Wakulwa v Republic (Criminal Appeal E009 of 2022)
[2025] KEHC 9814 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E009 OF 2022

WM MUSYOKA, J

JULY 4, 2025

BETWEEN

JACKTONE WAKULWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence, in Busia CMCSOC No. 108 of 2021, of 27th January 2023 and 15th March 2022, respectively, by Hon. RN Ng'ang'a, Resident Magistrate, RM, and EC Serem, Resident Magistrate, respectively)

JUDGMENT

1. The appellant was convicted of defilement of a minor of fourteen years, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He had denied the charges, and a trial was conducted, where the prosecution presented four witnesses.

2. PW1 was the minor complainant. According to her, the applicant lured her to his house, removed her underpants, and inserted his penis into her vagina. She reported to her parents, who took her to hospital, and onwards to the police. The appellant was her neighbour. PW2 was the mother of PW1. She was informed by PW1, of what had befallen her. She was among those who escorted her to hospital. She identified the appellant as a pastor, and a neighbour. PW3 was the police officer who investigated the matter. PW4 was a clinician. He attended to PW1.

3. The appellant was put on his defence. He testified on 9th November 2021 and 30th November 2021. He denied committing the offence.

4. Judgement was delivered on 1st February 2022. It was found that the offence had been proved to the required standard. The appellant was sentenced to serve twenty, 20, years' imprisonment.

5. The appellant was aggrieved, hence the appeal. His petition of appeal was filed on 22nd March 2022. The grounds are that the medical evidence did not link him to the offence, the investigations were shoddy and there was bad blood in the family.

6. Directions were given, on 27th March 2025, for canvassing of the appeal by written submissions.

7. The appellant filed written submissions. He also amended his grounds of appeal. The new grounds revolve around not being accorded a fair trial, his written submissions not being considered; the evidence being inconsistent and contradictory; and the sentence being harsh.

8. Regarding the trial being unfair, he cites Article 50(2)(g)(h) of *the Constitution*, on the issue of not being informed of the right to legal representation and to be assigned an Advocate paid for by the State. Within that, he also raises issue with the language used at trial. He cites Republic vs. Chengo & 2 others [2017] eKLR [2017] KESC 15 (KLR)(Maraga, CJ, Mwilu, DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) and Njuguna vs. Republic [2007] 2 EA 370. Regarding language, he also cites section 198(4) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya.

9. On the trial being defective, he points at not being given a chance to submit, after he had given his defence statement, for the court fixed the matter for judgement, without inviting him to submit, or enquiring whether he intended to submit. He cites section 213 of the *Criminal Procedure Code*, Akhunga vs. Republic [2003] eKLR and Salan Deen vs. Republic [1996] EA 272.

10. On contradictions, he points out that the elements of the offence of defilement are the age of the child and penetration, citing Mwiloria vs Republic [2018] eKLR. He argues that the age of PW1 was not conclusively proved, for reliance was only on a certificate of birth, which was a photocopy. Gorton vs. Hunter (Lord Denning) and Eliud Waweru Wambui vs. Republic [2019] eKLR are cited. He states that the certificate of birth, though marked for identification, was never produced as an exhibit. He cites Joseph Njaramba Kagura vs Republic [1982-1988]. On penetration, he argues that the same as not adequately proved, as he and PW 1 were examined four, 4, five, or five, 5, days after date of the alleged commission of the offence. He also argues that the evidence falls short of convicting him to the offence. He cites Ben Murungi vs. Republic [2001] eKLR.

11. On severity of sentence, he pleads remorse, his great age, and that he was denied a chance to mitigate.

12. On fair trial principles, it is disappointing that despite more than ten, 10, years lapsing since promulgation of the new Constitution in 2010, trial courts still struggle to comply with it. The fair trial principles, in Article 50(2) of *the Constitution*, require that certain standards be maintained for there to be a fair trial. These are basic minimums. Failure to adhere to them makes the trial unfair. Most of these fair trial principles were not in the old Constitution. Their introduction into the new Constitution presented a paradigm shift in the way criminal trials are conducted and handled. Some trial courts do not appear to be alive to this.

13. The appellant raises three, 3, issues around this. There is the issue of the language used at the trial; the right to be informed of his right to be represented by an Advocate of his own choice at trial; and the right to be provided with an Advocate paid for by the State, and to be informed of that right.

14. The issue of the language used in court is an old matter in criminal litigation. An accused person should be able to follow and understand the proceedings. In short, he should be able to understand what is going on in court, and to actively participate in it. The trial is about him, and the proceedings should not go on as if he is a spectator or third party to them, instead he should be the key figure that he in fact is. To play his central role, in the trial, effectively, the accused person, must be at par with the court and the prosecutor. He should be able to understand what is being done, and what is being said. That,

ideally, should not be a problem, if he speaks the language of the court, which is principally English. English is the premier language, because the statutes, which create and define the offences, are in it, and so are the documents used in prosecution. Kiswahili is a language of the court too. It is, however, largely, secondary. The law books are not in Kiswahili; neither are the court documents used in prosecution. The courts, in Kenya, are usually conducted in English, but with an inbuilt mechanism for seamless translation or interpretation, into Kiswahili, for those who are not conversant with English. If the accused can manage both, the better.

15. The challenge usually arises where an accused person is not fluent in or conversant with either English or Kiswahili. Such a person would be completely at sea, where proceedings are conducted in English and Kiswahili. To bring him at par with the presiding officer of the court, and the prosecution, provision or procuration of a translator or interpreter, to the language he speaks, would be critical. Being able to understand and follow the proceedings gives confidence to the accused person, to enable and encourage him to participate in the proceedings, and to also earn the trust that justice could be done in his case, and to thereby own the proceedings.

16. Translation or interpretation is critical, even where the accused person is represented by an Advocate. The accused needs to follow what is going on. The trial is not about his Advocate. It would be him on trial, not his Advocate. The translation or interpretation should not be for the benefit of his Advocate, but the accused person. If he does not understand either of the languages of the court, then every word spoken in English or Kiswahili, by any of the other actors, must be translated or interpreted, for his benefit, into the language that he speaks or understands. He should never feel like an outsider, or third party, or spectator in his own trial, even if he has legal representation.

17. Since language is critical to communication during a trial, so much so that it finds its way into *the Constitution*, the trial court should be sensitive to it. It is one of those things that the trial court should note on arraignment. When the accused person is presented in court, for the first time, before anything else is done, the trial court ought to enquire, from him, whether he is familiar or conversant with the languages of court, and, if it established that he is not, the court should establish the language that he understands or is conversant with. Since this goes to constitutional fair trial rights, a note of the language to be used by the accused, during the trial, should be noted in the court record. This is critical, so that if the language is other than the two languages of the court, arrangements can be always made for a translator or interpreter to be available.

18. So, what happened here? The accused was arraigned on 14th July 2021. It is not recorded whether the court inquired to the language that the accused was familiar with, nor whether he gave an indication of the said language. What I see is that interpretation was provided in Kiswahili, and that the appellant made certain remarks in Kiswahili. He indicated that he was admitting the charges. Then, on 23rd July 2021, he is recorded as changing plea, in Kiswahili still. For the greater part of the proceedings, the notes indicate that interpretation was English/Kiswahili. However, on other dates, there was translation or interpretation into other languages. On 24th August 2021, for example, it is indicated that there was interpretation into Luhya language. On 31st August 2012, the record indicates that the appellant informed the court that he was ready to proceed in Marachi language, and an interpreter was availed. On that day, PW1 and PW2 testified. PW3 testified on 21st September 2021, and interpretation was in Kiswahili. On 7th October 2021, it was indicated that there was an interpreter, Linet Ochwadi, but the language that she was availed to translate was not indicated. Ruling was delivered on 26th October 2021, and there was a Luhya translator. Even then the appellant still addressed the court in Kiswahili. He made his defence statement twice, on 9th November 2021 and 7th December 2021, in Luhya. The ruling on no case to answer was delivered twice, on 26th October 2021 and 30th November 2021, and,

on both occasions, translation or interpretation was provided, including of the requirements of section 211 of the *Criminal Procedure Code*.

19. My review of the trial record, therefore, reveals that the trial court complied with the constitutional requirement, that interpretation or translation be provided, where the accused person was unfamiliar or unconversant with English and Kiswahili.

20. The need to be informed of the right to legal representation, by an Advocate of one's choice, is informed by the fact that many accused persons encounter the criminal justice system for the first time, on arraignment. Because of that many of them would not know what goes on in court, what they are supposed to do or say there, the various trial stages, their rights during the trial, among others. They do not know what would be expected of them. Because of that, they are not able to actively engage with the system. They would not even know that they have a right to be represented by an Advocate in those proceedings, to help them navigate through the system. Or even that, should they choose to be represented, they have a right to choose one of their own liking. Chances are that they may not appoint an Advocate to represent them, simply because they do not know that that right exists, or that that is an option open to them. Hence, the need to make it a right, for them to be informed of the right to appoint an Advocate, if they desire to, which then translates to a duty on the court, to inform them of that right.

21. It is just a right to information, and nothing more. On the face of it, what the accused person does with the information may not be of much interest to the court, except where the accused person appears to be indigent. The duty is to let the accused person know that right, and to record that communication in the court file. That would be adequate, unless there is material pointing to the accused person being indigent. In the event of such a case, the court may be required to intervene, through the *Legal Aid Act*, Cap 16A, Laws of Kenya, to secure legal representation, by an Advocate paid for by the State, should the offence charged be complex or expose the person to a stiff or lengthy term in jail.

22. The duty, therefore, given this latter requirement, is not just about simple communication of information. More should be done. The court should inquire into the background of the accused person, particularly with respect to capital offences, and offences exposing the accused person to lengthy sentences, such as life imprisonment, or even the minimum sentences, which expose accused persons to lengthy sentences in the region of a decade and above in jail. The duty to enquire is required by the *Legal Aid Act*, for the purposes of determining whether the accused person is so indigent or destitute, as to require state intervention. Upon making that assessment, the trial court is expected to set into motion the process of getting for the accused person an Advocate paid for by the State.

23. One may wonder why all that effort should be made. As indicated above, the courtroom is normally new territory for very many accused persons, which could prove to be a daunting task to them. Navigating through the trial could present a huge challenge to them, which, ultimately could prove costly to their rights, raising the spectre that they did not get a fair trial, or justice was not accessible to them on that account. To effectively challenge the prosecution and confront his accusers, the accused person ought to be familiar with the terrain, and, if he is not, an effort be made to ensure that he is, through getting an Advocate to act for him. It is about equality of arms, as between the prosecution and the defence. It is about access to justice. An accused person who finds himself, in the position of a fish out of water, cannot be said to have had access to justice.

24. The right to time to be informed of these twin rights, to legal representation of own choice and at State expense, is at arraignment, that is when the accused person is presented in court for the very first time, to answer to the charge. It is at that time that the accused person is most likely to be bewildered at the new environment, and when he would be most in need of legal guidance. Arraignment is usually

followed by plea-taking, where charges are read to the accused, and he is required to answer them. That sets the stage for what happens next. Either conviction and sentence, or trial. There would be need for the accused to understand what is expected of him, of the options open to him, and how to handle the situation. The presence and involvement of an Advocate is most critical at this stage. However, an accused person may be informed of these rights at any other stage of the trial, if there was a lapse at arraignment, and efforts ought to be made thereafter for compliance with the other constitutional fair trial principles.

25. The appellant was arraigned on 14th July 2021. The record is silent on whether he was informed of those rights. He pleaded guilty. He was remanded, for the purpose of being produced for facts, on 20th July 2021. He was produced on 21st July 2021, the facts were not read to him, for he changed plea. The stint in remand, seven, 7, days, perhaps afforded a chance for him to be appraised of his rights by his co-remandees. Anyhow, the record of 21st July 2021 is silent on whether he was informed of those rights. The trial commenced in earnest on 31st August 2021, and, on that date, the record is equally silent. The issue was not adverted to by the court thereafter.

26. The right to be informed of the fair trial rights relating to representation is a constitutional imperative. It should arise with respect to all offences and charges. It is particularly important where the offences have stiff punishments or sentences attached to them, or where the charges are complex by their nature. The burden is heavier on the trial court in that respect. The burden is not just about trying the case. It is also about being concerned about whether the accused person can access justice, by way of being able to understand what is going on and actively getting involved in the process. Those concerns ought to trouble the mind of the court before the trial commences, so that there is equality of arms, as between the prosecution and the defence, right from when the trial commences.

27. In this case, the sentence for defilement of a minor of fourteen, 14, years, is a minimum of twenty, 20, years in prison, upon being convicted. That is a very long period. Two decades. For the appellant herein, it meant that he was destined to die in prison, upon conviction. On arraignment, on 14th July 2021, he informed the court that he was eighty-one, 81, years old. Twenty, 20, years could translate to 101 years for him, if he were to serve the entire period, that is if he was not released on revision or prerogative of mercy.

28. The trial court did not comply with these constitutional prerequisites. That rendered the trial unfair, regardless of whether the appellant would have appointed an Advocate, upon being informed of that right, or assigned one paid for by the State.

29. On the proof of the age of the complainant, PW1 said that she was fourteen, 14, years old, at the material time. PW2, her mother, also stated that she was fourteen years old. She presented a certificate of birth, serial number XXXXXX, which was marked as P. Exhibit B1. On proof of age, I am certain that there was overwhelming evidence that the complainant was aged fourteen years at the material time. PW2 was her blood or biological mother. No other evidence, of proof of date of birth, can trump that of the mother of the person in question. She produced a certificate of birth as proof, and it was produced and marked as an exhibit, contrary to the assertion, by the appellant, that it was only marked for identification. It was produced by PW2.

30. According to P. Exhibit B1, the date of birth is indicated as 21st August 2007. The offence was allegedly committed on 9th July 2021. That made PW1 thirteen, 13, years nine, 9, months and eighteen, 18, days old as of 9th July 2021. That brought her within the age bracket contemplated in section 8(3) of the *Sexual Offences Act*.

31. On penetration, the appellant argues that the same was not adequately proved. He points to the fact that he and PW1 were medically examined four, 4, to five, 5, days after the alleged incident. I should start by pointing out that medical evidence is not the only way of establishing penetration. The oral testimony of the complainant is adequate, if the trial court finds her to have been truthful. The penetration would have happened to the complainant. She would be the best source of proof of penetration of her vagina. It happened to her. In this case, PW1 gave evidence that was straightforward on what the appellant did to her. The trial court believed her. There was corroboration from PW2. PW1 reported the incident to PW2 the same day it happened. The medical examination happened on 12th July 2021, but that was not fatal, so long as the testimony of PW1 was found to be truthful, by the court, and is adequately corroborated by other evidence.

32. The appellant submits that the medical evidence did not link him to the offence. That is true. However, the testimony of PW1, alone, was adequate to link him to the offence.

33. There is the issue of the appellant not being given an opportunity to make closing remarks at the tail end of the trial. That is what the final address or submissions are about. Final arguments on the facts and the law. I agree, it is a right that accrues to an accused person. However, the omission to grant a chance to make the closing speech is not fatal to the trial. The final determination, by the court, is based on the evidence and the law, and not the opening and closing addresses by the parties. Indeed, for most trials before the magistrates, such speeches are never made. In fact, the concept of opening and closing speeches is common in proceedings at the High Court, and it is not always that the parties bother to make the speeches. It is a right which accrues to parties, but it is not critical, for the case does not hinge on it. A conviction should be quashed only on the basis that the evidence was inadequate, and not because the accused person was not given a chance to give closing remarks or make a closing statement or submissions.

34. On the matter of sentence, the appellant was charged under section 8(3) of the *Sexual Offences Act*. That provision relates to defilement of minors in the age bracket of twelve,12, and fifteen, 15, years. The certificate of birth produced as evidence of the age of PW1, placed her in that age bracket. The penalty prescribed is a minimum of twenty, 20, years' imprisonment. The sentence imposed on the appellant, on 15th March 2022, was that minimum. It is a statutory minimum. It leaves the court with no discretion. The discretion exercised here was to give the appellant the basic minimum, the court could as well have considered a heavier sentence, as it should have, given that the appellant was an elderly man who ought to have known better than a much younger man.

35. The appellant, perhaps, has in mind the jurisprudence in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), where mandatory sentences were held to be unconstitutional, and where the courts opened doors for trial courts to exercise some measure of discretion. However, there have been further developments. In Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ&P, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), were declared to be bad law.

36. In Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) it was declared that Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) only applied to murder charges. In

Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) it was declared that the minimum sentences, prescribed under the *Sexual Offences Act*, are constitutional and valid. Therefore, regarding the sentence, the trial court did not err.

37. Overall, the trial court handled the matter well, save for not complying with constitutional requirements in Article 50(2)(g)(h) of *the Constitution*. Article 2(1) of *the Constitution* declares the supremacy of *the Constitution*, and Article 2(4) declares that any act or omission in contravention of *the Constitution* is invalid. The trial omitted to comply with Article 50(2)(g) of *the Constitution*. That omission was invalid, according to Article 2(4), and its effect was to render invalid the proceedings that the trial court was conducting. It rendered the trial unfair. The trial process commenced on a wrong footing, which tainted it to the very end.

38. As the trial of the appellant was unfair, I do hereby declare a mistrial. The effect shall be that the conviction of the appellant herein, on 15th February 2022, is hereby quashed, and the sentence imposed, on 15th March 2022, vacated. The appellant shall be released from prison custody, to be handed over to the police, who shall thereafter present him at the Busia Chief Magistrate's Court for re-trial. It is so ordered.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 4 TH DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Jacktone Wakulwa, the appellant, in person.

Advocates

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