimed that she was 12 years old. The complaint testified that she was born on 25th May 2007, and was in class 4. GMO referred to an application for certificate of birth as proof. That document was not produced as an exhibit, for it was only for identification, ostensibly to be produced later by the investigating officer, who never testified, and so it can be of no value, for it did not get to form part of the court record. Curiously, although GMO only made reference to an application for certificate of birth, and not the certificate itself, and that application form was not produced as an exhibit, and was only marked for identification, there is in fact, in the trial court record, a copy of a certificate of birth, for the complainant, serial number A2480226, dated 25th July 2019. One would wonder how it found its way into the court record, given that no one mentioned it, leave alone producing it as an exhibit. It is not marked as an exhibit. I shall attach no value to, in the circumstances. However, I am persuaded that the age of the complainant was sufficiently proved, her guardian or caregiver was her grandmother, who would be expected to have knowledge of such things.

27. On discrepancies in the evidence, the appellant raises issue with the complainant bearing the pain of defilement for 6 days without anyone noticing. Well, the medical evidence did not establish anything particularly abnormal, as would have caused her considerable pain, which would have been readily noticeable by those around her. The only remarkable thing was about a broken hymen, but it was not disclosed whether the breakage was fresh. On the matter of her sister having informed a man about hearing the complainant scream yet the complainant herself did not talk about screaming, I note that the complainant testified that she cried, but her cries could not be heard, that would be an allusion that to the possibility that she raised alarm one way or the other. As to whether some man told her sister that he had heard the complainant screaming, I have no idea what the appellant means by that, for, from the record before me, the complainant did not testify on that, neither did her grandmother.

28. On the alleged discrepancy between the testimonies of GB and GMO on whether the complainant had been sent to the shops that day, I do not see any. The complainant said that she was sent to the shops that day by GMO, and that was when she met the appellant; while GMO did not mention sending her to the shops, but said that she did not come for lunch that day. The fact that GMO did not allude to sending her to the shops would not necessarily mean that it did not happen. In any event, the issue of being send to the shop is remote to the crucial issues. On whether the shop, where the alleged defilement happened, was closed during the incident, I also do not find any issue. The complainant testified that she entered the shop through the man entrance, the appellant was at that time with a customer, then he closed the shop. It appears at page 5 of the typed record, which reads, "He had a customer (1). I entered the main entrance ... He closed the shop." She did not enter a closed shop; the shop was open when she arrived, and was closed after she entered. I have addressed the issue of Tanga Kona hereabove, where I have stated that the overwhelming evidence was that the appellant operated a shop at Nambale, and GB was clear that that was where she was assaulted.

29. The principle is that not every inconsistency or contradiction should vitiate a prosecution. The *Criminal Procedure Code* has not dealt directly with the question of inconsistencies and contradictions, but the courts have stated 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. See Joseph Maina Mwangi v Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), Twehangane Alfred v Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007 (unreported), John Cancio De SA v VN Amin [1934] 1 EACA 13 (Abrahams CJ&Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ) and Philip Nzaka Watu v Republic [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA).

30. The appellant submits that the medical evidence did not establish penetration. He argues that other than the alleged broken hymen, the other evidence did not establish any abnormality with the genitalia of the complainant. He submits that the clinician did not find any bruises or spermatozoa. The medical evidence is concerning. For a minor of 12, or thereabout, a sexual encounter with an adult should leave her with marks that would be notable. Of course, in this case the complainant went to the medical facility rather late in the day, 6 days after the event, by which time all the evidence would have, perhaps, completely disappeared or been erased, by way of the spermatozoa being washed away, either during bathing, or through urination, or naturally expelled from the body. Bruises would have healed naturally. There was discharge, which the clinician said had nothing to do with spermatozoa, and was natural. Although the complainant complained of pain while urinating or defecating, the clinician did not explain the cause of that.

31. The appellant submits that the prosecution was relying only on the fact of the broken hymen, yet case law is to the effect that that would not be sufficient, for loss of the hymen can be caused by many other factors. I agree, based on PKW vs. Republic [2012] eKLR KECA 103 (KLR)(Rawal & Maraga, JJA), David Mwingirwa v Republic [2017] KECA 666 (KLR)(Githinji, Karanja & Kiage, JJA), Benard Ndegwa Maina v Republic [2020] eKLR (), Dominic Angote v Republic [2020] KEHC 6108 (KLR) (Ndung'u, J) Halake v Director of Public Prosecutions [2024] KEHC 6974 (KLR)(Cherere, J) and Ongaga v Republic [2024] KEHC 3629 (KLR)(), and other cases, and have nothing more to say. It would have helped if the clinician had assessed whether the breakage of the hymen was fresh or recent, by perhaps, putting a time frame. If the opinion was that it was freshly torn or the tear was recent, there would have been basis to bring it within the time it was alleged the sexual assault happened. However, she stated that she did not establish when it was broken, and, therefore, that evidence would be of little value, in terms of connecting the appellant to the offence.

32. The appellant argues that crucial witnesses were not called. He has in mind Michelle, the sister of the complainant. Both the complainant and their grandmother mentioned her. She was the person to whom the complainant disclosed her ordeal, and Michelle then informed the grandmother. However, the grandmother did not corroborate the statement that she learned of the complainant's problems from Michelle. Was Michelle a critical witness? It is trite that the prosecution need not call any number of witnesses to establish its case, and it would suffice that it calls enough to prove the charge. In this case, the prosecution called 3 witnesses, the complainant, her grandmother and the clinician. Should more have been called? Given that the medical evidence was not adequate, for the purpose of proving penetration, and that the complainant made a report to the grandmother after 6 days, and it was after that she was taken to hospital, it would have been prudent to have more witnesses to corroborate her testimony, and provide credibility to it.

33. The appellant argues that evidence of the witnesses of the defence was excluded. The appellant was the only witness for the defence. I have closely considered the judgment. I note that the testimony of the appellant was recited at paragraph 10 of the judgement. However, there was no mention of that statement in the determination. The trial court, however, did note, at paragraphs *9* and *20*, that the line of cross-examination, of prosecution witnesses, by the Advocate for the appellant, suggested that the loss of the hymen could have been due to other factors, but the trial court did not buy that argument. In the defence, the appellant merely denied the offence, and stated no plausible defence, which the trial court could have been said to have excluded or ignored or not considered.

34. The other issue is about the voir dire examination. The appellant submits that it was not properly done. The record reflects that the same was done, but in a flippant and perfunctory manner. It was not given the seriousness due to it. Before the complainant took to the witness stand, she made a statement, no doubt upon examination by the court, to the effect she attended the Catholic Church, and when she

sworn by the Bible it meant that one should not lie. She also mentioned that she was 12 years old. The court then concluded that she was confident. However, what is amiss with what the court did is that it is not required to determine whether the child is confident, but whether, according to section 19 of the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya, the child understands the nature of an oath, is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. The record is silent on whether the trial court exercised its mind on those matters, before it decided that the child could testify. Being confident may have nothing to do with understanding the nature of the oath, or being possessed of sufficient intelligence to warrant giving evidence, or understanding the duty to speak the truth.

35. After conducting a voir dire, the trial court is required to assess whether the child should give sworn or unsworn evidence. The record is silent on whether such an assessment was done. Indeed, the record of the trial court is silent on whether the testimony of the complainant was taken sworn or unsworn. Since it is not recorded that she made a sworn statement, it should be presumed that her evidence was unsworn. The voir dire examination was conducted, but it was mishandled, to the extent that the considerations required, by section 19 of the of the *Oaths and Statutory Declarations Act*, were not taken, and to the extent that the trial court did not decide on whether the testimony of the complainant was to be taken under oath, and did not in fact record that the evidence was taken sworn or unsworn

36. Was the mishandling of the voir dire examination fatal? According to section 19 of the of the *Oaths and Statutory Declarations Act*, the voir dire examination or test is required only with respect to children of tender years. It is not to be conducted for all children. It is generally accepted that tender years is capped at 10 years. Teenagers, aged 13 to 17, cannot be children of tender years, and voir dire should not be expected to be conducted with respect to them. 11 and 12 are borderline, but certainly they do not fall under tender years.

37. Under the *Penal Code*, Cap 63, Laws of Kenya, section 14 delineates the age of criminal responsibility. A child under the age of 8 is absolutely of tender years, and cannot be held criminally responsible for any act or omission. Under that provision a child under 12 years, meaning aged between 8 and 11, both inclusive, would not, generally, be criminally responsible, unless, at the material time, it is proved that he had capacity to know that he ought not to do the act in question. Similarly, a male child of under 12 is presumed to be incapable of having carnal knowledge. My point is that, under section 14 of the *Penal Code*, a child of 7 and below is of tender years, and criminal responsibility ought not be assigned to him. Children in the age bracket of 8 to 11 are excused criminal responsibility, except where it is established that they knew between right and wrong. Age 12 is treated as the cut-off age, so far as criminal responsibility is concerned.

38. My submission is that a child of 12 years is not of tender years, would be criminally responsible for their acts or omissions, should not be subjected to voir dire examination, and should, therefor, give sworn testimony. The omission, therefore, to take the statement of GB on oath, was fatal.

39. My last word is that I have very closely perused the judgement, and I am persuaded that the trial court did not adequately analyse and consider the issues arising. At paragraph *6*, the court describes the complainant as a child of tender years. At age 12, the complainant was certainly a child, but she was not of tender age, going by what is discussed above. She should not have been subjected to voir dire examination, in the first place, and her evidence ought to have been taken under oath. Paragraphs *13*, *14* and *21* would reveal that the trial court did not have a proper appreciation of the case before it. The trial court was very clear that the complainant was 12 years old, at paragraph 14 of the judgement, and it is for that reason that it recited section 8(3) of the *Sexual Offences Act*, at paragraph *13*. Yet, at paragraph *21*, the trial court did not convict him under section 8(3), which caters for 12-year-olds,

but under section 8(2), which caters for children aged 11 and below, but then proceeded to sentence, apparently, under section 8(3). The mind of the trial court was, no doubt, not clear on these issues.

40. At paragraph *16*, it is stated that the trial court had observed that the complainant and noted that she was a truthful witness. The judgement was by Hon. Nyaloti, CM. Hon. Nyaloti did not take the evidence of the complainant, who was the very first witness to testify. That evidence was taken by Hon. Mrs. Ambasi CM. Hon. Nyaloti only took the evidence of the clinician. She did not meet the complainant, for her to observe the demeanour, and to get an impression of how she viewed the appellant. I have looked at the notes by Hon. Mrs. Ambasi CM, when the complainant testified on 9th July 2019, before her, and noted that Hon. Mrs. Ambasi CM, only commented that the complainant was confident, after taking her through voir dire, but did not make any notes on her truthfulness.

41. Again, at paragraph 16 of the judgement, Hon. Nyaloti CM writes that she had noted, from the demeanour of the complainant, that the complainant was terrified of the appellant. One would wonder where that came from, for Hon. Nyaloti CM did not interact with the complainant at any stage. Hon. Nyaloti CM took over the matter on 1st March 2023, when section 200 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, was complied with, and evidence was taken from PW2, the clinician. Oral hearings closed on 10th May 2023, written submissions were received on 7th June 2023, and judgement was delivered and sentence pronounced on 9th August 2023. I have very closely gone through the record of the court appearances between 1st March 2023 and 9th August 2023, and I see nothing that indicates that the complainant attended court on any of those days, for I have seen no record of the same, to warrant the comments, in the judgement, that the complainant was terrified of the appellant. As indicated above, Hon. Mrs Ambasi, CM, only found the complainant to be confident, and she did not record that she was fearful of the appellant. In any case, confidence and terror cannot stand together.

42. Paragraph *18* states that the trial court was satisfied that there was penetration of the minor based on the age assessment report. Penetration is not proved by way of age assessment. In any case, no age assessment report was presented and produced in the case. Paragraph *19* states that the medical evidence had confirmed penetration, yet PW2, the clinician, was vague about that, for she testified that her opinion on penetration was informed more by the history given by the complainant, than by her own findings, from tests and examination.

43. Clearly, the appellant should not have been convicted under the main charge. The alternative charge could not stand either, for the principal witness was the complainant, who was not a child of tender years, yet her testimony was taken unsworn. That was fatal to all the charges.

44. In view of everything said above, it should be clear that the conviction of the appellant was not safe. I shall, accordingly, allow the appeal. The conviction of the appellant is hereby quashed. The sentence imposed on him is hereby set aside. He shall be set free, from prison custody, unless he is otherwise lawfully held. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Tyson Otieno, instructed by Masiga Otieno & Associates, Advocates for the appellant.

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