



REPUBLIC OF KENYA



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**Wanyama v Republic (Criminal Appeal E032 of 2021)
[2025] KEHC 2902 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E032 OF 2021
WM MUSYOKA, J
MARCH 14, 2025**

BETWEEN

BENJAMIN MAKANDA WANYAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. RN Ng'ang'a, Resident Magistrate, RM, in Busia CMCSOC No. E006 of 2020, of 5th October 2021)

JUDGMENT

1. The appellant, Benjamin Makanda Wanyama, 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 22nd March 2022, at Bunyala Sub-County, within Busia County, he intentionally caused his penis to penetrate the vagina of EA, a child aged 11 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.
2. PW1, Kizito Murunga, was the clinical officer who allegedly examined and treated the complainant. There was no discharge. No bleeding from the vagina. Hymen was intact. He later stated that the hymen was broken, but could not tell whether it was freshly so. He could not tell the age of the injury. He said that there could have been a mistake in the filling of the treatment book, for the post-rape care, PRC, and police 3, P3, forms indicated that the hymen was broken. He said that the incident had happened a day before the child was seen, examined and treated by medical personnel.
3. PW2, IA, was the complainant. She identified the appellant by name, and described him as a neighbour. He came to their home, on 24th July 2020, when her parents were away. He sent her brother on an errand, and when he and she were left alone, he dragged her to her mother's bedroom, and defiled her. Her elder brother came in, and found them. The appellant pleaded with him, not to tell anyone, then



- he left. She and her brother then reported to their grandmother and their mother, after which she was taken to the police and to hospital.
4. PW3, LBO, followed. He testified that he came home and found the appellant lying on PW2. When the appellant saw him, he was shocked, and asked the witness not to tell his mother. The witness got out, and the appellant chased after him whilst still pleading. He and PW2 ran to their grandmother, and reported what had happened. They were referred to their mother. PW2 was counselled not to bathe, and was taken to hospital.
 5. PW4, TSO, was the mother of PW2 and PW3. She testified that PW2 and PW3 reported to her that the appellant had defiled PW2. She made a report at Port Victoria Police Station, and took PW2 to hospital. She denied maliciously causing him to be prosecuted. PW5, No. 110724, Police Constable Lillian Twala, was the arresting and investigating officer.
 6. The appellant was put on his defence, vide a ruling that was delivered on 23rd July 2021. He made a sworn statement, on 7th September 2021, and called no witness. He denied the charges, but conceded that he knew PW2, PW3 and PW4.
 7. In its judgment, delivered on 5th October 2021, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. The appellant was sentenced to life imprisonment, on 2nd November 2021.
 8. He was aggrieved, and brought the instant appeal, revolving around the trial court failing to evaluate all the evidence; the evidence being contradictory and inconsistent; the case not being proved to the required standard; there being a grudge between the family of the complainant and that of the appellant; and failing to consider the mitigation.
 9. Both sides filed written submissions. Those by the appellant are dated 23rd January 2025, while those filed by the respondent are dated 27th January 2025.
 10. In his written submissions, the appellant has introduced new grounds of appeal, around his constitutional rights in Article 50(2)(c)(g)(h)(m) of *the Constitution* being violated or not complied with; the evidence on penetration being contradictory and inconsistent; the evidence of PW1 being admitted despite he being an incompetent, incredible and doubtful witness; the trial being defective, for being contrary to Article 50(2)(f) of *the Constitution* and sections 213 and 310 of the *Criminal Procedure Code*; the trial court improperly reconciling the discrepancies, contradictions and inconsistencies in the prosecution case; and imposing an indefinite sentence.
 11. The submissions turn on 6 points: the trial court being unfair, for non-compliance with or being contrary to Article 50(2)(c)(g)(h)(m) of *the Constitution*, with respect to language, failure to be informed of rights, failure to be assigned an Advocate, and non-disclosure of the evidence in advance; a crucial element of defilement, penetration, not being proved; an incompetent and doubtful clinical officer; a defective or illegal trial; whether the medical evidence supported the charge; contradictions and inconsistencies in the evidence; and a harsh sentence.
 12. The appellant has cited *Kiyato vs. Republic* [1986] KECA 32 (KLR) (Kneller, Hancox & Nyarangi, JJA), *Njuguna vs. Republic* [2007] 2 EA 370, *Republic vs. Chengo & 2 others* [2017] eKLR [2017] KESC 15 (KLR)(Maraga, CJ, Mwilu, DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ), *Thomas Patrick Gilbert Cholmondeley vs. Republic* [2008] eKLR (Omolo, O’Kubasu & Onyango Otieno, JJA), *Reward vs. Republic* [1993] All ER 557, *Odhiambo Michael vs. Republic* HCCRA No. 280 of 2014, *Maitanyi & Jackson Kamande vs. Republic*, *Ben Maina Mwangi vs. Republic* [2006] KEHC 974 (KLR)(Lesiit, J), *Akhuya vs. Republic* [2003] eKLR (Kwach, Tunoi



- & Bosire, JJA), Dinkerai Ramkrishna Padya vs. Republic, Kimotho Kiarie vs. Republic [1984] eKLR (Kneller JA, Chesoni & Nyarang’i, Ag JJA), Manyeso vs. Republic [2023] KECA 827 (KLR) (Nyamweya, Lesiit & Odunga, JJA), Evans Wanjala Wanyonyi vs. Republic [2019] eKLR (Makhandia, Kiage & Otieno-Odek, JJA), Jared Koita Injiri vs. Republic [2019] eKLR (Musinga, M’Inoti & Murgor, JJA) and Francis Karioko Muruatetu & another [2021] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).
13. The respondent largely supports the findings and holdings of the trial court. It cites Okeno vs. Republic [1972] EA 32 (Sir William Duffus P, Law & Lutta, JJA), George Opondo Olunga vs. Republic [2016] eKLR, CWK vs. Republic [2015] eKLR (Kimaru, J), Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ).
 14. I will first consider the issues raised in the grounds of appeal, in the petition of appeal. Although there is allusion to amended grounds of appeal in the document that was filed simultaneously with the written submissions, I note that the alleged amendment does not conform with the rules pertaining to amendment of pleadings. I shall, for that reason, treat the grounds in the new document as additional or supplementary grounds. The same appear to be the basis for the written submissions filed by the appellant.
 15. The first issue is about the trial court failing to evaluate the whole evidence, hence arriving at the wrong conclusions. I have perused the judgement. It is divided and subdivided to several sections and subsections. I see 2 sections, one headed “PROSECUTIONS CASE,” and the other “DEFENCE.” I deduce from them that the trial court narrated or recited the testimonies from the witnesses presented by either side, being PW1, PW2, PW3, PW4, PW5 and the appellant. Then I see another section headed “ISSUES FOR DETERMINATION,” with subsections headed “Whether there was penetration,” “Whether the age of the Complainant was proved,” “Whether the accused person was properly identified” and “Inconsistencies in the Prosecution evidence.” I see that under these subsections and subheadings, the trial court did analyse the evidence, by considering the testimonies and narratives, and the documents that the witnesses presented as exhibits. I am not persuaded that the evidence, as a whole, was not considered.
 16. On contradictions and inconsistencies, I have gone through the record, and noted the inconsistencies pointed out by the appellant. I note too that the trial court did note those inconsistencies and contradictions, and dealt with them, in the judgment, under the subheading “Inconsistencies in the Prosecution evidence,” and concluded the same had been cured by the explanations given by the witness.
 17. 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 interpreted section 382 thereof, to say that whether inconsistencies or contradictions are to affect the decision will depend on whether they are so fundamental as to cause prejudice to the appellant, or they are so inconsequential as to have no effect to the conviction and sentence. See Joseph Maina Mwangi vs. Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), Twehangane Alfred vs. Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 (unreported), John Cancio De SA vs. VN Amin [1934] 1 EACA 13 (Abrahams CJ&Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ) and Philip Nzaka Watu vs. Republic [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA).



18. I note that the trial court concluded that the discrepancies did not touch the core of the evidence, being that all the elements of the offence of defilement had been fully proved, hence the charges had been well anchored in evidence. The trial court expressed itself as being guided by *Twehangane Alfred vs. Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA) and *Erick Onyango Odeng' vs. Republic* [2014] eKLR (Githinji, Musinga & M'Inoti, JJA).
19. On the trial court failing to find that the investigations had failed to get to the root cause of the charges preferred, being a longstanding grudge between the family of the appellant and the family of the complainant, I would state that a court only tries a charge based on the evidence presented. The prosecution would only be bound to present such material as would prove the charge. It would not be the duty of the court to try to find explanations for the charge before it, or to speculate about the real motives behind why it was preferred, and where it has to, it must seek answers from the evidence presented by both sides.
20. I have very closely scrutinised the testimonies from the prosecution witnesses, and nothing from those testimonies bring out a grudge of any sort as between the families. I have equally perused the defence statement made by the appellant; and I have noted that he did not lead evidence of a grudge between the parties. The only statement I see, from his testimony, is that "The case emanates from a witchcraft issue from home." There would be little, in that statement, pointing to a grudge. The trial court did consider the alleged grudge, and found that, if there was any, the same did not negate the case presented by the prosecution. I find nothing to fault in that conclusion.
21. On his mitigation not being considered, I note that he made a statement in mitigation, on 3rd October 2021, where he said that he was the only child of his father, he had a family, and he did not know how his wife and children were faring. He was sentenced on 2nd November 2021, after the court considered a probation officer's report that had been called for. I note that in pronouncing sentence, the trial court did not refer to his statement in mitigation. I note, though, that the charge he faced was premised on section 8(2) of the *Sexual Offences Act*, which provides for a mandatory sentence, upon conviction. A mandatory sentence would leave the sentencing court with no room for manoeuvre, in the sense of exercise of discretion, and the statement on mitigation would be of little use. The omission by the trial court, therefore, would not be an error, in my humble view, in the circumstances, upon which a decision of the court could be vitiated.
22. Let me now advert to the written submissions. Some of the issues submitted on relate to some of the grounds that I have disposed of above, and I shall not revisit them, but I shall dwell on the rest.
23. I will start with the sentence being harsh, given that I have mentioned aspects of sentence hereabove, when I was addressing the matter of mitigation. I reiterate that the appellant faced a charge premised on section 8(2) of the *Sexual Offences Act*. The sentence prescribed, under that provision, is mandatory, for the offence of defilement of a minor aged 11 years or below, the convict "shall upon conviction be sentenced to imprisonment for life." The trial court convicted the appellant under section 8(2), under which he was charged, and imposed the sentence prescribed. That was the only sentence available. The trial court had no discretion in the matter, and the issue of the prescribed sentence being harsh would not arise, as it is what the law prescribes.
24. The appellant grounds his case on the harshness of the sentence, on *Francis Karioko Muruatetu & another* [2021] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and related cases. *Francis Karioko Muruatetu & another* [2021] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) cannot help him. The Supreme Court, in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), clarified that



- Francis Karioko Muruatetu & another [2021] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) applied only to murder cases. The appellant was convicted of defilement, not murder.
25. 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), the High Court, following directions given in *Francis Karioko Muruatetu & another* [2021] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that courts, subordinate to the Supreme Court, and in particular the High Court, could address minimum mandatory sentences imposed by other laws, along similar lines, in proceedings properly brought before them, sought to set similar principles for mandatory sentences with respect to sexual offences, by declaring that such sentences were unconstitutional, for such provisions took away the discretion of trial or sentencing courts in sentencing.
 26. The Supreme Court, however, in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), has declared that the position, stated 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), is not good law, and asserted that the sentences prescribed under the *Sexual Offences Act* were constitutional, and trial and sentencing courts were bound to impose the sentences prescribed in the relevant legislation.
 27. The ground of appeal around the trial being illegal or defective is premised on Article 50(2)(f) of *the Constitution* and sections 213 and 310 of the *Criminal Procedure Code*, which relate to the right to be present during trial and to address the court at the conclusion of the trial. I doubt that Article 50(2)(f) is of any relevance here, for the appellant does not complain that he was excluded from the proceedings at any time, or that the court conducted proceedings in his absence, or that he was barred from the trial in any way. I have not seen, from the record, any material which would suggest so. Perhaps, although, not articulated, he has issues with virtual hearings.
 28. I take judicial notice of the fact that the appellant was charged and tried at the height of the Covid-19 pandemic, and the containment measures in place then had outlawed social interaction, which necessitated and validated remote hearings. If his complaint is around that, then there would be no basis for it, as the times and seasons necessitated and demanded remote trials. He was not tried in absentia, for he appeared before the trial court virtually. That was not illegal, for it was sanctioned by the law, under the circumstances then prevailing.
 29. Sections 213 and 310 of the *Criminal Procedure Code* allude to oral speeches or submissions, which, in contemporary practice, have largely been replaced with written submissions. The complaint is that the appellant was not properly guided on when to file written submissions, for the court received his submissions after the ruling that he had a case to answer, and before he had made his defence statement.
 30. Although sections 213 and 310 of the *Criminal Procedure Code* are couched in mandatory terms, the omission to afford the parties an opportunity to make addresses or deliver speeches, or to file submissions, cannot possibly be fatal, in terms of vitiating a trial, and rendering it illegal or defective. These addresses, whether made orally or in writing, are mere arguments, based on analysis of the evidence tendered and the supporting written law. The trial court can still determine a matter without them, and a decision made without input, in that form, from the parties, would not render the trial illegal, and should be upheld, so long as the trial court was faithful to adherence to applicable law, evidence and process. What would be most critical in a trial is that the parties are afforded an opportunity to present evidence and to challenge the same, by getting a chance to testify in court, call



witnesses and cross-examine the witnesses presented by the other side. Parties have a right to comment on the evidence adduced by both sides, but the omission to afford parties that right, I submit, would not be fatal to the final determination.

31. The appellant submits that the trial court had ordered, on 3rd August 2021, that written submissions be filed, and thereafter fixed a date for defence hearing. I have read and re-read the record of the proceedings of 3rd August 2021, both the handwritten and typed versions, and I have seen nothing that alludes to directions that written submissions be filed ahead of the defence hearing. The record that I have before me, of what the trial court ordered or directed on 3rd August 2021, says “Mn on 10-08-2021 to confirm issuance of proceedings & fix DHg date,” and that was after the appellant had informed the court that he had “Not yet supplied with proceedings.”
32. The issue of written submissions was first raised by the appellant, on 24th August 2021, when he informed the court that “I have prepared my submissions.” At that stage the trial court had not made any order for filing of written submissions. On 24th August 2021, the court did not make any mention of written submissions, for the order made was, “Defence Hearing on 31-08-2021.” Come 31st August 2021, the defence hearing did not happen, for the appellant insisted that he could only proceed after it was confirmed that his written submissions were on record. He said, “I can’t proceed. My submissions are still here. I will proceed when they are confirmed to be on record.” Then the court directed: “Defence hg on 7-09-2021. Submissions to be filed.”
33. The trial court did not originate the requirement for the filing of written submissions prior to the defence hearing, it was the appellant who insisted on them, and the trial court obliged, for whatever it was worth. It would be cheeky to accuse the trial court of directing that the said submissions be filed, when that direction was given only after the appellant insisted on filing those submissions, and asserting that he would not make his defence statement unless the submissions had been filed, yet no order had been made in that behalf.
34. The ruling, on a no case to answer, was delivered on 23rd July 2021, after which the trial court placed the appellant on his defence, and read out the requirements of section 211 of the [Criminal Procedure Code](#) to him. No order was made on submissions. The appellant requested for typed proceedings, and an order to that effect was made, and the matter was then set down for 3rd August 2021, to confirm the availability of the typed proceedings, and to allocate a date for defence hearing. On 3rd August 2021, no order on written submissions was made. The typed proceedings were not ready, and a date for defence hearing was not fixed, as a result. The matter was put off to 10th August 2021, when no order on written submissions was made, but the typed proceedings were ready, and a date for defence was given, being 31st August 2021, with a mention date for 24th August 2021. Come 24th August 2021, the appellant indicated that his submissions were ready. The court did not advert to submissions at all, for it merely reiterated 31st August 2021 as the date for defence hearing. On 31st August 2021, the appellant insisted that he would not defend himself before his submissions were placed on record, whereupon the court put off the matter to another date, and directed him to file his submissions.
35. The sense I get is that the appellant wanted things to happen in his own way, rather than in the way directed by the court. Upon putting him on his defence, the trial court was ready to fix the matter for defence hearing. However, the appellant asked for proceedings. In the mind of the trial court, the proceedings were being sought for the purpose of assisting the appellant prepare his defence. Apparently, the appellant wanted them for a different purpose, preparing written submissions, and he resisted being given a date for defence hearing and he declined to proceed with his defence until he had filed his submissions, and the court obliged, ostensibly to move the matter forward. The trial court did not require him to file written submissions. It was him, in his own wisdom, who insisted on filing



- submissions, ahead of his defence hearing. Since he was derailing the proceedings by that insistence, the court obliged him. I see no wrongdoing on the part of the court.
36. On whether there was penetration, the appellant points at the medical evidence, and argues that the same was inconsistent. One set of documents indicates that the hymen was intact, while the other set says it was broken. The appellant appears to argue that those 2 positions are irreconcilable. The trial court noted that inconsistency or contradiction, but was satisfied that the clinician had explained the same, as an honest mistake. The question then would be whether that explanation was adequate? The inconsistency related only to the hymen. Was the rest of the evidence, in the medical documents, consistent with defilement of a minor of 11 years?
 37. It is trite, that defilement need not be proved only by forensics or medical evidence. Corroboration of evidence adduced from a minor, particularly of tender years, is required, but only where the testimony of a minor appears to be not so credible. The court may convict, based on the uncorroborated evidence, where it is convinced or persuaded that the minor is telling the truth. See *Moses Mutahi Mugo vs. Republic* [2022] eKLR (Odunga, J). Corroborative evidence would be used to confirm the evidence tendered by the complainant, or to connect the accused person to the offence. That would then mean that the testimony of the complainant herein, PW2, would have sufficed, as proof that she was defiled by the appellant, so long as the trial court was satisfied that she was being truthful.
 38. Section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, states the need for evidence of children to be corroborated before it is relied upon, but it also goes on to provide, with regard to sexual offences, that the trial court may rely or depend on the uncorroborated evidence of the alleged victim of the crime, so long as it is satisfied that the alleged victim of the offence was telling the truth. It was stated, in *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR (Kihara Kariuki PCA, Maraga & Mohammed, JJA), that medical evidence was usually not necessary. A similar position was taken in *AML vs. Republic* [2012] eKLR KEHC 2554 (KLR)(Odero, J), *Kassim Ali vs. Republic* [2006] eKLR KECA 156 (KLR) (Omolo, Bosire & Githinji, JJA), *Lumbasi vs. Republic* [2016] KEHC 2942 (KLR)(Mwita, J), *Robert Mutungi Muumbi vs. Republic* (2015) eKLR KECA 584 (KLR)(Makhandia, Ouko & M’Inoti, JJA), *Williamson Sowa Mbwanga vs. Republic* (2016) eKLR KECA 147 (KLR) (Makhandia, Ouko & M’Inoti, JJA), among others.
 39. Medical evidence or forensics go some way in corroborating testimonies of complainants in sexual offences. However, forensics or medical evidence need not be the most decisive in proving commission of these sorts of offences, for the reasons given above. A court can still convict without such evidence. What should happen in cases, such as the instant one, where the medical evidence is shaky, especially on account of inconsistency or contradiction? I believe that such evidence could undermine the credibility of the complainant, and raise as doubt as to the truthfulness of her testimony.
 40. The testimony of the complainant herein, PW2, was straightforward, that the appellant sent away her brother, so that he could be left alone with her. He pulled her into a bedroom, and defiled her. She reported to her grandmother and mother. Then she was taken to hospital. The clinician then comes to court to present evidence which is inconsistent on certain aspects.
 41. The question would be whether penetration was proved. The complainant testified that it happened. Her brother, PW3, saw the appellant lying on PW2. He did not describe what else he observed, besides seeing the appellant on top of PW2. The complainant, PW2, and PW3 then reported the incident to their mother, PW4. PW4 did not testify as to whether she did any physical examination of PW2 after the incident was reported to her, allegedly shortly after it had happened. Instead, she rushed PW2 to hospital.



42. At the hospital, it was recorded in the treatment notes, that the clothes of PW2 were intact, she had no pubic hair, her vulva was normal, there was no bleeding from the vagina, no bruises were visible, there was no discharge and the hymen was intact. It was concluded, in the medical treatment notes, that it was an alleged defilement. A laboratory test was recommended, and was done, the same day. The outcome was that there were no pus cells, no spermatozoa, no yeast cells and no epithelial cells. The other medical records generated thereafter, on 25th July 2021, presumably based on the treatment notes, slightly differ from the treatment notes, in respect of 1 detail, the hymen, the conclusion in them is that the hymen was broken, but everything else was normal.
43. The appellant argues that the 3 documents were not all prepared by the witness, PW1. I would have no way of knowing that, for I am not a document examiner. However, all 3 appear to have been signed by the same person, Aluku, except for the laboratory report. My understanding of the medical treatment notes is that a physical examination of PW2 did not reveal any evidence of defilement, hence the conclusion that that was a case of alleged defilement. The laboratory tests did not help either, for there was nothing abnormal. It is these treatment notes that are said to carry a mistake. I would find that unusual. The treatment notes were the primary records, from which the PRC and the P3 form were subsequently generated. If there was a mistake in the primary record, then the same ought to have been carried over into the secondary documents. If anything, any genuine mistake should have been in the secondary documents, made in the process of transferring the information from the primary record to the secondary one.
44. PW2 was a very young child. Not of tender years for sure, at 11, but very young. It would be inconceivable that she would have sexual contact with an adult leaving her with no mark discernible to medicine, where an examination and tests are conducted hours thereafter. Equally intriguing is the fact that PW2 did not testify to have had experienced any pain, whatsoever, from the alleged ordeal. This is an aspect that the trial court did not interrogate. PW4, the mother, did not, apparently, carry out a physical examination of her daughter, to get a preliminary view of the situation. She did not speak of anything unusual with the child. Then the clinician saw nothing on the minor worth raising eyebrows. The vulva was normal. No bleeding from the vagina. No bruises seen, of the labia minora and majora. Hymen was intact. He concluded that the defilement was an allegation. He then sent her to the laboratory. The tests were negative.
45. The prosecution was largely founded on the alleged absence of the hymen. In the first place, the evidence, on whether the hymen was broken, should have been taken to be inconclusive. The primary document relied on by the prosecution pointed to the hymen being intact. The secondary documents, generated from that primary document, contradicted the primary document. The explanation about the error in the primary document should have been taken with a pinch of salt, for the reasons that I have given above. Other than the broken hymen, everything else was normal. Then the clinician could not tell whether the tear on the hymen was recent or old, yet the age of the loss of the hymen was critical, for if it was recent, then it would have corroborated the narrative by PW2, that the appellant had just defiled her. The alleged broken hymen was the only evidence the prosecution was hanging on, and the approximate or estimated age of the alleged breach should have been established.
46. The clinician, PW1, introduced himself to the trial court as Kizito Murunga, based at Busia County Referral Hospital. The medical records, presented as evidence, emanated from Port Victoria Sub-County Hospital. PW1 did not explain how he came to testify on documents made at Port Victoria Sub-County Hospital, yet he was working at Busia County Referral Hospital. PW2 was allegedly seen examined and tested at Port Victoria Sub-County Hospital, yet the clinician testifying in her case came from Busia County Referral Hospital. That was critical, given that the person who allegedly signed the treatment notes, the PRC and the P3 form, signed the same as RC or RE Aluku or a name like that.



- PW1 did not use that name as part of his name in his introduction. There was no knowing whether the person bespeaking those documents was their maker, and whether he was qualified to testify on them, in the circumstances. The inconsistencies in his testimony, and the sketchy way he testified, should have gone to the credibility of his evidence.
47. I find it curious, that the charge accused the appellant of committing the defilement on 24th July 2020, yet there are inconsistencies as to when PW2 was taken to hospital. PW2, PW3 and PW4 testified of the incident happening on 24th July 2020, a report was made to the police the same day, and PW2 was taken to hospital the same day. According to PW5, the investigating officer, the report was made on 24th July 2020, at the police station, and by then PW2 had already been taken to Port Victoria Sub-County Hospital. PW5 testified that she took PW2 to the hospital the following day, 25th July 2020, for the PRC and P3 forms to be filled. PW1, the clinician testified that he saw PW2 on 24th July 2020, and filled the P3 form on the said date. Then during re-examination, he testified that he examined PW2 a day after the incident, hence he could not find any trace of blood. The trial court have to be PW1 was a very shifty and unreliable witness.
48. Let me get back to the hymen. It has been said by the courts that a broken hymen is not necessary proof of defilement, for a hymen can be broken under various other circumstances. See PKW vs. Republic [2012] eKLR KECA 103 (KLR)(Rawal & Maraga, JJA), David Mwingirwa vs. Republic [2017] KECA 666 (KLR)(Githinji, Karanja & Kiage, JJA), Dominic Angote vs. Republic [2020] KEHC 6108 (KLR)(Ndung'u, J) and Halake vs. Director of Public Prosecutions [2024] KEHC 6974 (KLR)(Cherere, J). In a case, such as the instant, where there was inadequate proof that the hymen had been broken, and where the clinician could not tell whether the same was freshly torn, the trial court ought to have exercised caution.
49. The medical evidence was, in view of the above, shaky, and the trial court ought not have relied on it to convict. Should the evidence have been disregarded? I do not think so. It was placed on record, and the trial court could not ignore it. The trial court could rely on the evidence of PW2, on what had transpired, and the corroboration provided to that evidence by PW3 and PW4, and could convict based only on that evidence, without the forensics. However, the moment the forensics were introduced into the matrix, the case tilted in favour of the appellant, for it created a reasonable doubt as to whether PW2 had been defiled at all, for the forensics on the penetration were not conclusive.
50. I am alive to the position that I held previously, that the trial court could still convict, where the medical evidence fell short, based only on the evidence of the complainant, if it was persuaded that the complainant was truthful and reliable. I have since reconsidered the position, on the basis that the forensics or medical evidence, once placed on record, cannot be ignored or disregarded. Whatever emerges from it ought to be used to gauge or evaluate the credibility of the rest of the evidence, as adduced by the complainant and his or her witnesses.
51. The burden of proof was always on the prosecution, to establish, beyond reasonable doubt, that there was penetration, of PW2 by the appellant. I am not persuaded that the trial court had evidence, to that standard, to warrant the conviction of the appellant.
52. Having disposed of the general grounds around substance and process, let me now advert to the constitutional issues raised about the trial, that the fair trial principles were infringed, or violated, or breached, or not complied with. The issues raised turn around the language used at trial, the failure to be informed of the right to an Advocate of own choice and or of an Advocate provided at the expense of the State, and the failure to disclose the evidence in advance.



53. It is the mantra that justice must not only be done, but it must also be seen to be done. It would be done when looked at from the perspective of the content and substance of the process, in terms of the weight of the case, based on the evidence marshalled and presented before the court. There ought to be evidence that establishes, beyond reasonable doubt, that the accused person committed the offence. The second level is also important, the process through which the accused person is taken. Whereas the evidence marshalled against the accused may be strong enough to establish his guilt, the process of his trial must also be fair, in terms of affording all the safeguards for a fair trial. Where the trial process is not fair, justice would not be seen to be done, even when the evidence presented is sufficient to support a conviction. An unfair trial cannot support a conviction, regardless of the weight of the evidence presented. Where unfairness is established, the trial, leading up to conviction, would be vitiated and rendered invalid.
54. Whether or not the trial was fair or observed the fair trial principles is dependent on the record kept or maintained by the trial court. The fair trial principles are stated in *the Constitution* of Kenya, at Article 50, and cover what happens at the time the accused is presented in court, during the trial and immediately thereafter. It includes being informed of the charges sufficiently to assist him decide on how to plead; the plea-taking exercise and the trial itself being conducted in a language that the accused understands, so that he is able to fully participate in the proceedings, so as to challenge the evidence adduced against him; being informed of his right to an Advocate of his own choice, and if he cannot afford one, one being availed by the State, depending on the gravity of the charges; being furnished, in advance, with the evidence to be adduced at the trial, to enable the accused prepare adequately ahead of the trial, for his defence; among others.
55. Whether there has been adherence to these principles should be apparent from the trial court record. Where the record is silent on any of these fair trial items, the presumption would arise that there was no compliance, even if the trial court had tried to comply. The only way to detect compliance is by looking at the trial record. The only way the trial court can demonstrate that it complied is by recording the compliance. I have repeatedly held, in other cases, that the promulgation of the new Constitution of Kenya, in 2010, reconfigured how pleas are to be taken henceforth, as it requires a strict compliance with fair trial principles, as enumerated in Article 50 of *the Constitution*.
56. Let me start with language. The official languages of the court are English and Kiswahili, and trials in Kenya are routinely in these languages, either exclusively in 1 of them, or a mixture of both. Although these 2 are said to be the official languages in Kenya, and of the court in particular, fluency in both is not common. Not every Kenyan, or Kenyan resident, is able to speak in English, or Kiswahili, or both. Both are not indigenous. English is an import from England. It came with the colonisation and Christianisation of Kenya. Kiswahili has its origins in Arabic, and it is traceable to the coming of the Arabs to the east coast of Africa centuries ago. So, much as these 2 languages are said to be the official languages, it should be appreciated that they are not necessarily spoken by all individuals within Kenya, and a court trying any person in Kenya should be sensitive to that, and seek to establish the language with which the person presented before it is familiar, and should he be unfamiliar with the 2, then establish which other language he is familiar with, and make an effort to get a person, familiar with it, to translate or interpret it to the court.
57. Language is critical, for communication is at the heart of any trial. The trial is principally mounted for the benefit of the accused person, to establish his guilt or innocence. The medium of trial is through presentation of witnesses in court, who then testify orally, by narrating the events around the alleged offence. That is about communication. As it is the accused being tried, the language used at the trial ought to be one that he is familiar with, so that he can understand what would be happening in court.



58. Understanding what is happening in court is at 3 levels. Firstly, so that he understands the charges themselves. He should understand what it is that he is exactly accused of having done, which was wrong. Secondly, it is about being able to follow what the witnesses presented by the prosecution are telling the court. Thirdly, it is about him, upon understanding the case against him, and the evidence tendered in support of the charges, being able to ask relevant questions, to the witnesses, by way of challenging the charges and the evidence. He can only be effective in that respect if there would be effective communication, between him, the court and the prosecution. In the absence of that, the trial would be a charade. As the trial is mounted for the purpose of the accused person, it must be relevant to him. It must not be done for the sake of it, or for the purpose of just going through the motions. The trial court must be sure that it is communicating with the accused person. The language, with which the accused person most comfortably communicates, is critical.
59. The issue of interpretation or translation was not introduced by *the Constitution* of Kenya, 2010. It preceded it. The courts had pronounced themselves on it, before *the Constitution* was promulgated on 27th August 2010, particularly with respect to plea-taking, in such cases as *Wanjema vs. Republic* [1971] EA 493 (Trevelyan, J), *Adan vs. Republic* [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA) and *Ombena vs. Republic* [1981] eKLR [1981] KLR 450 (Law, Miller & Potter, JJA), where it was stated that translation or interpretation, to inform the accused of the charges against him, is so fundamental that a breach of it should invite declaration of a mistrial. A mishandling of a trial, by way of not establishing the language that the accused person being tried is familiar with, would be fatal to the trial. It would be fatal to the trial, not the prosecution, and, for that reason, it should lead to a declaration of a mistrial, but not an acquittal, for it would be a mistake of the court, and not of the prosecution.
60. The appellant submits that the language that he used at trial is not known, for the record is silent on the language that he was familiar with, or that he used at the trial. He submits that it ought not be presumed that he understood English, yet PW5 testified in English. He suggests that he might have posed irrelevant questions to PW5 as a result.
61. The record reflects, and the appellant concedes, that the charge was read to the appellant on 28th September 2020, in English, and was translated to Kiswahili. The trial court did not record that Kiswahili was the language that the appellant understood. There is no minute in that record, indicating that the trial court ever enquired from the appellant about the language that he understood, and there is nothing stating that the appellant said that he understood the Kiswahili language, with such sufficiency as to be subjected to a trial exclusively in the language. The only way to gauge whether an accused person is comfortable with the language adopted by the trial court, for the purposes of the trial, would be by the trial court recording that it made enquiries about the language that the accused would be comfortable with, as between the official languages, English and Kiswahili, and, should it turn out that he is unfamiliar with neither, identify which other.
62. The appellant is not saying, on appeal, that he was not familiar with both official languages. He only appears to have an issue with the use of English. When he was arraigned, the appellant responded to the charges in Kiswahili, according to the record of 28th September 2020. The record indicates that, throughout the trial, the trial court used English and Kiswahili. The usual practice is that the presiding judicial officer uses English, being the language in which the laws are crafted, meaning *the Constitution*, the statutes and case law, then the court assistant interprets whatever the judicial officer says to the accused person.
63. The trial herein commenced in earnest on 8th July 2021, when PW1, PW2, PW3, PW4 and PW5 testified. According to the record they all testified in Kiswahili, save for PW5. The record is silent on



whether interpretation was provided, when PW5 testified in English, but I note that she was extensively cross-examined by the appellant. The cross-examination was just as extensive as the examination-in-chief. Whether he cross-examined in English or Kiswahili, there can be no doubt that he fully enjoyed and exercised his right to confront his accuser. He has not established that the questions that he posed were irrelevant. There can be no merit to his allegation that he was handicapped, language-wise, during that trial.

64. The other element of the fair trial principles relates to legal representation. *The Constitution* casts a duty on the court at 2 levels. The duty is to inform the accused person of his right to legal representation by an Advocate of his own choice, at 1 level; and at the other level, to inform him of his right to an Advocate provided by the State, should he be unable to afford an Advocate of his own. These are new rights under *the Constitution*, 2010. Prior to that the trial court was under no obligation to inform accused persons of these rights, for it was presumed that they knew about them. Now it is a constitutional obligation. Failure to comply, by the trial court, would render the trial unfair, for not keeping to the constitutional dictates.
65. The provisions are not decorative. They must be complied with. Non-compliance should invite consequences. The principal consequence is to vitiate the trial, by rendering it a nullity, under Article 2(4) of *the Constitution*. Sadly, the trial courts continue to proceed in the pre-2010 mode, where there was no obligation to communicate those 2 twin rights to the accused. In a sense, it would amount to ignoring the command by *the Constitution*, that trial courts inform accused persons of their rights in that regard. *The Constitution* of Kenya is the supreme law in the land, by dint of Article 2. It cannot be ignored.
66. I have, in other cases, discussed the importance of the right to legal representation, particularly where the charges are serious, in terms of the penalties prescribed. See *Ogombe vs. Republic* [2023] KEHC 21011 (KLR) (Musyoka, J), *Ojiambo vs. Republic* [2023] KEHC 24201 (KLR) (Musyoka, J), *Kinyua vs. Republic* [2024] KEHC 9469 (KLR) (Musyoka, J), *Ochume vs. Republic* [2024] KEHC 9470 (KLR) (Musyoka, J) and *Tom vs. Republic* [2024] KEHC 14939 (KLR) (Musyoka, J), among others. My colleagues, who have handled similar matters, in *Ann Wairimu Kimani vs. Republic* [2011] KEHC 1287 (KLR) (Sergon, J), *Chacha Mwita vs. Republic* [2020] eKLR (Mrima, J) *AOJ vs. Republic* [2021] KEHC 8076 (KLR) (Ong’ino, J), *Gitonga vs. Republic* [2023] KEHC 2624 (KLR) (Gitari, J), *Marete & another vs. Republic* [2024] KEHC 14744 (KLR) (Gitari, J) and *Opiyo vs. Republic* [2024] KEHC 7732 (KLR) (Aburili, J), among others, have taken a position similar to mine.
67. In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) vs. Burundi - 231/99* (2000), that right was explained in the following terms:

“Legal assistance is a fundamental element of the right to a fair trial, more so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words be able to argue their cases on equal footing.”



68. In *Pett vs. Greyhound Racing Association* [1968] 2 All ER (Master of the Rolls, Lord Justice Davies & Lord Justice Russel), it was said:
- “It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “you can ask any questions you like;” whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”
69. In the instant case, the offence was allegedly committed on 24th July 2020. The appellant was arraigned in court on 28th September 2020. These events happened some 10 years after *the Constitution* of Kenya was promulgated in 2010. The trial court was obliged to bend to the demands and commands of *the Constitution*, particularly regarding Article 50(2)(g)(h). The *Legal Aid Act*, Cap 16A, Laws of Kenya, became operational on 30th May 2016, to give effect to Article 50(2)(g)(h) of *the Constitution*. Section 43 of the *Legal Aid Act* requires the trial court to inform the accused person of his right to an Advocate provided by the State at State expense, after assessing the circumstances of the accused person. These are duties imposed on the trial court, by *the Constitution* and the relevant statute.
70. Did the trial court obey those commands? From the record before me, I have been unable to find compliance. That issue was not adverted to, on 28th September 2020, when the appellant was produced in court, for plea; neither was it raised on 8th July 2021, when the hearing commenced in earnest. It was not dealt with thereafter by the trial court. For all practical purposes, the trial court apparently turned a blind eye to Article 50(2)(g)(h) of *the Constitution* of Kenya and section 43 of the *Legal Aid Act*. As stated above, *the Constitution* of Kenya, 2010, is the supreme law in Kenya, by dint of its Article 2. Whatever it commands must be adhered to, and any non-adherence has consequences. A trial mounted in violation of *the Constitution* is a nullity, by virtue of Article 2(4) of *the Constitution*.
71. The final constitutional issue that the appellant raises is about the right to prior disclosure of evidence. That would entail the prosecution availing to him in advance the evidence they intend to present against him, being the statements of the prosecution witnesses and documents that they would rely on as exhibits. It is about being afforded facilities to prepare a defence, to avoid an ambush.
72. Was there compliance? When plea was taken, on 28th September 2020, the said documents had not been furnished. On 22nd October 2020, the appellant indicated that he had not been furnished with the witness statements, and the prosecution undertook to comply. The matter was mentioned on 3rd October 2020, 12th November 2020, 26th November 2020, 15th December 2020, 21st January 2021, 2nd February 2021 and 25th February 2021, for that purpose. The witness statements were availed on 25th February 2021, paving way for the hearing, which commenced on 8th July 2021. I do not find any non-compliance with that requirement.
73. In view of everything said above, it would be my conclusion that the appellant did not get a fair trial, for some of the constitutional fair trial principles were not observed or complied with. More crucially, the case against him was not proved beyond reasonable doubt. He should have been given the benefit of the doubt.
74. Consequently, I do hereby quash the conviction of the appellant, and set aside the sentence imposed upon him. He shall be set free from prison custody, forthwith, unless he is otherwise lawfully held. It is so ordered.



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

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Benjamin Makanda Wanyama, the appellant, in person.

Advocates

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

