Pascal v Republic (Criminal Appeal E062 of 2023)
[2025] KECA 1559 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1559 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E062 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

AUGUSTINE MWENDWA PASCAL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos written by E. Ogola, J. and delivered by D. K. Kemei, J. on 14th February 2017 in HCCRA No. 1 of 2016)

JUDGMENT

1. The appellant, Augustine Mwendwa Pascal, was charged, tried and convicted by the Senior Resident Magistrate's Court at Tawa on a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA) in that on the 5th of November 2015 in Mbooni West District within Makueni County, he intentionally and unlawfully caused his penis to penetrate the vagina of MK, a girl aged 8 years (minor).

2. The evidence that was adduced before the trial court in support of that charge was that, on 5th November 2015, at 3.00pm, MK, who testified as PW1, met the appellant, a neighbour, on the road. The appellant took her to his house and gave her two 50 shilling notes. He then removed his clothes and her panties, threw her on his bed and inserted his penis in her vagina. She felt pain and bled. The minor's father, PW2, recalled that on the material day, at 3.30pm, he was called by his mother and informed that his daughter, PW1, was unwell. She had been defiled by the appellant and was bleeding from the anus. PW2 proceeded to report the matter to Kikima Police Station and took PW1 to Kikima Hospital for treatment. Laurence Kiloli Musyoka (PW3), a village elder/community policing member, testified that on the fateful day he was called by the area chief at 6.00pm and instructed to arrest the appellant. He proceeded to the business premises of the appellant and effected the arrest. No. XXX P.C Collins Aoko (PW4), the investigating officer, testified that on 5th November 2015, at 7.30pm, he received a call from the OCS informing him that a defilement suspect had been arrested at Utangwa. He

went ahead and rearrested the suspect. He took both the minor and the appellant to Mbooni hospital for examination. PW4 recorded statements from witnesses and recovered a pair of cream panties and a blue dress, both stained. He also recovered two 50 shilling notes.

3. Dr. Patrick Mutinda (PW5), the doctor who examined the minor at Mbooni Hospital, testified that she was 8 years old. On examining her, he observed that her clothes were stained with blood. Her vagina was lacerated and bleeding, her vulva was swollen and her hymen was broken. There was also indication of penetration. PW5 produced in evidence the age assessment report of the minor, the P3 form which he filled upon examining the minor, and the treatment cards of both the minor and the appellant.

4. At the close of the prosecution's case, the learned Magistrate (M.M. Nafula, SRM) found that a prima facie case had been established against the appellant and placed him on his defence.

5. The appellant (DW1) gave a sworn statement and called two witnesses. He denied committing the offence but admitted that the minor was his neighbour. The appellant claimed that PW2, the minor's father, had demanded to be paid some money but his parents refused. DW2, the father to the appellant, testified that on the material day he was with the appellant at his shop and they only went home at 5.00pm, when he was informed that the area Chief was looking for the appellant. The appellant was then arrested. DW2 also claimed that PW2 had asked for Ksh.200,000 from him in order to settle the matter. DW3, the appellant's brother, gave testimony that on the fateful day DW1 and DW2 went to Wote. They returned at 5.00pm and later the appellant was arrested.

6. The trial Magistrate evaluated the evidence tendered before her and as aforementioned, found the appellant guilty as charged. She then sentenced him to life imprisonment.

7. Aggrieved by the judgment and sentence of the trial court, the appellant preferred an appeal to the High Court at Machakos. By a judgment written by Ogola, J., but delivered by Kemei, J. on 14th February 2017, the appellant's appeal was dismissed and the conviction and sentence were upheld.

8. That decision provoked this appeal raising some five grounds in a self-crafted memorandum of appeal, which are that the learned Judge erred by failing to:

    1. Re-evaluate the entire prosecution evidence.

    2. Find that the medical evidence was benign and unable to prove penetration.

    3. Find that the trial was in contravention of Article 25(c) of the *Constitution*.

    4. Observe that the prosecution case was impeachable under section 163(1) of the *Evidence Act*.

    5. Give adequate consideration to the defense.

9. During the hearing of the appeal, the appellant appeared in person while Mr. Jami Yamina, Assistant Director of Public Prosecutions, appeared for the state. Both parties had lodged written submissions which they briefly highlighted.

10. The appellant's submissions were that the *voir dire* was not properly administered since the trial court did not test whether the minor truly knew and understood the reason for taking an oath. It was argued that the age of the complainant was not proved to the required standard. The learned Judge was faulted for relying on the age assessment report without giving her own opinion on the age of the complainant despite having seen her. The prosecution was also put on the spot for seemingly alluding to the fact that the minor may have been 15 years old, when they referred to section 8(3) of the *SOA* in their written submissions. Various authorities, including *EK v Republic* [2018] eKLR, were cited to demonstrate that the age of the victim of sexual assault under the *SOA* is a critical component and, age assessment

cannot be considered as conclusive evidence of that ingredient. The appellant contended that the element of penetration was also not proven as required by law. *Citing Terekali And Another v Republic* (1952) EA and *Maitanyi v Republic* [1986] KLR 198 he urged that his identification as the perpetrator of the offence was not conclusive. He submitted that it was not clear who identified him to the area chief, who then called the arresting officer and instructed him to arrest him.

11. The prosecution was faulted for failing to prove its case beyond reasonable doubt by not establishing all the ingredients of the offence. On reliance of the Canadian decision in *R v LIFCHUS [*1997] 3 SCR 320 and the holding in *Bater v Bater* [1950] ALL ER 458 & 459, it was submitted that where the prosecution fails to satisfy the court of the guilt of the accused person, beyond reasonable doubt, then he must be acquitted. The appellant beseeched us to allow the appeal, quash the conviction, set aside the sentence and set him at liberty. In the alternative, he prayed that we should consider the rehabilitation programs which he had participated in while in custody or invoke section 333(2) of the *Criminal Procedure Code* and have the sentence imposed begin from the date of his arrest being 5th November 2015.

12. In yet another document titled 'Appellant's Rebuttal', the appellant reiterates the prosecution's alleged failure to establish the ingredients of the offence with which he was charged. It is argued that PW5 did not present any papers to show that he was qualified to carry out the medical procedures and produce the PRC and P3 forms, as well as undertake the age assessment. Further, the appellant contends that the evidence of PW2 amounted to a frame-up. He questions why PW2 went directly to the police station to report when he was informed that his daughter, PW1, was unwell, instead of rushing to take her to hospital. He challenges the fact that while the complainant testified that he gave her Ksh.100 in denominations of Ksh.50, both her and PW4 produced in court two Ksh.50 shilling notes, which were marked as PEX 2a and 2b. To the appellant, the total amount produced in court was Ksh.200, contrary to what the complainant had alleged. Referring to the wording in the charge sheet, specifically, the use of the words, 'sub-section 2 of the *Sexual Offences Act*', instead of section 8(2) of the *Act*, it is argued that the charge sheet was defective. The appellant also3 contends that the sentence that was imposed was harsh, excessive and went against all principles of sentencing.

13. In opposition to the appeal, Mr. Yamina urged that the appellant had not pointed out any question of law, that is, that the findings of both courts below were not based on the evidence on record. On the question of the age of the complainant, counsel submitted that the charge sheet was clear that she was 8 years old at the time of commission of the offence. Moreover, the age assessment medical report confirmed that age and a voir dire was conducted on the minor, which demonstrates that the court was of the mind that the witness was a minor. Counsel contended that the testimony of the prosecution witnesses together with the exhibits that were tendered proved the case beyond reasonable doubt. We were urged not to interfere with the concurrent findings of the two courts below as they were based on the evidence presented and there was no misapprehension of that evidence. Counsel asserted this Court's duty on a second appeal, to be confined to points of law as elucidated in *Reuben Karari s/o Karanja v Republic* (1950) 17 EACA 146 cited in *Karingo & 2 Others v Republic* Criminal Appeal No. 63 & 105 of 1981 (Consolidated) and *Chemagong v republic* [1984] KLR 213 as cited in *David Njoroge Macharia v Republic* [2011] eKLR.

14. On identification, it was submitted that the appellant was well known to PW1 since they were living in the same neighbourhood. In response to the appellant's contention that the prosecution seemed to suggest that the complainant was 15 years old by referring to section 8(3) of the *SOA* in their submissions, counsel clarified that it was an error on their part, the correct provision being as stated in the charge sheet. Mr. Yamina urged us to dismiss the appeal and only interfere to the extent of declaring the appellant a dangerous sexual offender under section 39 of the SOA.

15. his being a second appeal our jurisdiction is, indeed, limited to a consideration of matters of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. This was affirmed by the holding of this Court in *David Njoroge Macharia v Republic* [2011] eKLR;

> That being so only matters of law fall for consideration–see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v. R* [1984] KLR 611."

16. We think that ultimately the fate of this appeal centres on whether the prosecution established all the ingredients of the offence of defilement, beyond reasonable doubt and whether this Court can interfere with the sentence meted out. The appellant also raised two preliminary issues being that, the charge sheet was defective and the voir dire was not administered properly. We shall first determine the two preliminary issues.

17. The appellant contests the use of the words, 'sub-section 2 of the *Sexual Offences Act*' in framing the charge, instead of section 8(2) of that *Act*. He contends that the said error rendered the charge sheet defective. We note that the learned Judge considered this issue and found that the charge as framed was proper and within the law. He reasoned that the issue was not one that could be allowed to affect substantive justice and, in any event, one had to interpret the entire section in order to give meaning to it. We hold a similar view as the learned and find that the said inconsequential error is one that is curable under section 382 of the *CPC*. The section reads;

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
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> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

18. The appellant has not demonstrated how the apparent error in the charge sheet prejudiced him, if at all. As a matter of fact, the record shows that when the substance of the charge was read to him at the beginning of the trial, he responded without any objection. Essentially, he understood the nature of the charge and its penalty. We, therefore, find his grievance to be of no consequence to the prosecution case.

19. Concerning the conduct of the voir dire, the appellant's complaint is that the trial court did not test whether the minor truly knew and understood the reason for taking an oath. We observe, however, that the appellant never raised this issue during trial and neither was it raised at the first appeal stage. Even so, our perusal of the record reveals otherwise. On 23rd November 2015, when PW1 appeared in court to testify, the learned Magistrate conducted a voir dire and recorded the questions and answers by which she was eventually satisfied that the complainant was intelligent enough to give evidence

on oath. Thus, we find no merit in that complaint. We re-affirm this Court's sentiments in *Japheth Mwambire Mbitha v Republic* [2019] KECA 813 (KLR);

> (14) In this case, a perusal of the record reveals that prior to receiving the respective testimonies of PW 2 and PW 3, the learned trial magistrate went on an enquiry of whether each of the witnesses understood the meaning of telling the truth and the consequences of lying. Having satisfied herself that the two minors understood the importance of telling the truth, the court went on to record their evidence. No objection was ever raised by the appellant regarding the voir dire examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven.
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> (15) Having satisfied herself that the two minor witnesses understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted their evidence and from the record, we see no reason to interfere with that finding."

20. We now turn to the substantive complaints. On proof of the age of the complainant, the charge sheet shows that she was 8 years old. In her testimony during trial, after the trial court conducted a voire dire and determined that she was intelligent enough to give evidence on oath, she stated that she was 8 years old and was in class two. PW5, the doctor who examined her and conducted an age assessment, corroborated her testimony by estimating her age to be about 8 years old. The two courts below observed that although the prosecution did not produce the complainant's birth certificate or any document to prove her age, the evidence of PW5 in that respect as displayed in the age assessment report, was credible. We, just like the two courts below, are satisfied that the age of the complainant was appropriately proven. This Court has time and again held that one of the credible forms of proving age under the SOA is through medical evidence. That was the case in *Mwalango Chichoro Mwanjembe v Republic* [2016] KECA 183 (KLR) where the Court stated;

> 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 documentary 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* vidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*,Cr.Appeal No.19 of 2014 and *Omar Uche v R*,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable." See also *KA v Republic* [2023] KEHC 1514 (KLR)

21. At any rate, there was nothing before the trial court to indicate or even remotely suggest that the complainant was not a child of eleven years or below, which is the critical cut off point for the specific offence charged. We are satisfied that the age was well and fully proved.

22. Concerning penetration, PW5, the doctor who examined the complainant testified that he observed that her clothes were blood stained. She was also bleeding from her vagina and her vulva was swollen. Further, her hymen was broken, her vagina lacerated. PW5 concluded that there was indication of penetration. In our view that evidence was cogent and compelling in proving the element of penetration.

23. Next, the appellant challenges his identification as the perpetrator of the offence. In view, however, of the uncontroverted evidence of both PW1 and PW2, that he was their neighbour, and considering that the incident happened during the day, at around 3.00pm, we are not persuaded by the appellant's protestation. We are satisfied that he was positively identified and both the trial and first appellate courts properly directed their minds in convicting him for the offence of defilement.

24. Turning to the sentence, the appellant urged us to interfere with the life imprisonment sentence that was imposed on him, taking into consideration the rehabilitation programs which he has participated in while in custody. In the alternative, he prayed that we should invoke section 333(2) of the *CPC* and have the sentence begin from the date of his arrest being 5th November 2015. The appellant was sentenced pursuant to section 8(2) of the *SOA* which provides for a mandatory minimum sentence of imprisonment to life for a person found guilty of defiling a child aged 11 years and below. While we take note of the appellant's pleas, we are also cognizant of the Supreme Court's decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) to the effect that courts do not have jurisdiction to interfere with the minimum mandatory sentences set in the *Sexual Offences Act*. Given that such a decision is binding upon us, we cannot interfere with the life sentence meted out. Being an indefinite, indeterminate as opposed to a term sentence, the provisions of section 333(2) of the *CPC* for the reckoning of time in custody do not apply.

25. In the result, the appeal wholly fails and stands dismissed in entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR