



**GKN v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 11066 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E037 OF 2024
CW MEOLI, J
JULY 24, 2025**

BETWEEN

GKN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence in Loitokitok
SRM's S.O. Case No. E033 of 2022 before J.N Nthuku, PM)*

JUDGMENT

1. The Appellant, GKN, was charged in the trial court with Defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*. In that on 24th December 2022 at [Particulars Withheld] village, Loitokitok sub-county within Kajiado County, he intentionally caused his penis to penetrate the vagina of PN a child aged 3 years. The Appellant faced an alternative charge of Indecent Act with a child contrary to Section 11(1) as read with Section 11(4) of the *Sexual Offences Act*, particulars thereof being that on 24th December 2022 at [Particulars Withheld] village, Loitokitok sub-county within Kajiado County, he intentionally touched the vagina of PN a child aged 3 years.
2. He denied the charges, but following a full trial, the Appellant was found guilty and convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. He was thereafter sentenced to serve 30 years imprisonment. Aggrieved by the conviction and the sentence, he filed the Petition of Appeal dated 22nd March 2024 but later introduced amended grounds via his written submissions dated 11th February, 2025 as follows:
 - a. That the learned trial Magistrate erred in law and fact by convicting the appellant based on the complainant's evidence, which was obtained and presented in violation of established procedural rules.



- b. That the learned trial Magistrate committed an error in law and fact by imposing a 30-year sentence following an unfair trial process that lacked comprehensive forensic evidence, specifically DNA evidence, linking the appellant to the charge.
 - c. That the learned trial Magistrate improperly rejected the appellant's sworn defence, thereby failing to give due weight and consideration to the appellant's testimony during the trial.
3. The appeal was canvassed by way of written submissions. The Appellant opened his submissions by asserting the duty of the prosecution to prove the guilt of an accused person beyond reasonable doubt. Asserting that in sexual offences, the minor victim must be demonstrably aware of the importance of telling the truth, he pointed out that the trial court upon conducting a *voire dire* examination of the minor victim recorded in its notes that the child was too young to understand the importance of telling the truth. Thus, rendering her an incompetent witness.
4. It was his contention that the trial court should not have admitted the minor's her testimony, in light of the provisions of Section 151 of the *Criminal Procedure Code*, and Section 19 of the *Oaths and Statutory Declarations Act*. The Appellant therefore contended that the minor victim having failed to satisfy the basic criteria for giving sworn testimony, her unsworn evidence should not have been received at the trial. In his view, the trial court's failure to observe the above statutory provisions undermined the integrity of the trial process and the conviction cannot stand.
5. Here, he cited a decision simply described as Criminal Appeal E014 of 2020 and further contended that the consideration of the minor's testimony was a breach of natural justice. Thus, the sentence resulting from the unfair process was unjust. He contended further that the prosecution failure to produce forensic evidence to demonstrate that the Appellant had indeed engaged in the act of penetration with the minor undermined the prosecution case. He therefore sought that the conviction be quashed and the sentence be set aside.
6. In submissions dated 20th May 2025, the State through their counsel defended the conviction and sentence. Addressing the charge sheet, counsel first noted that the complainant's age was stated to be 3 years at the time of commission of the offence. Which counsel described as a typographical error, given the evidence of age adduced at the trial. Additionally, that the Appellant was erroneously charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, instead of Section 8(1) as read with Section 8 (2) of the same Act, although the Appellant was eventually convicted on a charge of Defilement under the latter provision of the *Sexual Offences Act*.
7. Secondly, invoking the provisions of Article 159(2)(d) of *the Constitution* to the effect that justice shall be administered without undue regard to procedural technicalities, counsel submitted that the prosecution failure to amend the charge sheet so as to cite Section 8(1) as read with Section (2) of the *Sexual Offences Act* did not result in an unfair trial. Nor prejudice the Appellant during trial. But was an error, which was never raised during trial, and curable by application of Section 382 of *Criminal Procedure Code*. Counsel relying here on the decisions in *Mwangi Njoroge v Republic (2015) eKLR* and *Ogotu v Republic Criminal Appeal E031 of 2020 [2025]*.
8. The prosecution identified the core issue raised in the appeal to be whether the prosecution had proved its case beyond reasonable doubt. Reiterating the three ingredients of the offence of defilement, counsel asserted that evidence of penetration was overwhelming. Citing the medical report confirming that the complainant on examination by the clinician was found to have sustained a broken hymen, swollen labia majora and a tear on the labia minora. These findings confirming penetration as defined in Section 2 of the *Sexual Offences Act*. He cited the holding by the Court of Appeal in *Mohamed Bachero v Republic [2015] eKLR* that the slightest penetration is sufficient to establish the offence of defilement.



9. On the second ingredient of identification the Respondent underscored the fact that this was not a case of a stranger, rather it was a case of recognition. In this regard invoking dicta by the Court of Appeal in *Anjononi & Others v Republic* [1980] eKLR that recognition is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant. Hence asserting that the complainant's familiarity with the Appellant significantly reduces the chances of mistaken identity. The Respondent, therefore, submitting that the Appellant was positively identified by the complainant as the perpetrator.
10. Regarding proof of age, counsel reiterated testimony by the minor's grandmother that she was 4 years old at the time of the offence. And as confirmed by the birth certificate produced at the trial, indicating the minor's date of birth to be 29/3/2018.
11. Addressing challenges raised with respect to the credibility of the minor's evidence, the Respondent's counsel asserted that the trial court was best placed to assess the demeanor of the witnesses and determine her truthfulness. Adding that an appellate court will not interfere with such findings unless it is demonstrated that the trial court misapprehended the evidence or acted on wrong principles, as affirmed in *Republic v Oyier* [1985] eKLR. Further describing the minor's testimony as consistent, and detailed unshaken by cross-examination.
12. Further, counsel citing Section 124 of the *Evidence Act* and the pronouncement of the Court of Appeal thereon in *Keter v Republic* [2002] 1 KLR 35, stated that the Section permits a court to base a conviction on the sole testimony of the victim of a sexual offence, even if uncorroborated, provided that the court believed the victim and records the reasons for that belief. And pointing out that in the instant case, the trial magistrate recorded clear and sufficient reasons for believing the complainant. Moreover, that in this instance, the minor's testimony was corroborated by independent medical evidence confirming penetration.
13. Regarding the sentence of thirty years imposed by the trial court, counsel termed it as lawful and within the prescribed range and discretion of the court. In light of the fact that Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* prescribes a mandatory sentence of life imprisonment for the offence for which the Appellant was convicted. In conclusion, counsel asserted that the charges against the Appellant were proved beyond reasonable doubt, and hence the conviction and sentence were lawful. He urged the court to dismiss the appeal.

Analysis and Determination

14. The court has reviewed the entire record of the proceedings before the trial court and the rival submissions on the appeal. As the first appellate court, this court is required to re-evaluate the evidence tendered before the trial court with a view to arriving at its own conclusions. The duty of the first appellate court was spelt out in the case of *Okeno vs. Republic* [1972] EA 32, as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. R.* [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala vs. R.*, [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the



trial Court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post*, [1958] E.A. 424”.

15. Similarly, in the case of *David Njuguna Wairimu vs. Republic* [2010] eKLR the Court of Appeal reiterated that: “ The duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”
16. Three key elements, namely, the age of the victim, penetration and identity of the perpetrator must be proved beyond reasonable doubt for the prosecution to succeed in a charge of defilement. The prosecution bears the burden of proof beyond reasonable doubt. This burden of proof never shifts to an accused person.
17. In proof of these ingredients the prosecution relied on the evidence of four witnesses. The star witness was PN testifying as PW2. Following a *voire dire* examination of the PW2, the trial court received her unsworn evidence after making a finding to the following effect: “Child too young to understand importance of telling the truth or meaning of oath she will give unsworn evidence” (sic). The Appellant by his submissions has made heavy weather of this statement and the court will address that matter later in this judgment.
18. Be that as it may, the minor’s grandmother NW testified as PW1. Her testimony was as follows. She was a peasant farmer residing at Ngwaro Rongena (sic). In the material period, she was married to and was living with the Appellant. Also living with couple were their infant son and PW1’s own granddaughter PN (PW2), a minor born on 29.03.2018. On 24.12. 2022 at 3pm, PW1 left home to go to the market leaving the infant and PW2 in the care of the Appellant. Returning home at 7pm, she found PW2 sleeping on the couch, and she took her to bed. However, on the following day, which was Christmas day, she noticed that PW2 did not appear well and lacked appetite. Presently, PW2 approached her in her room and reported that she had pain in her vagina and could not urinate. Upon being questioned she told PW1 that “Guka alichukua kitu yake akaingiza huku ndani.”
19. Shocked by the revelation, PW1 had confronted the Appellant who reacted violently, and arming himself with a panga, exposed his penis to PW1’s daughters present at the home. PW1 then took the child to Rombo Health Centre for treatment and later to Loitokitok Sub-County Hospital where she was examined by Francis Nana (PW3), a clinical Officer who stated that the child had sustained serious injuries to her genitalia.
20. On her part, PW2 testified that while at her grandmother’s home the Appellant did bad things to her while the grandmother was away at the market. Stating that she was on a couch when the Appellant called her and touched her. And said that after he took off her pant, the Appellant “Akiingisha kitu yake huku”(sic), while pointing to her crotch. And that the Appellant didn’t remove his trousers but only pulled out ”his thing” and inserted it in her, causing her pain, while threatening he would kill her. Further, she stated that the Appellant then inserted fingers between her buttocks. She testified that when she reported the incident to PW1, she got angry and struck the Appellant.
21. During cross-examination, PW2 insisted that the Appellant did “bad things to her on the bed” and denying that he assaulted her, repeated that he “inserted his thing here” while pointing to her crotch.



- She maintained that she was telling the truth and that she attended church, before breaking down and sobbing.
22. PW3, a clinical officer based at Loitokitok sub-county Hospital testified that upon examining PW2 on 26.12.2022, he noted that her labia majora was swollen, that she had a tear on labia minora and that the hymen had broken. Noting further the presence of pus cells, which he said was an indication of infection. His opinion was that there was defilement. He produced the P3 form, the PRC form, and treatment notes as P. Exh. 2, 3 and 4, respectively.
 23. Cpl. Esther Munyalo (PW4) of Loitokitok Police Station testified that on 26.12.2022 while at the station, she received a complaint from PW1 to the effect that PW2 had informed her that while she was away from home on 24.12.2022, the Appellant had defiled her. And that PW2 had been treated at Loitokitok sub-county hospital. With her colleague PCs Njoroge and Mutiso they proceeded to the Appellant's house and arrested him.
 24. When placed on his defence the Appellant elected to make a sworn statement. To the effect that on 25.12.2022 he left home and travelled to Illasit and returned home later to spend the evening with his family. Then his wife, PW1 left home, allegedly to attend a function while he retired to bed at 8pm. Shortly after, he heard a knock on the door and upon opening saw police officers who arrested him and took him to the station where he found PW1 who was drunk had claimed that he had defiled a child. He had thereafter been charged. He testified further that PW1 had visited him in custody and stated that she did not know the reason behind his arrest.
 25. Under cross -examination he stated that the minor was his grandchild who was staying with him and PW1 at the material time. He said he did not know why the minor falsely accused him. And that he had a peaceful relationship with PW1 who loved him but had reported to police while drunk.
 26. From the foregoing evidence, there was no dispute concerning the relationship between the Appellant, PW1 and PW2 and that at the material time, PW2 was living in the couple's home. The key disputed issue was whether the Appellant defiled PW2 on 24.12.2022. Based on the evidence of PW1 and PW2 it appears that the Appellant was at home alone with PW2 and his infant son with PW1 at the time of the offence. Thus, the only witness concerning the incident was PW2.
 27. Unsurprisingly, the Appellant has assailed her credibility on this appeal. First, based on the trial court's statement upon the conclusion of the *voire dire* examination to the effect that, "Child too young to understand importance of telling the truth or meaning of oath she will give unsworn evidence." (sic). And asserting that the finding rendered PW2 an incompetent witness whose evidence should not have been received. The Applicant complains that due to these events, he was subjected to an unfair and unjust process and his conviction is thereby vitiated. The Respondent's submissions did not expressly address this particular complaint.
 28. Section 125 (1) of the *Evidence Act* which provides for the competency of witnesses generally states that "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".
 29. While Section 151 requires that every witness in a criminal case shall be examined on oath, Section 19(1) of the Oaths and Statutory Declaration Act makes an exception as follows:
 1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is



possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that Section.”

30. In the case of *Karimi vs. Republic* (2016) KECA 812 (KLR), the Court of Appeal considered the above provisions and consequences of non-compliance with the requirement for the conduct of a *voire dire* examination in respect of a witness who is a child of tender years, in that case determined to be a child under 14 years of age, as held in *Kibangeny Arap Korir v Republic*, [1959] EA 92 by the Court of Appeal for Eastern Africa.

31. The Court of Appeal stating in the foregoing regard that:

“ 10. Another point of law which was not raised by the appellant (perhaps because he was not represented by counsel) was the credibility of the evidence by the complainant, a child of 12 years whose competency to give evidence was not tested by the trial magistrate through *voire dire* examination. The first time the complainant testified was on September 13, 2011. She was recalled again on September 26, 2011, when she was cross examined by the appellant. The complainant was not subjected to *voire dire* examination, an aspect that seems to have eluded both courts below.... Nonetheless, as it is apparent to us; we have to address it as a point of law in the instant appeal. Subjecting a witness of tender age to *voire dire* examination is founded under Section 125(1) of the *Evidence Act*, which states...

11. Also Section 19(1) of the *Oaths and Statutory Declarations Act* has something to do with receiving evidence of a child in the following:-.....

12. Both statutes are silent on the definition of who is a child of tender years. In our own understanding of the above provisions of the law *voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.....

32. As regards the rationale for Sections 125(1) of the *Evidence Act* and 19(1) of the Statutory Oaths and Declarations Act, the Court of Appeal stated:

“ 16. Which definition should guide the courts in determining who is a child of tender years, is it the *Children Act*, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the *Evidence Act* and the *Oaths and Statutory Declarations Act* of *voire dire* examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by *the Constitution*. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct



voire dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the *Children Act* cannot globally be imported for offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children’s Act has remained a guide in regard to criminal responsibility.

17. In a recent decision of the Court of Appeal sitting in Nyeri the case of Patrick Kathurima v Republic, [2015] eKLR; it was held: “We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of cap 15. We are aware that Section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes’.
33. Thus, the Appellant’s assertion that the provisions of Section 125(1) of the *Evidence Act* and 19(1) of the *Oaths and Statutory Declarations Act* are intended as safeguards to the constitutional right to a fair trial is accurate. Thus, it cannot be disputed that the question whether a voire dire was properly conducted, or at all could potentially, impact upon the accused’s right to a fair trial. However, whether failure to conduct a voire dire examination or to conduct it properly, or in a certain format vitiates a trial, as was the result in Karimi’s case (supra) will depend on unique circumstances of the case under consideration, and especially whether the accused person was thereby prejudiced.
34. In Thomas Mwambu Wenyi v Republic (2017) KECA 520 (KLR) the Court of Appeal considered a second appeal where the trial proceedings during voire dire examination of minor witnesses did not indicate the questions asked by the trial court, but merely reflected words to the effect “that upon examination of the minor I do accept her affirmed” and later in the judgment the trial court stating that “It is no doubt the two children were talking the truth.”
35. The Court of Appeal expressed observed as follows:-

”It is not disputed that the questions put to the minors by the court and their responses thereto were not reflected on the record. When confronted with a similar complaint, the learned first appellate court Judge set out the provisions of Section 19 of the oaths and Statutory Declaration Act Cap 15 Laws of Kenya, enshrining the voire dire principle. He then drew inspiration from the case of Fransio Matovu versus Republic [1961] E.A 260.”



36. In the *Fransio Matovu* case, the Court of Appeal for Eastern Africa held inter alia that:
- “A judge, when confronted with a child of tender years called to give evidence, should himself question the child to ascertain whether he or she understands the nature of an oath, and if the judge does not allow the child to be sworn, he should record whether, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth”.
37. Resuming on the theme above, the Court of Appeal in *Thomas Mwambu Wenyi’s* case (supra) proceeded to discuss other similar cases, including *DWM v Republic* [2016] eKLR; *Patrick Kathurima v Republic Nyeri* CRA 137 of 2014 and ; *Mohamed v Republic* [2005] 2KLR 138 before stating that:-
- “In *Patrick Kathurima versus Republic Nyeri* CRA 137 of 2014, this Court after reviewing case law on the subject observed thus:-
- “It is best, though not mandatory, in our context that the questions put, and the answers given by the child during *voire dire* examination be recorded verbatim as opined by the English Court of Appeal in *Regina versus Campell* (Times) December 20,1982 and *Republic versus Lalkhan* [1981] 73 CA190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.”
38. In the case of *Maripett Loonkomok v R* (2016) KECA 520 (KLR), the Court of Appeal grappled with the effect of failure by the trial court to administer *voire dire* examination in respect of a minor complainant who was found to be aged about 11 years at the time of the offence. The Court stated that it was firmly “settled that not in all cases that *voire dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No.10 of 2014”.
39. The Court also stated that it was equally settled that pursuant to the provisions of Sections 208 and 302 of the *Criminal Procedure Code*, a witness who did not give evidence on oath may be subjected to cross-examination, and cited *Nicholas Mutua Wambua and another v Msa* Criminal Appeal No.373 of 2006.
40. In restating the provisions of Section 19 of the *Oaths and Statutory Declarations Act*, the Court of Appeal stated that where, in the opinion of the court a child does not understand the nature of an oath, his evidence may be received if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.
41. Thus, whereas in the instant case the trial court found that the minor did not understand the nature of the oath, her evidence could be received upon the court finding that she was possessed of sufficient intelligence to justify such reception, and that she understood the duty to of speaking the truth. The trial court record of proceedings during the *voire dire* examination of PW2 which took the question and answer format reads as follows:
- “Q: sasa
A: Poa
Q: What’s your name ?



A: CN

Q: How old are you?

A: I don't know

Q: Do you go to school?

A: Yes. [Particulars Withheld] Academy. I am in PP2.

Q: Are lies good?

A: I don't know

Q: Who is your teacher?

A: Tr. (teacher) W".

42. The court then recorded the following finding:

“Ct. (Court): Child too young to understand importance of telling the truth or meaning of oath. She will give unsworn evidence”.

43. The minor proceeded to give unsworn evidence thereafter and was cross-examined by the Appellant. A copy of an official acknowledgment of birth in respect of PW2 was produced as P.Exh. 1. The document indicated that PW2 was born on 29.03.2018 and therefore at the time of testifying in April 2023 was aged about 5 years, and therefore four years old at the time of the offence. This is what the trial court said in its judgment in relation to the evidence of PW2: -

“The child who is aged 4 years Stated that the accused defiled her and even in cross-examination by the accused she said the accused never beat her but he inserted kitu yake hapa indicating her crotch. This child broke down into tears upon turning and seeing the accused while testifying. She looked traumatizedThis child didn't strike me as one who had been coached. The medical evidence corroborate her evidence...Even the demeanor of this child when she testified showed she was scared of the accused person hence the reason she broke down when he was cross-examining her and his efforts to make her say he beat her up failed she maintained that he defiled her...”(sic)

44. Clearly, through the *voire dire* examination, the court formed the view that the child did not understand the nature of an oath, and equally, despite not expressly stating it, that the child was possessed of sufficient intelligence, the latter which is borne out by her answers. However, while the trial court stated that PW2 did not understand the importance of speaking the truth, the judgment of the court says otherwise. It appears to me, upon reviewing the record of the *voire dire* examination and the judgment, that in the former, the trial court conflated the two sequential steps in Section 19 of the *Oaths and statutory Declarations Act*. Being, firstly, whether the child understood the nature of an oath; and if not, whether the child was possessed of sufficient intelligence, and understood the importance of telling the truth, in order to justify receipt of her unsworn evidence.

45. Additionally, the question put to the minor as to whether lying is good or not seems a tad philosophical for a five-year-old, who from her answers, nonetheless appeared an intelligent and observant child. The question could have been broken down into simpler age-appropriate questions so that the minor could understand and give appropriate answers. Even so, the trial court itself demonstrated by its judgment that the child was a credible and believable witness. Undeniably, the *voire dire* examination was not properly conducted in this case, whose are not dissimilar to the situation obtaining in Thomas



Mwambu Wenyi's case (supra) where the trial court merely stated that "that upon examination of the minor I do accept her affirmed" and in the judgment held: "It is not in doubt the two children were talking the truth." Or the case of Loonkomok Maripett (supra) where no *voire dire* examination at all was held. Neither trial was found vitiated by the imperfect *voire dire* examination and the convictions were upheld.

46. The Court of Appeal in Thomas Mwambu Wenyi (supra) expressing the following position: -

"On account of the above observation, this Court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety.

There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where *voire dire* procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

"It is best though not mandatory in our context that the questions put, and the answers given by the child during the *voire dire* examination be recorded...

The trial magistrates' failure to reflect on the record the questions put to HW during the *voire dire* examination was not therefore per se fatal to the prosecutions' case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the threshold of proof beyond reasonable doubt."

47. And concluded by stating as follows: -

"The reasoning in the case law highlighted above, is that although it is desirable that the questions put by the court on the one hand and the responses of the minor (s) thereto on the other should be reflected on the record during the *voire dire* examination of minor witnesses, the failure to do so is not per se fatal to the prosecutions' case, so long as there is demonstration on the record that the trial court bore the need to carry out this exercise in mind, and in fact did carry it out. We therefore find no fault in the conclusion reached by the learned Judge that no prejudice or miscarriage of justice was occasioned to the appellant by the trial court's failure to reflect on the record both the questions put by the court to the minor (s) and the responses made by the minor (s) thereto in response to those questions.

The correct position in law with regard to the discharge or otherwise of the burden of proof in criminal trials is that enunciated by the predecessor of the court in *Sekitoleko versus Uganda* [1976] EA53 that:

"As a general rule of law, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else"

48. And in the case of Loonkomok Maripett, the Court of Appeal concluded that:

"It is clear to us from the record that the trial Magistrate deliberately did not conduct *voire dire* examination for he believed, erroneously, that the complainant was not a child of tender years....



It follows from a long line of decisions that *voire dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

“In appropriate cases where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

See *Athumani Ali Mwinyi v R* Cr.Appeal No.11 of 2015

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct *voire dire* examination. The complainant's evidence was cogent; she was cross-examined, and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement.”

49. Similarly in this case, despite the anomalies pointed out, there is demonstration on the record of the trial that the trial court was alive to the requirement to conduct a *voire dire* examination of PW2 prior to her testimony, and did so, albeit imperfectly. PW2 was cross-examined by the Appellant and in addition to her evidence the prosecution relied on medical evidence and the testimony of PW1 in the court's view no prejudice or miscarriage of justice was occasioned to the Appellant by the said imperfection and the trial is not thereby vitiated.
50. PW2's evidence-in-chief describing events of the material date in a sequential and detailed manner, and with clarity. During cross-examination, she was consistent and denied the Appellant's suggestion that her complaint was that the Appellant beat her and reiterating that the Appellant defiled her. The evidence of PW2 was not only believed by the trial court, but as the court found, also strongly corroborated by the medical evidence tendered by the clinical officer, PW3. That evidence was to the effect that when examined on 25th and 26th December 2022, PW2 had injuries to her genitals including swollen labia majora, tear on the labia minora and ruptured hymen, in addition to the presence of pus cells, which was an indication of infection. PW3's opinion was that there was defilement.
51. The Appellant's defence was centered on the date of his arrest, which he claimed to have occurred on 25.12.2022, whereas PW4 stated that the arrest was effected on 26.12.2022. Further, the Appellant's defence statement made no reference to the 24.12.2022, the asserted date of the offence. Regarding the said date, the trial court while considering the testimony that PW2 had on the said date been left by PW1 in the care of the Appellant, observed that could be no other explanation (other than penetration by the Appellant) for the injuries later found on the genitalia of PW2.
52. The Appellant when cross-examined stated that he had a loving relationship with his wife (PW1) and could not give any reason to motivate her to frame him. Besides, the allegations of a frame-up while she was drunk, were not put to PW1 during cross-examination, while she was evidently in a sober state. And PW2 in my view would be too young to be roped into such a conspiracy. The trial court having weighed the evidence before it correctly dismissed the defence. The complaint on this appeal in that regard cannot stand.



53. As regards the Appellant’s complaint that no forensic evidence was adduced to prove that he ”engaged in the act of penetration with the minor”, this complaint appears to allude to the type of evidence envisaged by Section 36 (1) of the Sexual Offences Act which provides that:

“Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

54. The Court of Appeal in *Chembe v Republic* (2024) KECA 647 (KLR) stated as follows regarding the above provision:

“28. Notably, Section 36(1) is couched in discretionary terms, rather than mandatory terms. The above provision was a subject of discussion, by this Court in the case of *Robert Mutingi Mumbi -vs- Republic*, Criminal Appeal No. 52 of 2014 (Malindi) where this Court stated:

“Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms.DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved.

29. In the case of *David Kahura Wangari vs. Republic* [2016] eKLR, this Court held that:

“There is no requirement for the appellant to be taken for treatment to establish an act of defilement. DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court.

30. And in the case of *AML vs. Republic* [2012] eKLR, this Court authoritatively stated that, “The fact of rape or defilement is not proved by D.N.A. test, but by way of evidence.”

55. The Court of Appeal therefore concluded by stating that:

“31. In view of the above cited authorities, the conduct of a DNA test is not mandatory and, in the circumstances of this case where the prosecution had satisfied all the elements of the offence of defilement clearly, a DNA test was unnecessary. See *Evans Wanjala Wanyonyi vs. Republic* [2019] eKLR.”

56. Similarly in this case, there was credible evidence tendered in proof of the offence, and forensic evidence was therefore unnecessary. Thus, nothing turns on that complaint. Reviewing the entire record, this court finds no reason to fault the findings of the trial court that the prosecution evidence proved the



ingredients of penetration, age and identity of the perpetrator, and hence the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Notwithstanding that the initial charge had been brought under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. By his appeal, the Appellant has not raised a complaint regarding his conviction under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, which matter the prosecution has addressed in their submissions.

57. The trial court after setting out the latter provisions of Section 8 (1), (2) and (3) of the Act stated in the judgment that:

“The accused was charged under Section 8(3) as opposed to Section 8(2) reasons best known to the prosecution. From the birth notification she (PW2) was born on 29th March 2018 so as at December (2022), she was 4 years (old) and a minor within the age covered by Section 8(2) of the *Sexual offences Act* ...her age has been proved.”

58. The trial court did not expressly invoke any provision in support of this finding. The statement of the offence in the charge sheet stated that the Appellant was charged with Defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*, while the particulars stated inter alia that the Appellant “intentionally caused his penis to penetrate the vagina of PN a child aged 3 years”. The complainant’s age at the time of the offence was proved as 4 years. Thus, there were two errors in the charge sheet. In the case of *Alexander Lukoye Malika v Republic* (2015) KECA 764(KLR), the Court of Appeal while considering the question whether the charge of defilement contrary to Section 8(1)(2) as framed and particulars thereof were defective, cited Section 134 of the *Criminal Procedure Code* regarding the requisite contents of a charge or information.

59. The Court proceeded to state as follows:

“We agree with counsel for the respondent that the appellant was not embarrassed or prejudiced in any way as Section 382 of the said Code provides that no finding, sentence or order passed by a competent court shall be reversed or altered on appeal or revision on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings unless such error, omission or irregularity has occasioned a failure of justice to the party before the court.

This court was faced with a question of sufficiency of particulars of an offence in a charge sheet in *Mahero v Republic* [2002] 2 KLR 406 and the court held:

“In the appellant's case we have perused through the record of the trial court and are satisfied that the appellant understood the charge he faced, he asked relevant questions to the charge and in no way was prejudiced”.

In *Frank Ochieng Otieno v Republic* (Kisumu) Criminal Appeal No. 363 of 2011 (ur) we had no doubt that the charge sheet was defective because it stated that the offence charged was contrary to Section “8 (1) (3)” instead of Section 8 (1) as read with Section 8 (4). We held in that case that:

“On the issue of alleged defective charge, there cannot be any gainsaying that there was indeed a defect: instead of the charge stating that the appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006, it read that the offence was contrary to Section 8 (1) (3) of the said Act. The



anomaly was not noticed by the learned trial magistrate. However, he still sentenced the appellant as if he had been properly charged. The learned Judge of the High Court clearly appreciated the defect and specifically stated that the appellant had been sentenced under Section 8 (4) of the said Act given the age of the complainant. Without saying so, it is clear that the learned Judge resolved the defect under Section 382 of the *Criminal Procedure Code*. She plainly had jurisdiction to do so. In our view, nothing should turn on this complaint as the irregularity did not in any case cause any prejudice to the appellant. He in fact does not appear to have noticed that defect himself when he appealed to the High Court because he did not complain about it. Accordingly, we find that the defect in the charge sheet was curable and was indeed properly resolved by the High Court under the provisions of Section 382 of the *Criminal Procedure Code*.” (Emphasis added)

60. The facts in the above decision are readily applicable to the present case. The Appellant clearly understood the charges facing him and robustly cross-examined the witnesses and gave his sworn defence. Other than stating that his sentence was unjust and unfair, he did not complain about the conviction under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. On its part, the trial court, upon noting the errors in the charge laid before it and the proven age of the complainant, but without expressly invoking the provisions of Section 382 of the *Criminal Procedure Code* convicted the Appellant under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. This court agrees with the Respondent that the Appellant was not prejudiced and that the trial court was justified in acting in this manner. In the result, the court finds no merit in the appeal against conviction.
61. As regards the sentence, under Section 8(2) of the *Sexual Offences Act* 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. That is a mandatory sentence. As stated by the Court of Appeal in Stephen Nguli Mulili v Republic (2014) KECA 408 (KLR) while upholding the enhancement by the High Court, of a sentence of ten years under the *Sexual Offences Act* to the minimum sentence of 15 years, the High Court is empowered under Section 354(3) (a) (ii) of the *Criminal Procedure Code* to enhance an erroneous sentence passed by the lower court under the *Sexual Offences Act*. The Court stated that the Act removed discretion in respect of minimum and mandatory sentences, especially where the victims were minors.
62. Hence the penalty provided for the offence under Section 8(2) of the Act, that is life imprisonment, is mandatory, not discretionary. The trial court while sentencing the Appellant on 20.07.2023 to thirty years imprisonment did not give any reasons for its decision. It is likely that the decision was influenced by the famous Supreme Court decision in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR. The sentence of 30 years imprisonment is described by the Appellant as unjust and unsustainable and by the Respondent’s counsel as lenient, but within the court’s discretion.
63. The rationale in the Muruatetu case (supra) has hitherto been applied in many cases involving offences under the *Sexual Offences Act*. Including Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso v Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR) in the Court of Appeal. However, the Supreme Court has recently pronounced itself in Republic Vs. Mwangi and Others



Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, regarding minimum and mandatory sentences prescribed under Section 8 of the [Sexual Offences Act](#):

“In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the [Sexual Offences Act](#) remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence.”

64. Further, in Republic v Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

“(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.

In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the [Penal Code](#). Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.”

65. In the circumstances, as explained in Muruatetu II case above, the decision in the Muruatetu I case cannot be applied in the sentencing of an offender convicted under Section 8 of the [Sexual Offences Act](#). Based on the provisions of Section 8 (1) as read with Section 8(2) of the [Sexual Offences Act](#) and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful mandatory sentence for the offence for which the Appellant was convicted is life imprisonment, and not 30 years imprisonment as awarded by the trial court.

66. This Court will therefore set aside the erroneous sentence of thirty years imprisonment imposed by the trial court, and substitute therefor the lawful sentence of life imprisonment. It is so ordered. In the result, the appeal has failed in its entirety and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 24TH DAY OF JULY 2025.

C.MEOLI

JUDGE

In the presence of:

Appellant: Present

For the Respondent: Ms. Kihumba h/b for Mr. Kilunda

C/A: Lepatei

