Wekesa v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 5842 (KLR) (9 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E005 OF 2024

JRA WANANDA, J

MAY 9, 2025

BETWEEN

SAMWEL WANJALA WEKESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. E. Kigen - PM, delivered on 21/03/2024 in Iten Senior Principal Magistrate's Court Criminal Case - Sexual Offences - No. E050 of 2023)

JUDGMENT

1. This is one of those cases that no Judicial Officer loves to handle. It is a shattering and disheartening, if not devastating case and gives the true picture of what humanity has turned into. An infant of 3 ½ years is alleged to have been defiled. If it is true, then it is one of those sad cases that prove that our institutions still have a long way to go in protecting our children.

2. The Appellant, then a 23 years old young man, was charged in the said criminal case 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 were that on 22/10/2023, at [xxxxxxxxx] village, in Keiyo South sub-County within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of JPP, a girl aged 3 ½ years.

3. The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the same date, time and place, he intentionally touched the vagina of the same child aged 3 ½ years with his penis.

4. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 5 witnesses. At the close of the prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. He then gave an unsworn statement, was

therefore not cross-examined, and called no other witness. By the Judgment delivered on 28/02/2024, the Appellant was convicted on the main charge and sentenced to life imprisonment.

5. Dissatisfied with the decision, the Appellant filed this Appeal on 8/04/2024 against both conviction and sentence. His Petition of Appeal, reproduced verbatim, raises the following lengthy grounds:

   i. That the Learned trial Magistrate erred in law and fact when he presided over the case of the Appellant without noting that the charge sheet was defective in form and substance as the section he was charged under 8 (1) as read with section 8 (4) was at variance with particularization of the charge which contrary to section 134 of the *Criminal Procedure Code* L.O.K and Constitution article 50 (2) (b).

   ii. That the Learned trial Magistrate allowed a breach of a fair trial to the Appellant by imposing an unconstitutional life sentence on the Appellant against a principle held in Kitsao Manyeso appeal case that was ruled that life sentence was unnonstitutional.

   iii. That the Learned trial Magistrate erred in law and fact where the Court allowed the prosecution to present hearsay evidence to convict and sentence the Appellant to life imprisonment while indirect evidence was not admissible in the case I was undergoing.

   iv That the Learned trial Magistrate erred in law and fact on failing to realize that the prosecution action of presenting the Appellant for a medical examination was an exercise in futility as it happened after three (3) days after the reporting of the case, as no medical evidence would have been recovered following the delay which could not sustain the proving of the charge. The stained pant was never presented in Court.

   v That the Learned trial Magistrate erred in law and fact on failing to realize that the medical evidence (P3) the Court was relying on was defective in authenticity and content. Its authenticity is in doubt because the document does not speak for itself as examination findings are mostly generalized and as to the content the medical doctor instead of filling the P3 form from the medical notes referred its readers to the medical notes instead which is a procedural irregularity.

   vi. That the trial Magistrate erred in law by misapplying it to an unsubstantiated clam that the Appellant committed an act of defilement to the complainant on the contrary the ingredients of the alleged offense were not properly established more so on the identification of perpetrator aspect The child was asked whether he recognized the Appellant and not as a perpetrator of the alleged wrongdoing. The conviction was based on being implicated and not on evidence.

   vii. That the Learned trial Magistrate erred in law and fact when she committed a procedural impropriety when she self appointed herself as the representative /interpreter for the complainant which ideally could have been the complainants mother.

   viii. That the Learned trial Magistrate erred in law and fact when she failed to make a finding that this case was a frame up whose purpose was to settle scores for his refusal to comply with sexual advances made against him by complainants' mother.

   ix. That the Learned trial Magistrate erred in law and fact when she failed to properly consider the defense the Appellant offered for his case to reach at a proper decision. An instance the Appellant reason not to run away gives great inference on the innocence of the Appellant. It was not a conduct that consummate with guilty party in a crime situation.

   x. That the Learned trial Magistrate shifted the burden of proof to the Appellant contrary to the provision of section 107 of the *Evidence Act* when the prosecution failed to discharge its duty

of proving its case and mainly focused on the aspect of the Appellant to exonerate himself to prove its case.

xi. That the Learned trial Magistrate erred in law and fact by allowing the Appellant to offer mitigation in Court and in effect the Appellant was sentenced by the Court without considering his mitigation against a principle held in a case of Eliud Waweru v R *CA No. 102 of 2016*.

xii. That the Learned trial Magistrate erred in law and fact when she failed in imposing a mandatory sentence which translates to the deprivation of the Court discretion to impose an appropriate or lesser sentence in the Appellant's case. The Appellant relies on the authority of Philip Mueke Maingi And Others v ODPP and A.G.

xiii. That the Learned trial Magistrate erred in law and fact when she ignored an exonerating evidence presented by complainant's mother when she testified that the date of the alleged offence was on 25th and not 22-10-2023. She had to be threatened with imprisonment to change her statement.

xiv That the trial Magistrate erred in law by not complying with provisions of section 169 (1) of the *Criminal Procedure Code* while writing a Judgement. In particular the justification to impose a harsh and excessive was not indicated.

Prosecution testimony at the trial Court

6. PW1 was A, the minor's mother. She stated that on 22/10/2023, the Appellant, the minor and herself went to church, the Appellant had told her that he wanted to go to church but he did not know the way and thus wanted the minor to escort him. She stated that they all then went to church and they left for home when the service ended at 3.30 pm, on the way home, the mother stopped to talk to a certain lady and the Appellant and the minor proceeded to go home. She stated that on Monday and Tuesday, she went to school with the minor and on 25/10/2023, the minor told her that the Appellant had defiled her. She testified that she then took the minor to hospital where she was examined and the doctor called the police, she went to the station where a P3 Form was filled and she was referred to Kamwosor and later to the Moi Teaching and Referral Hospital (MTRH). She testified that the minor was born on 23/09/2019, the Appellant had worked for her for 2 weeks as a cattle herder. In cross-examination, she stated that the doctor confirmed the minor's injuries, that the minor told her (PW1) that the Appellant touched her private parts, and told the doctor that the Appellant had pierced her with a needle, and that the minor told the mother that she felt pain when standing. The mother thus insisted that the Appellant defiled the minor on the Sunday when they came from church.

7. PW2 was the minor(victim). Because of her age, she was taken through a voire dire examination upon which the trial Magistrate recorded that she was too young to understand the effect of taking an oath and thus, directed that she gives unsworn evidence.

8. Pursuant thereto, the minor stated that she had gone to church with the Appellant whom she knows. The record then indicates that at this point, the minor shut down and refused to any answer further questions. The record is captured is as follows:

> "At this point, the minor shuts and refuses to answer all questions put to her by the prosecutor. It should be noted that the mother is before Court and seated next to the minor"

9. With this turn of events, the Prosecutor is recorded to have applied for the minor to be declared a vulnerable witness under Section 31 of the *Sexual Offences Act* and the evidence of the mother be

treated as evidence of the minor. Although there is no express order recorded, I presume that, there being no opposition, the request was allowed.

10. PW3 was Police Constable Monica Kanda Cheserek attached to Mokil Police Station. He stated that on 25/10/2013, the minor was brought to the station with a report that she had been defiled by their shamba boy, she escorted the minor to Kamwosor where she was referred to MTRH where a P3 Form was issued. She stated that the Assistant Chief arrested the Appellant on 27/10/2023, she (PW3) recorded witness statement and she charged the Appellant. She stated that she spoke to the minor who told her that the Appellant had used a needle which he inserted into the minor's private parts and that the doctor told them that there was penetration. In cross-examination, she stated that she did not visit the scene because of bad roads.

11. PW4 was Annolyne Rotich, a Clinical Officer at Kamwosor sub-County Hospital in Keiyo South. She stated that among other qualifications in the medical field, she also had a Diploma in Clinical Medicine with specialization in gender-based violence. She testified that the minor, born on 22/09/2019 was brought to her on 23/02/2023 at 2.00 pm with a history of having been defiled by a shamba boy by the insertion of a "prick" in her private parts which the minor demonstrated to her, that it happened on a Sunday when they were returning from church with the shamba boy and that the minor stated that it was a needle. PW4 stated that upon examination, she found that the minor had redness of the vagina, and there was no discharge but her hymen was broken. She testified further that the matter was reported on 22/09/2023 but the minor was brought on 25/09/2023 and that the minor also had a urine infection. In her opinion, there was penetration and the probable tool was a penis. In cross-examination, she stated that the minor's pant had a whitish discharge, the minor stated that she felt a lot of pain, and that the redness in the vagina suggested an intrusive activity.

12. PW5 was Daniel Cheboror, the Assistant Chief of Ketigoi sub-location. He stated that he learnt of the incident on 26/10/2023 from the minor's mother, that he advised them to take the minor to hospital and later report the matter at Kamwosor Police Station, a Police Officer later phoned him and he went and arrested the Appellant at 6.00 am when he found him asleep at the minor's homestead. He stated that he did not know the Appellant before the incident but was aware that there was a new person in that homestead.

Defence testimony before the trial Court

13. In his defence, as aforesaid, the Appellant gave unsworn testimony. He stated that on that Sunday, he woke up early, milked the cows and then drove the cows to graze, that the lady (presumably the child's mother-PW1) came home and asked him that they go to church, he told her that he was not ready and would go the following week but the lady insisted upon which he agreed and they therefore went to church together and returned at 3.00 pm.

14. He testified that on Monday and Tuesday, the minor was taken to school as usual, on Wednesday he was milking with the lady's husband and the lady returned home at 10.00 pm, and on Thursday he was arrested. He stated that the minor would not be walking if at all he had defiled her, and that during the time when the husband was away, the lady had made advances to him on several occasions but he had refused.

15. As aforesaid, after the trial, by the Judgment delivered on 21/03/2023, the Appellant was convicted on the main charge of defilement and sentenced to life imprisonment.

Hearing of the Appeal

16. The Appeal was canvassed by way of written Submissions. The Appellant, now represented by Messrs Ngigi Mbugua & Advocates, filed the Submissions dated 4/12/2024, while the Respondent (State), through Prosecution Counsel Calvin Kirui, filed the Submissions dated 11/09/2024.

Appellant's Submissions

17. In respect to "age", the Appellant submitted that it was not sufficiently proved as the minor was not subjected to age assessment and neither was a Certificate of Birth tendered in evidence, that the failure to prove "age" greatly prejudiced the Appellant as the age had an impact on the sentence that was meted out. According to Counsel, this is evidenced by the observations made by the trial Magistrate that the minor's age was indicated by the mother's oral evidence as well as the Notification of Birth produced in evidence and that the trial Magistrate in one portion of her Judgment erroneously stated that a Certificate of Birth had been produced. Regarding "penetration" and "positive identification" of the perpetrator, he pointed out that there is no approximate age of the injury, if any, indicated in the P3 Form considering that the defilement is alleged to have occurred on 22/10/2023 and the minor was brought to the hospital on 25/10/2023. According to Counsel, it is baffling that a child of such tender age could be defiled and still continue with her daily chores until after 3 days before it is detected, that there was no conclusive determination by the trial Magistrate that there was penetration by a penis, and that the minor, through her intermediary, only claimed that it was a needle and thus did not with particularity state that it was the Appellant's penis or something else. He also observed that all the tests for hepatitis, HIV and Syphilis all turned out negative, that there were also no samples taken to confirm whether it is the Appellant who committed the defilement, that the alleged pant (underwear) that had a discharge which was substantively mentioned was not produced nor any forensic investigation conducted.

18. He also contended that the medical officer admitted that not High Vaginal Swab (HV) test was not conducted since 48 hours had lapsed. In respect to the Appellant's defence that beforehand, the minor's mother had made advances to him, Counsel faulted the trial Magistrate for not considering it. According to Counsel therefore, the Prosecution case had a lot of irregularities and question marks and thus could not have met the threshold of beyond reasonable doubt.

Respondent's Submissions

19. Prosecution Counsel referred to the provisions of law under which the Appellant was charged and also the case of George Opondo Olunga v Republic eKLR and set out the ingredients of the offence of defilement and also restated that it is the duty of the Prosecution to establish the said ingredients, which burden, he conceded, never shifts to the accused person. He then recounted the testimony of the minor's testimony and that of her mother and submitted that the Appellant is not a stranger to the minor and her mother, and that although the minor was of tender age, she had been exposed and spent time with the Appellant as their worker long enough to identify him. Regarding "penetration", he cited the definition set out in Section 2 of the *Sexual Offences Act* and again recounted the mother's testimony on this aspect and also the testimony of the Clinical Officer and the entries made in the P3 Form. He also referred to Section 124 of the *Evidence Act* and submitted that the minor's testimony was corroborated by the medical evidence. On the issue of "age", he submitted that the evidence thereof was supported by the Notification of Birth produced in evidence and also that the Appellant did not challenge the same and no contrary evidence was produced. He also urged that in his defence, the Appellant chose to give unsworn evidence which was a mere denial of the incident and which denial was untrustworthy and that therefore, the trial Court rightfully held that the prosecution discharged its

burden to prove all the ingredients of the offence beyond any reasonable doubt. Regarding the charge sheet, he pointed out that the trial Court rightfully noted in the Judgment that the Appellant ought to have been charged under Section 8(1) as read with Section 8(2) of the Sexual Offence Act but the Court rightly held that the same was not a fatal defect as the Appellant was well aware of the case he was facing and the age of the minor. Counsel also denied the allegation that the prosecution evidence and witnesses were contradictory or inconsistent and wondered why the Appellant did not call the people he had mentioned in his defence as his witnesses and asserted that the burden of proof did not shift to the Appellant at any point. Regarding "sentence", he urged that the trial Court considered the offence, the Appellant's mitigation and sentencing submissions made and that therefore the Court's discretion was exercised judiciously.

Determination

20. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see Okeno v Republic [1972] E.A 32).

21. As pointed out, the Appellant was charged under "Section 8(1) as read with Section 8(4) of the Sexual Offence Act". Considering that the age of the minor was indicated to be 3 ½ years old, the trial Magistrate, in her Judgment, noted that the correct provisions ought to have been cited as "Section 8(1) as read with Section 8(2) of the Sexual Offence Act". As also stated, the Magistrate however held that the same was not a fatal defect as the Appellant was well aware of the case he was facing and also the alleged age of the minor. Although this issue was raised in the Grounds of Appeal, it was not revisited or urged in the Submissions filed by the Appellant's Counsel. In view thereof, I deem that the same is not being pursued any further.

22. In these circumstances, the issues that arise for determination in this matter, in my view, remain the following:

    i. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.

    ii. Whether the sentence of life imprisonment imposed against the Appellant was justified.

23. I now proceed to analyze and determine the said issues

i. Whether the charge of defilement was proved beyond reasonable doubt

24. Section 8(1) and 8(2) of the *Sexual Offences Act* under which the Appellant was presumed to be charged as aforesaid, provide as follows, respectively:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
>
> "8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

25. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, the age of the victim, penetration and positive identification of the offender. (see George Opondo Olunga v Republic [2016] eKLR).

26. In respect to proof of the "age" of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, stated as follows:

> " .... the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

27. Further, in the Ugandan case of Francis Omuroni v Uganda, Court of Appeal; Criminal Appeal No. 2 of 2000, the following was stated:

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

28. In this case, the document that was relied on to support the minor's age was a Notification of Birth which was produced by the minor's mother (PW1). The document indicates that the minor was born on 23/09/2019. The incident having been alleged to have occurred on 22/10/2023, it means that, if the document is to be accepted, then the minor was about 4 years as at that date. As guided in the above authorities, the victim's age may be established even through, or by the testimony of "the victim's parents or guardian and by observation and common sense" or by "baptism card or by oral evidence of the child if the child is sufficiently intelligent". In this case, I note that the Notification of Birth was not challenged at the trial nor was its authenticity questioned by the Appellant even during cross-examination. In light of the nature of items mentioned in the Court of Appeal authorities above as capable of establishing the age of a victim in cases of defilement, and there being no contrary evidence to the Notification of Birth, or any evidence indicating that the Notification is not "credible or reliable", I find no reason to fault the trial Magistrate for accepting it.

29. In the circumstances, I cannot find any reason to fault the trial Magistrate's finding that the victim's "age" as being a minor was proved. This ground, too, therefore fails.

30. On the issue of "penetration", Section 2(1) of the *Sexual Offences Act* defines the term as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

31. In regard thereto, the Court of Appeal, in the case of Mark Oiruri Mose v R (2013 eKLR, guided as follows:

> " ..... In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

32. In this case, there is no dispute that the Appellant was well known to the minor, the Appellant having been their worker for about 2 weeks prior, during which time he resided in the minor's parents' homestead.

33. It is however unfortunate that the minor could not complete her testimony as a witness. The record indicates that she just "shut off" and refused to answer any further questions, despite her mother's attempts to intervene. One cannot speculate why the minor "shut off" as aforesaid. She may just have been overwhelmed, stressed or fatigued by the occasion or by the whole judicial and medical processes that she had been made to undergo even prior to appearing in Court. It is also possible that the defilement incident, if it occurred, gave her painful and/or unpleasant memories and the "shutting off" was a natural mechanism to block her young mind from re-enacting the incident and the resultant trauma. Considering her age, any or all the above could be possible. All she did, in her brief opening testimony, was to confirm her mother's testimony that the Appellant accompanied them to church on the Sunday when the incident is alleged to have occurred. For this reason, the minor was, under the provisions of Section 31 of the *Sexual Offences Act*, declared a "vulnerable witness" and the evidence of the mother (PW1) who had already testified, treated as the minor's evidence.

34. Although in this case the Court declared the child to be a "vulnerable" witness under Section 31 of the *Sexual Offences Act*, no meaningful effort was made thereafter to actualize this declaration. Section 31 aforesaid provides as follows:

> "(1) A Court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -
>
> (a) the alleged victim in the proceedings pending before the Court;
>
> (b) a child; or
>
> (c) a person with mental disabilities.
>
> (2) The Court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the Court's opinion he or she is likely to be vulnerable on account of —
>
> (a) age;
>
> .....
>
> (c) trauma;
>
> .....
>
> (e) the possibility of intimidation;
>
> .....;
>
> (i) the relationship of the witness to any party to the proceedings;
>
> (j) the nature of the subject matter of the evidence; or
>
> (k) any other factor the Court considers relevant.

(3) The Court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the Court and advise the Court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the Court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open Court;

(d) prohibiting the publication of the identity of the minor or of the minor's family, including the publication of information that may lead to the identification of the minor or the minor's family; or

(e) any other measure which the Court deems just and appropriate.

(5) Once a Court declares any person a vulnerable witness, the Court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the Court shall record the reasons for not appointing an intermediary.

....."

35. Section 31 above was expounded upon by the Court of Appeal in the case of MM v Republic [2014] eKLR in the following terms:

> " The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the Court at any time that the witness is fatigued or stressed; and to request the Court for a recess.
>
> It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings.
>
> It is clear from sections 31(2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the Court to make that declaration before appointing an intermediary. In addition, the Court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the Court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering

from mental disorder. The Court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.

It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the Court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness ...."

36. The Court of Appeal further guided as follows:

> " Because of the reality that a child of tender years, or an extremely old person, or a person affected by disease of the body or mind or even a lunatic may have difficulties relating to the trial Court events in a crime, the role of an intermediary in such situations is imperative. Indeed, in jurisdictions such as South Africa, England and Wales, intermediaries are professionals whose services are sourced by the Court when the need arises. Perhaps that is what the framers of section 2 of our *Sexual Offences Act* had in mind when they included experts, psychologists, counsellors and social workers in the definition of 'intermediaries'.
>
> The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."

37. In view of the foregoing, I believe both the Prosecution and the Learned trial Magistrate ought to have done more insofar as facilitating or assisting the child to testify was concerned. It is now generally agreed that where the evidence of a child of tender years involved in a sexual assault tends to be inconsistent or nonsensical or where there appears to be serious trauma, fear or intimidation because of the person who is allegedly the offender or generally, the Court or the justice system environment, the prosecution ought to apply for the child to be declared a vulnerable witness, and for a trusted intermediary to communicate to the Court on her behalf. In my view, to actualize the spirit of Section 31 above, the Prosecution should have gone further and applied for orders that interventionary steps be taken to assist the child to first heal from the trauma before testifying. Such intervention would include, for instance, referring the child to counselling services. Alternatively, the Court could have itself initiated such process.

38. Needless to state, in invoking this course suo motu, the Court should be cautious as it should not to deemed to appear to be assisting the prosecution in compiling evidence. In this case, apart from simply declaring the child a vulnerable witness and deeming the mother's evidence as that of the minor, no further step was made to ensure that the child derived any benefit from such declaration such as would ensure that she was provided with a situation or environment that would have made it possible for her to testify.

39. Be that as it may, in view of the foregoing, in the absence of the child's own testimony, amongst all the witnesses who testified, it is her mother's testimony as (PW1) which would stand as the primary evidence as there was no eye-witnesses accounts. The mother testified that on the fateful day, 22/10/2023, the Appellant, the minor and herself all went to church together, the service ended at 3.30 pm and they all left to return home, that on the way she stopped to talk to a certain lady and the Appellant and the minor proceeded to go home. She stated that on the next 2 days, the minor went to school as usual but on 25/10/2023, while at home, the minor told her that the Appellant had defiled her. She testified that she took the minor to hospital where she was examined and the doctor called the police, she went to the station where a P3 Form was issued and she was then referred to the

Moi Teaching and Referral Hospital (MTRH) where the minor was again examined and the doctor confirmed that indeed, the minor had injuries which indicated that she had been defiled. The mother then stated that according to the minor, the Appellant touched her private parts, and had "pierced her with a needle", and that she felt pain while standing. There is also the evidence of the Investigating Officer (PW3) who she stated that she spoke to the minor who told her that the Appellant had used a "needle which he inserted into the minor's private parts and that the doctor told them that there was penetration". Also relevant is the Clinical Officer's evidence who testified as PW4 and stated that among other qualifications in the medical field, she also holds a Diploma in Clinical Medicine with specialization in gender-based violence. She testified that the minor was brought to the facility on 25/10/2023 at 2.00 pm with a history of having been defiled by a shamba boy by "inserting a prick in her private parts" which, according to PW4, "the minor "demonstrated" to her.

40. It is therefore evident that the minor gave the same account to all the 3 witnesses of what had transpired. To me, this demonstrates credible consistency by the minor considering her tender age. None of the witnesses, during cross-examination, gave any indication of any contradictory information given by the minor.

41. The Clinical Officer (PW4) also produced the P3 Form that she filled and which summarises the results of the examination she conducted on the minor. According to the P3 Form, there were dried stains on the minor's inner-wear and she found that the minor had redness of the vagina with no discharge but her hymen was broken. The approximate age of the injuries is then stated as "3 days ago" which then tallies with the date of 22/10/2023 on which the incident is alleged to have taken place. The Post Rape Care Form (PRCF) that she also produced contains similar entries and she added that the minor also had a urine infection. She therefore concluded that there was "penetration" and that the probable tool for the penetration was a penis. In cross-examination, she stated that the minor she felt a lot of pain, and that the redness in the vagina suggested an intrusive activity.

42. In my view, the above medical evidence, coupled with the testimony that the minor demonstrated the sexual act to the Clinical Officer, sufficiently corroborates the testimony that there was penetration and that therefore, by extension, the minor was indeed defiled.

43. Regarding the minor's use of the term "pricked" or "pierced" by a needle, it is true as correctly submitted by the Appellant's Counsel that it did not make any express reference to penetration by a penis. As aforesaid however, the Clinical Officer (PW4) testified that the minor demonstrated to her what had been done to her and which, according to her, indicated sexual intercourse.

44. I also cite the guidance given by the Court of Appeal in respect of the use of euphemism phrases by child-victims in sexual offence cases. In the case of Muganga Chilejo Saha v Republic [2017] eKLR, the Court of Appeal acknowledged that such use of euphemisms by children is acceptable in giving description of defilement especially where penetration is established. In accepting that in Kenya the society has adopted such terms as euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a Court room. If the trend in the decided cases is anything to go by, Courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja",

(Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial Courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial Courts should record as nearly as possible what the child says happened to him or her. (emphasis added)."

45. I may, on my part, also add that apart from feeling "shy, embarrassed and ashamed" to expressly mention the real names or description of the sexual act or of sexual organs, children of very tender ages may also genuinely and/or honestly not even understand the act of sexual intercourse itself and thus "ignorance" or even "naivety" may perhaps need to be added to those listed above by the Court of Appeal. In this case, the minor being of such tender age of 3 ½ years, and there being sufficient corroboration that she was defiled through penetration by a penis, I find it justifiable to place her circumstances in the categories listed above and thus accept her description as being "pierced" or "pricked by a needle" to amount to reference to penetration by a penis.

46. I note that the Appellant's Counsel took the view that it is baffling that a child of such tender age could be defiled and still continue with her daily chores until after 3 days before it is detected. I find this submission misconceived in the absence of any medical or scientific evidence to support it. It is purely speculative and peremptory. Counsel also observed that all the tests for hepatitis, HIV and Syphilis turned out negative. I am not certain whether Counsel is suggesting that any sexual intercourse act must inevitably result into the contraction of a sexually transmitted disease. If this is Counsel's argument, then the less I say about it the better. Counsel also correctly pointed out that that there were also no samples taken to confirm whether it is the Appellant who committed the defilement, that the alleged pant (underwear) that had a discharge which was substantively mentioned was not produced and nor was any forensic investigation conducted, and that the medical officer admitted that not High Vaginal Swab (Hv) test was conducted since 48 hours had lapsed. I agree these were not conducted but in light of the overwhelming evidence on record establishing that there was penetration, the absence of the above matters did not, in my view, in any way affect the final determination that led to conviction.

47. That the law requires corroboration of testimony by minors where such minor is the sole or single witnesses is clear from Section 124 of the *Evidence Act*. However, there is also the proviso to that section to the effect that, in cases of sexual offences, there need not be corroboration if the trial Court believed that the minor-victim told the truth and recorded its reasons. The section and the proviso are framed as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

48. From the foregoing, it is clear that the proviso to Section 124 of the *Evidence Act* allows the Court to convict on the sole evidence of a minor-victim of a sexual offence if it is satisfied that the minor is

being truthful. Accordingly, the prosecution need not call all witnesses who may have information on that fact. In this case however, Section 124 is not even relevant since the testimony on penetration was sufficiently corroborated by the medical evidence on record.

49. I, like the trial Magistrate, therefore reach the conclusion that there was sufficient corroboration before the trial Court to support the conclusion that "penetration" was proved.

50. On the issue of "identification", the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

51. In this case, as aforesaid, the Appellant did not deny the victim's and her mother's testimonies that the Appellant was well known to both of them prior to the incident as he had worked for them as a herder for about a fortnight and during all this time, he resided in their home. As also aforesaid, the testimonies of the witnesses is that the minor specifically named the Appellant (their shamba boy) as the perpetrator of the offence. In the P3 From, it is also recorded that the victim was defiled by a person known to her. I also note that the incident is alleged to have occurred during the day after the church service ended at around 3.00 pm when the Appellant and the minor returned home, thus the possibility of mistaken identity is very minimal.

52. I therefore find the above to be a case of "recognition" rather than identification of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification". In respect thereto, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the Appellants by Wanyoni and Joice to whom they were previously well known personally, the first Appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the Appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three Appellants to the police as the robbers who had robbed him.
>
> We are satisfied that there was no mistake as to the identity of the three Appellants and they were properly found guilty of the offence with which they were charged in count 1."

53. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. The ground of Appeal challenging the Appellant's "identification" also therefore fails.

54. I also agree that the Appellant's defence was simply a mere denial of the incident which did not tackle the specific accusations raised against him. The evidence placed him at the scene of crime. Regarding his claim that =e had earlier rejected sexual advances from the minor's, he did not even expressly allege that this could have been a motive for the minor's mother to have framed her. He simply raised it and left it hanging without any explanation. But even if it were to be presumed that the Appellant alluded to the same as being such motive, I find it very hollow. I say so because, for instance, at no point during the trial did he raise the issue at all, not even during his cross-examination of the minor's mother (PW1) and of the Investigating Officer. Raising the same for the first time when giving his unsworn statement was therefore, in my view, a clear afterthought.

55. In the end, I find that no justification has been demonstrated to warrant this appellate Court's interference with the verdict of conviction arrived at by the trial Court.

ii. Whether the sentence of life imprisonment was justified

56. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

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

57. As earlier observed Section 8(2) of the *Sexual Offences Act* provides 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."

58. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view thereof, it is clear that the sentence imposed by the trial Court, although the maximum stipulated, was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart from such mandatory sentences, where justified. This was stated in the Supreme Court case of Francis Karioko Muruatetu and Another v Republic [2017] eKLR.

59. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum/maximum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake v Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi v Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

60. However, by the subsequent clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae)

(Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.

61. The Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) in which the Supreme Court set aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside a mandatory minimum sentence of 20 years imprisonment imposed on the Appellant.

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62. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will therefore be acting ultra vires were it to set aside the sentence of life imprisonment on the sole basis that the same, being a mandatory sentence stipulated by statute, is unConstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

63. I am however also aware that, in respect to the sentence of life imprisonment, there is emerging jurisprudence questioning its Constitutionality. In regard thereto, I cite the Court of Appeal case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) 7 July 2023) (Judgment), which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal, the Supreme Court faulted the Court of Appeal for usurping the role of the Legislature by purporting to declare the life sentence as unConstitutional. It then swiftly reinstated the sentence. This was in the recent case of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR) in which the Supreme Court held as follows:

> "70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*."

64. My above observations do not however mean that this Court is barred from determining the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

65. The Supreme Court, in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in sentencing, the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

66. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second,

consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

67. Similarly, in the case of Daniel Kipkosgei Letting v Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

68. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a serious offence under Kenyan law and society at large, and is always severely punished. It is also relevant to note that the victim in this case was a 3 ½ years child of tender age, such a vulnerable human being who needed protection from all, including from the Appellant. Sadly, the minor's trust was shattered by the Appellant's heinous and beastly act. Instead of stepping in to act as her protector, the Appellant turned out to be the very savage monster he was supposed to protect the minor against. I do not have to be a psychologist to discern that the minor will suffer lifelong trauma resulting from the act and will forever remember that her chastity was robbed from her by a person who was supposed to protect her. The minor's family must also be silently suffering from serious trauma caused by the act. Taking all these factors into account, it cannot be denied that the Appellant merited a stiff and deterrent sentence.

69. Having said so however, I also find the existence of some mitigating factors. The Appellant is currently aged just about 25 years, thus at his prime. He is also a 1st offender. Although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time but by giving him a second chance in life, to come out of jail, once he has hopefully learnt his lesson, and rebuild his life.

Final orders

70. In the end, I make the following final Orders:

    i. The appeal against conviction fails and the same is upheld

    ii. On sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court and substitute it with a sentence of 40 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant

Ngigi Mbugua for the Appellant

Ms. Mwangi for the State

Court Assistant: Adwin Lotieng