Inyundo v Republic (Criminal Appeal E026 of 2023)
[2025] KEHC 17593 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17593 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E026 OF 2023

CW MEOLI, J

NOVEMBER 27, 2025

BETWEEN

KENFILL INYUNDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from Conviction and Sentence in Kajiado CM's S.O No. E042 of 2021, Kamau SRM)

JUDGMENT

1. Kenfill Inyundo, the Appellant herein was charged before the subordinate court with Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* in the main count, the particulars being that on 6th July, 2021 within Kajiado County, he intentionally and unlawfully caused his penis to penetrate the vagina of PM a child aged 7 years. The Appellant faced an alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He denied the charges and following a full trial, the Appellant was found guilty, convicted on the main count and sentenced to serve 10 years imprisonment. Aggrieved by the outcome, he lodged this appeal vide the petition of appeal dated 14th July, 2023 containing the following grounds of appeal:

    a. That the Hon. Trial Magistrate erred in both law and fact by irregularly conducting a voire dire examination thereby erroneously concluding that the minor was fit to give sworn evidence.

    b. That the Hon. Trial Magistrate erred in both law and fact by finding that the key ingredients of the offence were established against the appellant herein while in fact they were not.

    c. That the Hon. Trial Magistrate erred in both law and fact by failing to consider that there were gaps and discrepancies regarding the evidence tendered.

d. That the Hon. Trial Magistrate erred in both law and fact by not considering that the medical officer report lacked some vital information concerning offence and was not corroborative of the charges as a whole.

e. That the Hon. Trial Magistrate erred in both law and fact by not considering there was an existing grudge between the mother of the complainant and the Appellant that could have resulted to the fabrication of the case.

f. That the Hon. Trial Magistrate erred in both law and fact by failing to find that the inherent contradictions and inconsistencies on record not only impugned on the credibility of the various witnesses but also vitiated the overall burden of proof.

g. That the Hon. Trial Magistrate erred in both law and fact by failing to find that the failure to procure vital witnesses to substantiate the prosecution's case vitiated the charges therein and cast doubt on the appellant's culpability to have committed the offense in question.

h. That the Hon. Trial Magistrate erred in both law and fact by not observing that the charge sheet was fatally defective.

i. That the Hon. Trial Magistrate erred in both law and fact by failing to find that the prosecution failed in entirety to discharge the burden of proof as was mandated of it.

j. That the Hon. Trial Magistrate erred in both law and fact by meeting out harsh, unfair and excessive sentence on the appellant which was not justified by the totality of the evidence that was tendered against him.

k. That the Hon. Trial Magistrate erred in both law and fact by taking into account irrelevant factors and applied the wrong principles in sentencing by failing to take into account period spent by the appellant in remand....(sic)

3. The Appeal was canvassed through written submissions. By his submissions dated 30th May, 2025, the Appellant condensed some of his grounds, while addressing others separately as follows.

4. Whether the trial court erred in law and in fact by failing to critically and properly evaluate the evidence before it.

   Under this head, the Appellant contends that the trial magistrate failed to consider his alibi defence reiterated here, which assertedly placed him elsewhere during the alleged time of the offence, and stating that the prosecution did not discharge the burden of disproving it as required of them, citing Victor Mwendwa Mulinge vs. Republic [2014] eKLR and Ssentale vs. Uganda [1968] EA 365.

5. The Appellant also asserted discrepancies between the medical evidence tendered by PW5 and his witness DW2 and highlighted the fact that DW2 disputed the former's findings regarding lacerations, tears, and inflammation, because no injuries on the outer majora were observed and, that the presence of pus cells indicated infection rather than defilement. Attributing the broken hymen to other factors, including examination by the parent, who allegedly had a grudge against the Appellant. The Appellant thus complained that the trial court failed to assign probative value to DW2's expert testimony, contrary to Section 48 of the *Evidence Act*.

6. The Appellant also cited inconsistencies in PW1's account, noting that she initially claimed to have been pricked by a thorn, only to change the narrative on the next day to allege defilement. To the Appellant, this fact coupled with the absence of spermatozoa and abnormalities documented in the P3 form, undermined the prosecution case. He relied on the case of P.K.W vs. Republic [2012] eKLR, per Maraga & Rawal JJA .

7. Whether the trial court erred in law and in fact by not taking note of the fact that the charge sheet before it was defective Restating the statement of the offence invoking Section 8(1)(2) of the *Sexual Offences Act*, counsel for the Appellant described it as a non-existent offence. And that despite the trial court's attempt to cure the defect under Section 382 of the Criminal Procedure Code, the error was fundamental and prejudicial, and violated the Appellant's right to a fair trial under Article 50(2)(b) of *the Constitution*. He asserted that the conviction was unsafe as the prosecution failed to amend the charge, thereby compounding the procedural irregularity. Counsel citing the case of Republic v Benson Kibet Chumo & Another [2014] eKLR for the proposition that "A charge must be clear and unambiguous to enable the accused to prepare a defence."

8. Whether the trial court erred in fact and in law by irregularly conducting a voir dire examination leading to the conclusion that that the minor complainant could give sworn testimony

   The Appellant's counsel stating that PW1, a 7-year-old child, was the key prosecution witness argued that the trial court failed to properly conduct and record a voir dire examination to determine her understanding of the oath and the duty to speak the truth. And that her inconsistent statements—initially claiming injury from a thorn and later alleging defilement—cast doubt on her credibility. Counsel invoked dicta in Johnson Muiruri v Republic [1983] KLR 445.

9. Whether the trial court erred in law and in fact by convicting the appellant on insufficient evidence Counsel for the Appellant posited that the prosecution failed to prove the offence of defilement beyond reasonable doubt. Here citing asserted inconsistencies in PW1's testimony, lack of medical evidence confirming penetration, and failure to positively identify the Appellant as the perpetrator. He relied on several authorities, including Richard Munene v Republic [2018] eKLR and George Opondo Olunga v Republic [2016] eKLR. He asserted that the conviction was based on weak and inconsistent evidence, and that the trial court failed to uphold the standard of proof required in criminal proceedings. No submission was made in support of the ground challenging the sentence imposed by the trial court.

10. The Respondent opposed the appeal by their submissions dated on 11th May, 2025. The submissions addressed three questions, namely, whether the prosecution proved its case beyond reasonable doubt; whether the charge sheet was fatally defective; and whether the sentencing was excessive.

11. On the first question, the Respondent restated the ingredients of defilement to comprise the age of the complainant, penetration, and positive identification of the perpetrator. Reiterating the victim's testimony and medical evidence in proof of penetration, the Respondent cited the definition of penetration in Section 2 of the *Sexual Offences Act* to be "the partial or complete insertion of a genital organ into the genital organs of another person" as affirmed by the Court of Appeal in Mohamed Bachero v Republic [2015] eKLR. The Respondent further pointing out that the clinician (DW2) called by the defence to dispute the prosecution evidence in medical records had not examined the victim personally and relied solely on documents, which the trial court found less persuasive.

12. Concerning identification, the Respondent emphasized that this was a case of recognition, not stranger identification. Reiterating that the complainant knew the Appellant personally, hence reducing the risk of mistaken identity. Consistent with the dicta of the Court of Appeal in Anjononi & Others v Republic [1980] eKLR.

13. And further that the age of the complainant was confirmed by production of a birth certificate showing her date of birth as 20th June 2014. Defending the voir dire examination of the complainant, the Respondent stated that there was no evidence of irregularity in the proceedings and that upon conducting examination of the minor, the trial court satisfied itself that the child understood the duty to speak the truth.

14. Regarding the question whether the charge sheet was defective, the Respondent relied on the reasoning of the Musyoka J in Ekarot v Republic (Criminal Appeal E013 of 2022) [2024] KEHC 4100 (KLR), that the failure to present the provision of law contravened in the conventional way did not render the charge defective ''so long as the provision cited conveys both the definition or creation of offence, and the sentence prescribed." The Respondent therefore disputing that as drawn, the charge was prejudicial to the Appellant and emphasizing that the statement of the charge contained adequate information on the offence and penalty, and that minor defect was curable under Section 382 of the Criminal Procedure Code.

15. As to whether the sentence was excessive, the Respondent noted that the Appellant was sentenced to ten years imprisonment for defilement of a child aged below eleven years. And contending the said sentence was unlawful and contrary to the mandatory provisions of Section 8(2) of the *Sexual Offences Act*, which prescribes life imprisonment. Relying on dicta in the Court of Appeal decision in SOO v Republic (Criminal Appeal 120 of 2020) [2025] KECA 796 (KLR) regarding compliance with statutory sentencing guidelines and the decision of the Supreme Court in Republic v Julius Kitsao Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) in the latter where the Supreme Court reinstated a life sentence for defilement, after reversing the decision of the Court of Appeal decision to reduce a mandatory sentence. The Respondent submitted that Section 8(1)(2) of the *Sexual Offences Act* provides for a minimum mandatory sentence of life imprisonment for the defilement of a child aged eleven years or below. Accordingly, the trial court's sentence of ten years was unlawful, and the Respondent prayed for its substitution with life imprisonment.

Analysis and Determination

16. The court has considered the entire record of the lower court. As a first appellate court, this court is required to re-evaluate the evidence adduced at the trial and to draw its own conclusions as stated in Okeno -vs- Republic (1972) E.A 32:-

> "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 finding and conclusion; 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) EA. 424."

17. The appeal essentially challenges the prosecution evidence, which is described as inadequate to support the charge of defilement. Starting with the Appellant's objection to the charge as framed, the Appellant asserted that the charge was defective because the statement of the offence stated "Defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*", rather than defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. He contends that the former rendition refers to an offence unknown to the law.

18. 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 rendered to be 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. The provision is in the following terms:

> " 'Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

19. 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.
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> 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:
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> "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".
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> 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:
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> "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)

20. The above decision is readily applicable to the present case. The Appellant, from the lower court proceedings fully understood the charges facing him. He fully participated by cross-examining witnesses on pertinent issues. In the court's view, no failure of justice was occasioned by the faulty presentation of the statement of the offence, whose particulars were clearly set out. On its part, the trial court upon noting the anomaly in the statement of the offence in the charge laid before it and the proven age of the complainant, invoked the provisions of Section 382 of the Criminal Procedure Code before convicting the Appellant under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. In the result, nothing turns on this ground.

21. The offence of defilement comprises three key ingredients, namely, penetration, age of the victim and identity of the perpetrator, and the onus is always on the prosecution to prove the charge beyond reasonable doubt. The question to be considered on this appeal is whether the prosecution discharged

that burden. But first, the court must deal with the Appellant's complaint regarding the reception of the evidence of the minor complainant at the trial.

22. The Appellant's precise complaint concerns the voire dire examination of the minor complainant which he described as irregularly conducted, principally because of the format adopted and non-compliance with the objects and purposes of Section 19(1) of the *Oaths and Statutory Declarations Act*, namely, to ascertain that the child understood the nature of the oath hence gave sworn evidence, and if possessed of sufficient intelligence and understood the duty of speaking the truth, to give unsworn evidence. Hence in his view the examination yielded a wrong finding that the minor was competent to give sworn evidence.

23. Undeniably, because the complainant was aged 7 years at the time of the trial, a voire dire examination was necessary in this case, as the trial court correctly directed itself. 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".

24. 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 states that:

> (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."

25. In the case of Karimi Vs. R (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.

26. The Court of Appeal stated in the foregoing regard that:

> " 11. 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...

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.

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'

27. 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 is fatal to the prosecution case, 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.

28. In Thomas Mwambu Wenyi (2017) KECA 520 KLR the Court of Appeal considered a second appeal in respect of a trial whose proceedings did not contain a record of the questions asked during voire dire examination 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."

29. The Court of Appeal expressed its view 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 voir dire principle. He then drew inspiration from the case of Fransisio Matovu versus Republic [1961] E.A 260."

30. In that 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".

31. Resuming on the theme above, the Court of Appeal in Thomas Mwambu Wenyi's case (supra) proceeded to discuss the case of DWM versus Republic [2016] eKLR; Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 and; Mohamed versus 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:-
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> "It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir 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."

32. 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 voir 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 voir 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".

33. 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.

34. From the foregoing, it is evident that a trial court presented with a proposed minor witness is required to conduct a voire dire examination pursuant to Section 19(1) of the Oaths and Statutory Declaration Act to satisfy itself whether the minor understood the nature of the oath hence give sworn evidence, and if not, her unsworn evidence could be received if in the opinion of the court, she was possessed of sufficient intelligence and understood the duty to of speaking the truth. The record of proceedings during the voire dire examination in the lower court was as follows:

> " Voire dire
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> My name is PN. I am 7 years old. I live at Enturoto (sic) with my dad and mum. We go to PEFA church. I am in Sunday School. We are taught to always say the truth. Those who say the truth will go to heaven while those who lie will go to hell.
>
> I am here to tell the truth"
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> Court: She (Minor) appreciates the significance of testifying on oath. She will give sworn evidence".

35. It is also evident from the foregoing that the trial court asked questions, which were answered by the minor during examination, although the questions were themselves not recorded. While the question and answer format may be the ideal, there is no prescribed format for the conduct of voire dire examination of a minor witness. The trial court which interviewed the minor and had the opportunity to observe her as she spoke was evidently satisfied that she understood ''the significance of testifying on oath''. This finding indicates that the trial court in conducting the examination was alive to the requirements of Section 19(1) of the Oaths and Statutory Declaration Act.

36. The voire dire examination may not have been perfect and on the facts of this case, it is not dissimilar to the situation 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 no doubt the two children were talking the truth." Or the case of Loonkomok Maripett (supra) where no voire dire examination at all was conducted. Neither trial was found vitiated by the imperfect voire dire examination and both convictions were upheld by the Court of Appeal.

37. The mere fact that in this case, the trial court did not record the questions put to the minor, without more, does not vitiate the trial, and the Appellant has not demonstrated how he was prejudiced by the manner in which the voire dire examination was conducted. Issues regarding the credibility of the minor raised by the Appellant in support of this ground belong to the substance of her evidence and not the procedure by which the court satisfied itself of the requirements in Section 19(1) of the Oaths and Statutory Declaration Act.

38. Reviewing all the foregoing, this court is satisfied that although the ideal format of question and answer was not followed in this case, the trial court complied with the requirement to conduct the voire dire examination and that the process was not irregular merely because of the format adopted. (See Patrick Kathurima versus Republic Nyeri CRA 137 of 2014). The 1st ground of appeal which formed a key plank of the Appellant's appeal must therefore fail.

39. Now moving to the substance of the appeal, the prosecution case through five witnesses was as follows The minor complainant PN (PW1) testified that she was 7 years old and at the material time resided at Olturoto with her parents and three older sisters, in the family home that was close to the hospital known as Wilkister Memorial Hospital where the Appellant worked. It appears that PW1's family frequently borrowed a spray pump from the Appellant for use in spraying the family's animals. Thus, on the evening of 6.07.2021 at about 6.30pm, PW1's mother JS (PW2) sent PW1 to borrow the spray

pump from the Appellant. According to PW1, on arrival at the hospital and stating the purpose of her errand to the Appellant, he led her by hand to his single-roomed house next to the hospital.

40. Inside the house, the Appellant proceeded to place her on the bed before removing her trousers and underwear, and unzipping his trousers and touching her urinating organ (vagina). Thereafter, he exposed his urinating organ (penis) and inserted it into her vagina twice, and when she screamed from pain, he held her mouth and told her to be quiet. He then dressed her, gave her the pump and released her with a warning not to walk with a limp, on pain of a beating and on reaching home, to tell her mother that she had been pricked by a thorn. On reaching home and being questioned by PW2 for taking long on the errand, she repeated what the Appellant had instructed her to say.

41. During cross-examination, PW1 stated that the Appellant was alone when she found him at the hospital. She stated that she bled when the Appellant did bad manners to her.

42. Confirming that she had sent PW1 at 6.30pm on the material date to borrow the pump from the Appellant, PW2 stated that when she noted she was taking too long, she sent another daughter who met her on the way home, but was limping. On enquiring why, PW1 said she had been pricked by a thorn, which PW2 apparently doubted and noted that the minor did not eat her supper. On the next day, PW1 was unable to get out of bed, and concerned, PW2 and other daughters questioned her keenly, and observing her fear and reticence, eventually threatened to cane her. Whereupon, PW1 disclosed to them the events of the previous night at the hands of the Appellant and on examining PW1, the mother saw dirt in her private parts.

43. PW1 was escorted to Reheboth Hospital for treatment and later to Nairobi Women Hospital after the matter had been reported to Olturoto Police Post where P.C Oduna (PW3), who arrested the Appellant on the same date, was based at the time. PW2 said the Appellant had befriended her family and been very helpful for the period of 8 months during which they knew him as working at the Wilkister hospital close by. PW2 produced the birth certificate showing that PW1 was born on 20.06.2014 as Exh. 6 .

44. Richard Muvea of Isinya Police Station testified as PW4, and stated that he was the investigating officer, who on 7.07.2021 received PW1 and PW2 who were accompanied by PW3, on a complaint that the former had been defiled. He escorted the former to Nairobi Women's Hospital Kitengela where she was examined. The P3, GVRC and PRC forms completed thereafter were produced as Exh. 1,4, and 5 respectively, by John Njuguna (PW5) a clinician, who testified that the medical reports were prepared by his colleague Robert Milimo and that he was familiar with his handwriting.

45. Stating that PW1 was examined on 7.07.2021, PW5 set out the findings documented to include bruises in the internal part of the vagina (each 9 and 3 O'clock position) and that the hymen was lacerated and inflamed at 9 o'clock, all indicating trauma through penetration. He produced the lab report as Exh. 3 and the outpatient treatment invoices as Exh. 2.

46. Under cross-examination he stated that due to the delicate nature of the hymen, any slight injury amounted to tearing of the hymen and that the injuries sustained by the minor were less than 48 hours at examination.

47. When placed on his defence, the Appellant elected to give a sworn statement and called one witness. Stating that at the material time he was employed as a groundsman at Wilkister Memorial Hospital, the Appellant testified that on 6th July 2021 he was at work from 4PM to 9PM engaging in various activities including fetching cows, offloading tree seedlings, and watching television with colleagues. He denied that PW1 visited his house on that date and stated he left the hospital at 9PM to go home.

48. He admitted that he had previously known PW1's family well before PW2 initiated a sexual relationship with him, which broke down after six months, because PW2 became jealous after he entertained a female visitor staying with him in June 2021; that PW2 had threatened him while demanding for him to pay back Kes. 12,000/- which she had given him earlier, or suffer dire consequences. He was arrested on 7th July 2021 after PW2 reported him to the police, but he denied the allegations and maintained that he had no contact with PW1 on the date in question.

49. The defence witness was Baraza Okumu (DW2), a registered clinical officer with nine years experience. He took issue with the findings contained in medical reports produced by PW5, by asserting that the documented bruises at 9 and 3 o'clock positions and hymenal inflammation were inconsistent with typical signs of forced penetration, which would usually be accompanied by tears or lacerations on the labia majora and minora, both missing here. He asserted that hymenal inflammation could result from non-sexual causes such as infection, trauma from play, or examination by a parent or doctor. He cited alleged procedural lapses, including the failure to examine the alleged perpetrator and the absence of clothing analysis, which are standard practices in sexual assault investigations. Based on the report and his professional experience, he concluded that the findings did not support a diagnosis of defilement.

50. During cross-examination, he admitted that he did not examine PW1; that defilement could involve partial penetration and; that exceptional cases exist where vaginal injuries are restricted beyond the minoras, but maintained that the medical evidence in this case was inconclusive.

51. There was no dispute that the Appellant was at the material time employed as a groundsman and housed at Wilkister Memorial Hospital which was near the home of PW1's family, who were well known to the Appellant. There was no dispute that the Appellant knew PW1 and that her family related with him prior to the material date. As regards the age of the minor, there is evidence by PW1 herself, her mother PW2 and documentary proof in the form of Exh. 6, the birth certificate, indicating that PW1 was born on 20.06.2014, and was therefore aged 7 years at the material time.

52. The key contested issue centred on penetration, which the prosecution sought to prove through the testimony of PW1, 2 and 5 . PW1 gave a detailed account of the progression of events that occurred when she met the Appellant at the hospital where she had been sent by PW2 to borrow a spray pump. How the Appellant holding her by hand led her to his single room, placed her on his bed, removed her trousers and underwear, touched her in her private parts, unzipped his trouser to expose his male organ and inserted it, not once, but twice in her vagina, and after doing bad manners to her, a child's modest description for sexual activity, dressed her again before sending her off with the pump and a threat, and the lie that she should say she had been pricked by her thorn in explaining her limp. The witness' account appeared consistent and was not in any way challenged during cross-examination.

53. And although PW2 was not an eye witness of events at the Appellant's house, her evidence lends credence to PW1's account. She confirmed having sent PW1 to the Appellant to borrow a pump, a regular occurrence, that PW1 took too long, and upon return, her mood was subdued and fearful when questioned about the limping, repeating what she had been instructed to say by the Appellant. PW1, according to PW1 further declined to eat supper and was unable to get out of bed on the next day because of the alleged thorn, which PW2 insisted to be shown in vain. Further, the interrogation and cajoling by PW2 and her daughters almost failed until PW2 called for a cane to spank her, before PW1 narrated the events of the previous day after securing the promise to evade punishment if she revealed what happened to her.

54. Pausing there, the Appellant' s counsel referred to PW1's two narratives, first on the night of 6.07.2021 about a thorn prick, and second about defilement on the morning of 7.07.2021 as evidence of inconsistency. Not necessarily. It is not unusual for young victims of sexual assault to somehow blame

themselves for the assault and to fear disclosing such occurrences for fear of punishment by parents and significant others around them. PW1 was not limping when she left home, nor subdued. She came back a different girl, fearful and subdued, declined supper and unable on the next day to get out of bed. The limping gait is documented in the GVRC form Exh. 1, and confirms the testimony by PW2 .

55. The latter witness was described by the Appellant in his testimony as driven by desire for revenge because of a failed sexual relationship with the Appellant. While the Appellant gave a long account of how the alleged relationship started and failed, he did not during his cross-examination put this narrative to her at all, despite having her recalled for further cross-examination after her first testimony. The only reason must be that it was an afterthought. Besides, if the affair was between him and PW2, why would PW1, a mere child, equally make up a story against him. The Appellant never in cross-examination of PW1 suggested to her that her evidence was a fabrication of her mother.

56. Besides, the evidence by both PW1 and PW2 is strongly supported by medical reports prepared at the former's examination by a clinician at the Nairobi Women's Hospital, Kitengela, who unlike DW1 physically examined PW1 a day after the assault and noted bruises on the vaginal orifice and slight laceration of the hymen, with inflammation. The gist of the evidence of DW2 was that if there was forceful penetration, injuries on the minor would be found on both labias and the vagina and hymen. And that because documented injuries were only noted on the latter inner parts of the minor's organ, there was no forced penetration at all. While the injuries documented might well have been caused by other factors like excessive play or examination.

57. It appears that the witness understood penetration as a matter of forceful and complete penetration. He admitted as much during cross-examination and that it was possible for a child who had been defiled to present with the kind of injuries noted on PW1. Section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of a genital organ into the genital organs of another person"' as affirmed by the Court of Appeal in Mohamed Bachero v Republic [2015] eKLR .

58. The evidence of the experts was received by the trial court under Section 48, *Evidence Act* which the Appellant has called to his aid provides that :

> " When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."

59. No doubt, DW1 was an expert with some experience, but the opinion of experts is not binding on the court and must be considered in the context of the entire evidence before the court and subjected to a common sense evaluation. The trial court in its judgment correctly highlighted the fact that DW2 did not examine PW1 and reiterating the oral evidence by PW1 dismissed as unreasonable the contrary opinion of DW2. Upon reviewing the evidence of DW2 in the context of other evidence, this court is inclined to agree with that conclusion.

60. In the court's view, the evidence of DW2 appeared not only skewed, but also theoretical as he never examined the minor himself, and unable to dismiss the physical findings of the clinician who examined PW1 a day after the incident, proceeded to offer theories and conjecture as to how PW1's injuries may have occurred, which were not supported by any evidence. These theories, including accidental bruising of PW1's genitals from cycling or examination by a parent (an allusion to PW2) were never put to PW5, the clinician who produced the medical records or to PW1 and PW2 during cross-examination. Indeed, DW2 ventured to make the remarkable claim that because the Appellant's genital

organs were not examined the medical evidence relating to examination of PW1 alone was inconclusive. This assertion cannot stand up to scrutiny in the circumstances of this case.

61. In the court' s view DW2's skewed opinion was based on the faulty hypothesis that penetration must involve a high level of force or trauma and be complete and hence result in injuries to the labias, the vagina and hymen all at once. Every case stands on its own unique facts. Here, there is no plausible explanation for the delayed return of PW1 from her errand and her changed demeanor and behaviour and proven injuries, except that she had been defiled.

62. According to her, not only did the Appellant touch her private parts, but he also twice inserted his penis into her vagina. According to the GVRC form (Exh.1) the minor was limping when presented at the hospital on the next day, and there is no indication of a thorn found on her foot or anywhere else. The minor explained in her evidence how the issue of a thorn arose; it was the Appellant who, noting that she was limping, warned her not to do so, and instructed her as he sent her back home to lie that her limp was due to a thorn prick.

63. In any event, the trial court was entitled, having believed the testimony of PW1, as it obviously and properly did, to convict upon the sole testimony of the minor under the proviso to section 124 of the *Evidence Act*. In the court's considered view, penetration was proved beyond reasonable doubt.

64. With regard to the identity of the perpetrator, there was no dispute that PW1 and the Appellant were known to each other. According to PW1 and PW2, the minor was sent to the Appellant by the latter at 6.30pm, while it was still daylight. PW1' s recognition of the Appellant was therefore possible, more so as he closely interacted with her while he walked her from the hospital to his room where the offence occurred. The trial court dismissed his alibi defence raised at the last moment in his defence, to the effect that he was watching TV with other colleagues at the hospital at the material time. That said, it is true that an Accused person who raises an alibi defence bears no duty to prove it, and the burden to disprove it lies with the prosecution as held in Ssentale vs Uganda (1968) EA 365 and Wang'ombe vs Republic (1976-80)1 KLR 1683.

65. The trial court which had opportunity to observe the witnesses testify weighed the defence and prosecution evidence and found that the latter was watertight and effectively displaced the former. It bears repeating that the alibi defence is predicated on an alleged grudge arising from a romantic fallout between PW2 and the Appellant, which was never put to her during cross-examination to confirm or deny, and was like the alibi sprang up at the defence stage.

66. The evidence by PW1 and PW2 taken together with the medical evidence displaces such a likelihood. Moreover, according to the Appellant PW2 was a married woman, living with her husband and three daughters in the same locality as the Appellant and had allegedly been his paramour for some months prior to breaking up in June 2021. If indeed such a relationship existed, it was likely secret, as such relationships are wont to be, raising the question whether PW2 would have risked exposing herself by mounting serious false claims against the Appellant, and deliberately inflicting injuries on her youngest daughter (as DW2 appeared to suggest) in order to conscript her into the scheme. What was to be gained from such a scheme?

67. The Appellant's claim appears farfetched, and that must be why it was not canvassed during cross-examination of PW1 or PW2. In conclusion, the court is persuaded that the Appellant was properly convicted on credible and adequate evidence satisfying the standard of proof beyond reasonable doubt. The appeal against conviction must fail.

68. Concerning the sentence imposed, the Appellant's submissions are silent despite it having formed the basis of his grounds of appeal. This court agrees with the Respondent that the sentence of ten

years imprisonment was unlawful. Section 8(2) of the *Sexual Offences Act* provides that '' 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."

69. The Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR discussed section 8 of the *Sexual Offences Act* as follows:

> " In Hadson All Mwachongo v. Republic (2016) eKLR, this Court stated as follows regarding the sentences prescribed by the *Sexual Offences Act*:
>
> "The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment."

70. The trial court, in awarding a different sentence must have been influenced by jurisprudence from the Court of Appeal such as Evans Nyamari Ayako v Republic Criminal Appeal No. 22 of 2018 and other similar cases, emanating from the application of the decision of the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (Muruatetu I) to sexual offences. Thus, awarding a sentence, other than the prescribed mandatory sentence.

71. The rationale in Muruatetu I (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). However, the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2021) eKLR (Muruatetu II) expressly stated that the dicta in Muruatetu I only applied to murder cases. The Supreme Court has more recently further pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, regarding minimum or 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."

72. Further, in an appeal emanating from the Court of Appeal decision in Republic Versus 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." (emphasis added).

73. As explained in Muruatetu II above, and whose dicta was applicable as of August 2022 when the Appellant herein was sentenced, the decision in the Muruatetu I and Ayako's case and other similar

decisions in the Court of Appeal, cannot be applied in sentencing an offender convicted under Section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. Hence, the trial Court had no jurisdiction to award the sentence of 10 years imprisonment.

74. Based on the provisions of 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. The trial court had no discretion in the sentence, and the sentence of 10 years imprisonment is erroneous and without jurisdiction. Consequently, the Respondent's plea on the sentence is merited, more so given the very tender age of the victim. Accordingly, the court hereby sets aside the unlawful sentence of 10 years imprisonment and substitutes therefor the lawful mandatory sentence of life imprisonment.

75. In the result, the appeal is found to be without merit and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 27 TH DAY OF NOVEMBER 2025.

C. MEOLI

JUDGE

In the presence of:

For the State: Mr. Kilunda

For the Appellant: Ms. Mueni h/b for Mr. Aluda

Appellant: Present

C/A: Lepatei

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