Pailal alias Pastor Kanyari v Republic (Criminal Appeal E029 of 2022)
[2025] KECA 1790 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KECA 1790 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E029 OF 2022

MA WARSAME, JM MATIVO & GV ODUNGA, JJA

OCTOBER 31, 2025

BETWEEN

JACKSON PAILAL ALIAS PASTOR KANYARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Naivasha (G. W. Ngenye J.) dated 26{{^th}} May, 2022 in CRA No. E001 of 2021)

JUDGMENT

1. This is a second appeal by Jackson Pailal alias Pastor Kanyari in which he is challenging the judgment rendered by the High Court (Ngenye, J. as she then was) on 26th May 2022 in Naivasha High Court Criminal Appeal No. E001 of 2021. In the said judgment, the learned Judge dismissed the appellant's appeal against conviction and sentence of life imprisonment imposed by the Naivasha Resident Magistrate in Criminal Case (S.O) No. 50 of 2017 on 22nd August 2019 for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act).

2. The particulars of the offence were that on 6th December 2017 at Kenya Co-operative Creameries estate in Naivasha Sub- county within Nakuru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.O, a child aged 4 years and 6 months. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. It was alleged that on the above date and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of P.O, a girl aged 4 years and 6 months old.

3. The prosecution case rested on the testimony of 4 witnesses, namely, the complainant's mother, (PW1), a clinical officer at the Naivasha County Referral Hospital, (PW2), the complainant, (PW3) and the investigating officer, (PW4). The defence case rested on his sworn testimony. He did not call any witness in support of his defence. At the conclusion of the case, the trial court returned a

verdict of guilty on the main count. There was no finding on the alternative count. After considering the appellant's mitigation, the trial magistrate sentenced him to serve life imprisonment as per the provisions of section 8 (2) of the Act.

4. Dissatisfied by the said decision, the appellant appealed to the High Court at Nakuru in Criminal Appeal No. E001 of 2021 seeking to overturn his conviction and sentence. After hearing the appeal, Ngenye, J. (as she then was) upheld both the conviction and sentence and dismissed the appeal.

5. Undeterred, the appellant appealed to this Court seeking to reverse the High Court decision. In his grounds of appeal filed together with his submissions dated 20th June 2025, the appellant contends that:

   (a) in conducting the voire dire examination, the learned Magistrate stated that the complainant did not understand the importance of telling the truth, therefore her evidence required corroboration;

   (b) the complainant's evidence was procured through threats, hence it was not credible;

   (c) the complainant's evidence was uncorroborated as required by section 124 of the *Evidence Act*;

   (d) critical witnesses were not availed to corroborate the minor's testimony which had gaps, therefore any doubts should have been resolved in his favour;

   (e) his identification as the offender was not free from error;

   (f) life imprisonment violates articles 26, 27, 28, 29 and 50 of *the Constitution*.

6. During the virtual hearing of this appeal on 14th May 2025, the appellant appeared in person from Kamiti Maximum Prison while Mr. Omutelema, Senior Assistant Director of Public Prosecution appeared for the respondent. Both parties relied on their respective written submissions.

7. In support of his appeal, the appellant submitted that the prosecution did not prove its case beyond reasonable doubt. He contended that from the voire dire examination, the complainant did not possess sufficient intelligence nor did she understand the meaning of telling the truth, therefore, her evidence was not credible. Accordingly, section 124 of the *Evidence Act* could not apply, and therefore, his conviction was unsafe. To buttress this submission, he cited this Court's decision in Johnson Muiruri v Republic [1983] KLR 445 which underscored that voire dire examination enables the Court to satisfy itself whether the minor is possessed of sufficient intelligence to justify the reception of her evidence.

8. Contending that the victim's evidence was adduced through coercion, the appellant argued that PW1 testified that after learning that her daughter was not walking properly, she became harsh on the complainant and upon questioning her, the complainant promised to tell her what happened on condition that PW1 would not beat her. The appellant maintained that the complainant's statement to her mother was out of fear of being beaten. Further, no independent evidence was presented to ascertain that the appellant was properly implicated. Accordingly, his identification was flawed and as a result the conviction was unsafe.

9. Submitting on the question whether the complainant's evidence could be relied on without corroboration as required under section 124 of the *Evidence Act*, the appellant wondered how a child who could not understand the importance of telling the truth could accurately name him after five days, while an adult like her mother did not know Pastor Kanyari. Therefore, corroboration of her evidence was necessary.

10. Submitting on the ground that the failure by the prosecution to call a crucial witness was fatal to its case, the appellant cited the case of Juma Ngodia v Republic (1982-88) (KAR

454) in submitting that the prosecution did not give any reasons as to why it did not call the following witnesses: (a) the children who were said to have been playing with the complainant at the material time to confirm having seen the complainant going to the appellant's house; (b) Monica who is said to have noticed the complainant walking abnormally; and, (c) the village elder who led PW1 to Pastor Kanyari. It is the appellant's submission that the prosecution knew the evidence of the uncalled witnesses was adverse to its case, and avoided calling them to testify. He cited this Court's decision in Julius Kalewa Mutunga v Republic [2006] eKLR that as a general rule, whether a witness should be called by the prosecution is a matter within its discretion and an appeal court will not interfere with the exercise of that discretion unless, it is shown that the prosecution's failure to call the said witnesses was influenced by an oblique motive. He also cited Ng'ang'a v Republic [1981] 483 where this Court held that the prosecution may elect not to call a material witness but they do so at the risk of their own case.

11. Addressing the question whether he was properly identified as the offender, he maintained that his identification was not free from error and in the absence of credible, direct and unequivocal evidence linking him to the act of penile penetration, the conviction cannot stand.

12. Regarding the constitutionality of the life sentence, the appellant submitted that he properly raised the said issue before the High Court, but the learned Judge did not address it. He also submitted that the life imprisonment offends his right to a fair trial guaranteed under article 50 of *the Constitution* and sections 216 and 329 of the Criminal Procedure Code. He relied on the High Court decision in Edwin Wachira & Others, Mombasa High Court Petition No. 97 of 2021 which declared life sentences unconstitutional arguing that he was condemned to an indefinite incarceration without an opportunity to be rehabilitated or reintegrated which amounts to arbitrary denial of right to life and right to dignity contrary to Articles 26 and 28 of *the Constitution*.

13. The respondent's counsel Mr. Omutelema opposed the appeal.

In his submissions dated 11th June 2025, he rehashed the evidence on record and submitted that the prosecution proved each and every element of the offence to the required standard, therefore, the learned Judge properly analyzed the evidence and correctly concluded that the appellant's appeal lacked merit since the evidence was overwhelming.

14. Mr. Omutelema submitted that the complainant when prodded by PW1 stated that she had been defiled by the appellant and upon looking at the complainant's pants, PW1 saw dry semen. Counsel also referred to the testimony of PW2 and the P3 form which confirmed that the complainant was oozing blood from her vagina and her hymen was broken. Further, PW4 testified that the appellant was arrested by Nyumba Kumi elders after being identified by the complainant.

15. Regarding the complainant's age, Mr. Omutelema maintained that sufficient evidence was tendered confirming that the complainant was 4 ½ years old. He maintained the P3 form clearly indicated she was 4 ½ years old. Further, the complainant's age was confirmed by PW1 who stated that she was 4 ½ years old at the time of the offence and produced her notification of birth.

16. As to whether the appellant was properly identified as the perpetrator, counsel maintained that the complainant stated that she had been defiled by Pastor Kanyari, that she knew him, and even identified him in court by pointing at him. He maintained that the complainant's evidence was credible and truthful. Accordingly, the said evidence was rightly acted upon by the two courts below and PW1 and PW2 corroborated the complainant's evidence.

17. Regarding the sentence, Mr. Omutelema maintained that the appellant's mitigation notwithstanding, the circumstances of the case justified the sentence meted by the trial court because the victim was 4

½ years old, she was vulnerable, she sustained injuries in her genital and the appellant never showed any remorse. Further, mandatory sentences are still applicable for the offence in question as was held by the Supreme Court in Republic v Joshua Gichuki Mwangi SCORK Petition E018 of 2023 [2024] KESC 34 (KLR).

18. This is a second appeal, therefore, this Court's mandate is restricted to consideration of questions of law only by dint of Section 361 (1) (a) of the Criminal Procedure Code. (See this Court's decision in Ahamad Abolfathi Mohammed & Ano v Republic [2018] KECA 743 (KLR). Where the two courts below have made concurrent findings of fact, we are obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. (See Karingo v Republic [1982] KLR 213). In M'Riungu v Republic [1983] KLR 455, this Court was empathic that:

> " ..., an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

19. We have reviewed the record as well as parties' rival submissions. We find that the following issues fall for determination: (a) whether the offence of defilement was proved beyond reasonable doubt; (b) whether the complainant was a competent witness; (c) whether the complainant's evidence was procured through coercion; (d) whether the prosecution failed to call crucial witnesses; and, (e) whether we can interference with the sentence imposed upon the appellant.

20. First, we will address the question whether the prosecution proved, by way of evidence, the ingredients of the offence of defilement. Courts have consistently emphasized that the prosecution must prove all the essential elements of a criminal offense beyond a reasonable doubt. Judicial decisions emphasize that even if a court suspects that an offense occurred, it cannot convict without sufficient evidence demonstrating each ingredient of the crime. This principle is fundamental to ensuring fair trials and preventing wrongful convictions. The prosecution bears the primary burden of proving the accused's guilt beyond a reasonable doubt. The evidence presented must be strong enough to convince the court that there is no reasonable doubt about the accused's guilt. Each element defined by law as necessary to constitute a specific offense must be proven.

21. If the prosecution fails to prove any essential ingredient of the offense, the accused is entitled to an acquittal. Court decisions emphasize the need for concrete evidence, not mere suspicion or conjecture. Courts look for evidence that directly links the accused to the crime. In essence, the criminal justice system places a high value on proving the ingredients of an offense. This ensures that individuals are not punished without sufficient evidence of their guilt and that the justice system operates fairly and responsibly. (See Woolmington v DPP [1935] AC 462, a landmark decision in English law that established the principle of the presumption of innocence and the burden of proof in criminal cases. The case clarified that the prosecution bears the sole burden of proving the defendant's guilt beyond a reasonable doubt, and the defendant does not have to prove their innocence).

22. Turning to this case, section 8 (1) of the Act provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. A reading of this section shows that for the prosecution to succeed in an offence under the above section, it must prove beyond reasonable doubt that: (i) the victim is a child, (b) there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice; and, (c) the identity of the perpetrator must be established. It is a requirement that the three ingredients must be proved.

23. First, we will address the question whether, the complainant's age was proved to the required standard. Section 2 of the Act defines a child as follows: "child" has the meaning assigned thereto in the *Children Act*, 2001 (No. 8 of 2001). Under the *Children Act*, a "child" is defined as any human being under the age of eighteen years. Proof of age is important in a sexual offense. It forms part of the charge of the ingredients of the offence which must be proved by credible evidence because the sentence to be imposed dependent on the age of the victim. (See this Court's decision in Kaingu Kasomo v Republic, Criminal Appeal No. 504 of 2010 (UR)).

24. In Peter v Republic [2024] KECA 1124 [KLR], this Court highlighted the methods of proving age as follows:

> " 28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.
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> 29. ...
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> 30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt."

25. The complainant's mother (PW1) testified that the complainant was born on 17th May 2013. She gave her age as 4 years and 11 months. In support of the foregoing she produced the complainant's birth notification which showed that she was born on 17th May 2013. This document was produced as exhibit number 1 by PW4, the investigating officer. Determining age is a question of fact. It is a question that requires evidence to be presented and evaluated by a trier of fact. The two courts below were satisfied that the complainant's age was proved to the required standard. When any concurrent finding of fact is assailed in a second appeal, the appellant is required to point out that it is bad in law or it was based on no evidence or it was based on misreading of the evidence or the decision is one which no Judge acting judicially could reasonably have reached. We have carefully re- valuated the evidence presented before the trial court on the issue at hand. We are persuaded that the prosecution proved by evidence that the complainant was a child aged below 11 years within the meaning of section 8 (2) of the Act. We have no reason to fault the concurrent findings by the two courts below on this issue.

26. Regarding penetration, PW2 produced the P3 Form and the PRC. The salient points of this evidence were that, blood was oozing from the complainant's vagina and her hymen was broken, which led to the conclusion that she had been defiled. This evidence corroborated PW3's evidence that she had been defiled. Again, there are concurrent findings by the two courts below on this issue. We have re-evaluated this evidence and the conclusions made by the two courts below. It has not been demonstrated by evidence that the findings by the two courts below were on this issue, were not supported by evidence or that the decision by the two courts below is palpably wrong. Again, this ground of appeal fails.

27. The other critical ingredient of the offence is whether the appellant was properly identified as the offender. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Luckily, the law is not so much concerned with the number of witnesses called as with the quality of

the testimony given. A guilty verdict is permitted only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

28. The issue at hand narrows to whether the appellant's identification was both truthful and accurate. It is very important in criminal proceedings that a witness makes a positive identification of the person they claimed was the perpetrator. Because of the fallibility of human observation, evidence of identification is approached with some caution. It is not enough for the identifying witness to be honest. The reliability of his/her observation must also be tested. How is this observation tested? The witness observations should be tested against proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bag, etc, connected with the person observed, and so on. (See R. Turnbull [1977] Q. B. 224, a landmark legal case in England concerning the reliability of eyewitness identification evidence. The case established guidelines for Judges when dealing with identification evidence, particularly when the prosecution relies solely or substantially on the correctness of one or more identifications.)

29. Even though the complainant was the only eye witness, we note that the incident happened during the day. She gave an account of the events leading to her defilement. Her explanation and demonstration of how the appellant removed her clothes, and how he inserted his penis into her vagina and the fact that she was able to identify him by his nickname "Pastor Kanyari" having heard fellow children refer to him as such, is in our view credible and truthful. Furthermore, the complaint positively identified the appellant while in the dock. Also, PW4 testified that upon conducting investigations, he established that the appellant was known as Pastor Kanyari, which was his nickname. Notably, the appellant never denied that "Pastor Kanyari" was his nickname nor did he deny knowing the appellant.

30. Notably, the complainant identified the appellant by his nickname "Pastor Kanyari" prior to his arrest. She also identified him at the dock. Clearly, this was a case of recognition rather than identification. Decided cases are in agreement that evidence of recognition is more reliable than identification of a stranger. (See this Court's decision in Shalen Shakimba Ole Betui & Ano. v Republic [2009] KECA 101 (KLR)). This Court in Peter Musau Mwanzia v Republic [2008] KECA 92 (KLR) stated:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

31. We have considered PW3's evidence relating to the appellant's recognition as the offender and the evidence of PW4 who carried out investigations and established that "Pastor Kanyari" was the appellant's nickname, coupled with the fact that the incident happened during the day. We find that the said evidence is credible and reliable. Credibility focuses on whether a witness or piece of evidence is believable. A credible witness is one who comes across as honest and whose testimony is consistent and aligns with other evidence. Factors influencing credibility include the witness's demeanor, prior statements, and potential biases. Reliability, on the other hand, focuses on whether the evidence is accurate and trustworthy. It assesses whether the evidence accurately reflects the truth of what

occurred. A reliable witness provides accurate testimony, and their statements are consistent with the facts and circumstances of the case. Upon due consideration, we are satisfied that the complainant's evidence on identification was reliable and credible. Therefore, this ground of appeal fails.

32. The other ground urged by the appellant is that the complainant's evidence was procured through coercion. The contestation here as we understand it is that, PW1 was threatened by her mother (PW1) and only agreed to divulge the information to avoid beating by her mother. This argument, attractive as it is, was not raised before the trial court and before the first appellate court. Therefore, the High Court never rendered itself on the said issues. In Peter Kihia Mwaniki v Republic [2010] eKLR, this Court stated:

> " Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit."

33. On a second appeal, this Court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower courts, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal. Consequently, we are precluded from addressing the said issue.

34. The other ground of attack urged by the appellant is that the prosecution failed to call crucial witnesses. Determining this issue, the first appellate Judge stated:

> " It is well settled that the prosecution reserves the right to determine the number of witnesses it deems sufficient to prove a fact. I have carefully perused the evidence on record and I am unable to see the benefit that the evidence of the aforesaid witnesses would have added since the four witnesses called by the prosecution sufficiently established the case for the prosecution."

35. The appellant maintained that the prosecution failed to call crucial witnesses in support of its case identifying him as the offender. These are: (a) the children who were said to have been playing with the complainant at the material time to confirm having seen the complainant going to the appellant's house;

(b) Monica who is said to have noticed the complaint walking abnormally; and, (c) the village elder who showed PW1 Pastor Kanyari.

36. Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact. In Julius

Kalewa Mutunga v Republic [2006] eKLR this Court was categorical that as a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

37. The East African Court of Appeal in Bukenya & Others v Uganda [1972] E.A. 549 laid down the following principles:

a. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent; (b) the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case; (c) where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution. However, counsel was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. Therefore, the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances of the case, it is to be inferred that the reason why the witness was not called was because the party expected to call him failed to failed to do so due to an oblique motive. This Court in Omukanga v Republic [2023] KECA 430 (KLR) stated:

> "...We further point out that a party desirous that adverse inference be made owing to the failure to call certain witnesses should, as a matter of good practice, identify the various aspects of the case that, in the view of that complaining party, the uncalled witnesses would have shed more light on. It is also important for the party to establish a link between the uncalled witnesses and the set of evidence. In our view, anything short of this, would amount to mere speculation not actionable by the courts. The alleged oblique motive should be visible from the record or the evidence by itself."

38. Guided by the settled position of the law exemplified in the above cited decisions, we find no merit in the appellant's submissions inviting us to find that the prosecution failed to avail crucial witness and urging this court to find that the evidence by the said witnesses would have been adverse to the prosecution case. The appellant has not persuaded us that the prosecution case had gaps which would have been filled by the alleged uncalled witnesses. Therefore, this ground of appeal collapses.

39. Lastly, we will address the appellant's contestation that the trial court erred in failing to find that the complainant did not understand the nature of oath and the rationale for telling the truth. The role of a voire dire examination is for the trial court to satisfy itself that the child understands the purpose and nature of an oath and whether he/she possesses sufficient intelligence to appreciate the need to tell the truth as per section 19 of the *Oaths and Statutory Declarations Act* which provides;

> "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."

40. This Court in Maripett Loonkomok v Republic [2015] eKLR, discussing the above provision stated:

> "Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again 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...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No 137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination..."

41. Discussing the duty imposed on the trial court, the East African Court of Appeal in Gabriel Maholi v R. [1960 EA] 159 had the following to say:

> "... Even in the absence of express statutory provision, it is always the duty of the court to ascertain the competence of a child to give evidence. It is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also, that the child understands the difference between truth and falsehood."

42. The above provision imposes a duty on the trial court to not only be satisfied that the child understands the duty of speaking the truth, but that he/she must manifestly appear to be so satisfied. The court must satisfy itself on the intelligence of the child on whether it possesses sufficient intelligence of understanding nature of an oath and saying the truth. The court must record its satisfaction in its proceedings by indicating how it came to be satisfied with intelligence of a child. This Court in John Wambua Mutunga v Republic [2005] eKLR stated:

> "...There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again, investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"

43. The record shows that the trial court conducted voir dire examination after which it stated:

> "Court: I have considered the answers of the minor in voire dire examination. I am satisfied that the minor does not understand the meaning of an oath. The minor will tender an unsworn statement. The accused will be accorded a chance to cross-examine her."

44. The complainant gave unsworn evidence. In terms of section 19 cited above, we are satisfied that the complainant's evidence was properly received. Her evidence is not to be considered in isolation. We have considered the evidence of her mother and the clinical officer, PW2. We are satisfied that her evidence was properly corroborated.

45. Turning to the appeal against the sentence, the appellant urged that life sentence is unconstitutional because it violates his right to a fair trial as guaranteed under article 50 of *the Constitution*, sections 216 and 329 of the Criminal Procedure Code and further the sentence condemns him to indefinite incarceration which was declared unconstitutional in Edwin Wachira & Ano. v Republic (supra). As we answer this line of argument, it is important for us to underscore that the Supreme Court affirmed the lawfulness of life imprisonment prescribed under the *Sexual Offences Act* in Republic v Joshua Gichuki Mwangi and Others (supra) when it stated:

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death
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> under section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
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> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below...
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> (68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate 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 that sentence"

46. The upshot of the foregoing is that, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER, 2025.

M. WARSAME

JUDGE OF APPEAL

.....

J. MATIVO

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.