Ngetich v Republic (Criminal Appeal E104 of 2024)
[2026] KEHC 1821 (KLR) (17 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E104 OF 2024

JM OMIDO, J

FEBRUARY 17, 2026

BETWEEN

GEOFFREY NGETICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. M.N. Olonyi Wekesa, Resident Magistrate delivered on 26th November, 2024 in Tamu Sexual Offence Case No. E012 of 2024 Republic v Geoffrey Ngetich)

JUDGMENT

1. The Appellant Geoffrey Ngetich was in the first count charged before the trial court with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. As is instructive from the charge sheet, the particulars of the principal count were that on the 16th day of July, 2024 at Kipkelion West Sublocation, Subcounty within Kericho County, the Appellant intentionally caused his penis to penetrate the vagina of MC (name withheld), a child aged 6 years.

3. In the alternative count to the first count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the alternative count to the first count were that on the 16th day of July, 2024 at about 1630hrs Kipkelion West Sublocation, Subcounty within Kericho County, the Appellant intentionally touched the vagina, buttocks and breasts of MC, a child aged 6 years.

5. In the second count, the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

6. The particulars of the offence in the second count were that on the 16th day of July, 2024 at Kipkelion West Sublocation, Subcounty within Kericho County, the Appellant intentionally caused his penis to penetrate the vagina of IC (name withheld) a child aged 7 years.

7. In the alternative count to the second count, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

8. The particulars of the alternative count to the second count were that on the 16th day of July, 2024 at about 1630hrs Kipkelion West Sublocation, Subcounty within Kericho County, the Appellant intentionally touched the vagina, buttocks and breasts of IC, a child aged 7 years.

9. The Appellant denied all the counts, which then called for a full trial.

10. The prosecution case was founded on the evidence of seven witnesses while the defence comprised of the Appellant's sworn testimony and the evidence of his witness.

11. Following the conclusion of the trial, the Appellant was convicted on the two principal counts (the first and the second count) and subsequently sentenced to serve life imprisonment on both counts, with the trial court ordering that the sentence in respect of the second count be held in abeyance.

12. Aggrieved by the convictions and sentences, the Appellant lodged the present appeal vide the petition of appeal (wrongly titled as memorandum of appeal) dated 31st December, 2024 in which he raised the following grounds of appeal:

    a. That the learned trial Magistrate erred in law and in fact in finding the Appellant guilty as charged where the evidence was insufficient to warrant such findings and conclusions.

    b. That the learned trial Magistrate erred in law and in fact by failing to consider the probation report in its eternity (sic) and only looked at the recommendation.

    c. That the learned trial Magistrate erred in law and in fact by finding or concluding that there was penetration where the medical report was that hymen was intact, hence failing to factor in medical evidence.

    d. That the learned trial Magistrate erred in law and in fact by admitting the charges which were defective in nature and law and making a finding upon such charges.

    e. That the learned trial Magistrate erred in law and in fact by failing to call for and factor in medical examination of the Appellant where probation officers report showed the Appellant was of mild mental conditions.

    f. That the learned trial Magistrate erred in law and in fact by passing a harsh sentence without considering the mitigating circumstances during the trial process.

    g. That the learned trial Magistrate erred in law and in fact in that knowingly the matter is of grave nature, if one is found guilty, to make orders for appointment of an advocate on pro bono to represent the interests of the Appellant.

    h. That the learned trial Magistrate erred in law and in fact by being emotional while conducting trial and in passing sentence.

13. On the strength of these grounds, the Appellant urges this court to allow the appeal, quash his conviction on both counts and acquit him and set aside the life sentences.

14. This being a first appeal, this court is enjoined to re-analyze, re-evaluate and re-assess the evidence before the trial court and reach its own conclusions bearing in mind that it did not see or hear the witnesses when they testified first hand (see Okeno v Republic [1972] E.A, 32 at 36; Pandya v Republic [1957] EA 336; Shantilal. M. Ruwala v Republic [1957] EA 570; and Peter v Sunday Post [1958] EA 424.)

15. In executing its duties, this court must consider whether the trial court considered all the evidence, weighed it correctly and whether it correctly applied the law or legal principles to it in arriving at its decisions in respect of both the convictions and sentences.

16. Now to the record of the trial court, the same bears it that the learned trial Magistrate separately conducted voir dire examinations in respect of MC and IC, both children of tender years to determine or establish whether the children possessed sufficient intelligence and understood the duty of speaking the truth and whether they were capable of giving rational testimony.

17. The trial court observed as follows with respect to MC:

> "I have listened to the answers given by the minor. She appears intelligent enough to understand and respond to the questions put forth to her but does not understand the relevance of oath. Under the circumstances, the minor will give unsworn evidence, and the accused will have a right to cross-examine her."

18. The learned trial Magistrate reached the same finding with respect to IC

19. With that, MC proceeded to testify as PW1 and told the trial court that she was 7 years old and a grade 1 learner. She told the court that on a day that she did not specify at about 1600hrs, she was in the company of her friend and neighbour IC, whom she met on her way home, when the two girls met the Appellant, who then dragged them from the road and took them to his house and that the Appellant did "tabia mbaya" to the two girls, beginning with IC following which he did the same to PW1.

20. PW1 told the trial court that before proceeding to sexually violate the two minors, the Appellant took them to a room where he put them on a bed where they lay. She stated that the Appellant undressed her by taking off her clothes and panty, rendering her completely naked. She explained that after violating IC, the Appellant did "tabia mbaya" on her private parts, where she used to "poop" using his penis and that she experienced a lot of pain and bled. He then asked the two girls to leave and warned them that he would beat them up if they told anyone what he had done to them.

21. MC explained to the trial court that the Appellant's house was located at a place on the way from her school to her home. She stated that the Appellant was a neighbour and one she knew well, having seen him in the village previously severally, adding that she knew his name as Geoffrey Ngetich. She pointed at the accused person in the dock as the assailant.

22. The witness told the trial court that she was later taken to Fort Ternan Hospital where she was examined and treated. She stated that that was not the first time that the accused person had done "tabia mbaya" to her, that he had done to her the same before.

23. On being cross examined by the Appellant, PW1 told the trial court that the Appellant forcefully pulled her and IC to his house, where he left his daughter outside and that he then proceeded to defile the two girls. She stated that she bled from her private parts and walked home with difficulty and in pain, where she then showed her mother where she had been injured by the Appellant.

24. The second prosecution witness was IC (PW2), who told the court that she was 8 years old and that on the fateful day (no specific details given) at about 1600hrs, she and PW1 were leaving their respective

schools when they met the Appellant, who was well known to PW2, and whose name she said was Geoffrey Ngetich, who then called the two girls and took them to his house.

25. PW2 explained to the trial court that the Appellant took the minors and his daughter to the bedroom, whereafter the Appellant's daughter went out of the house, leaving him, PW1 and PW2 in the bedroom, on the bed.

26. PW2 further told the trial court that the Appellant proceeded to undress both minors and took off his pair of long trousers and inner wear. That he then removed his "dudu" and did "tabia mbaya" to both herself and MC PW2 explained that the Appellant inserted his penis inside her "ass and vagina" and the part where she uses to pee. She stated that the Appellant told the minors that he would beat them up if they screamed. The Appellant then asked the two girls to leave. PW2 stated that it was the first time that the Appellant defiled her.

27. In her further evidence before the trial court, PW2 stated that the two girls proceeded to PW1's home where she told PW1's mother what had transpired. She also informed her own mother when she got to her home. She was taken to Rosy Hospital where she was examined and treated. She pointed out the Appellant in the dock as the assailant.

28. The third prosecution witness (PW3) was JK (name withheld), who told the trial court that she was PW1's mother and PW2's aunt. She produced her daughter's certificate of birth (PExh1) that indicated her date of birth as 29th June, 2017.

29. The witness recalled the events of 17th July, 2024 and told the trial court that on that day, she was called by JM (name withheld), who was PW2's mother, who told her to find out from her daughter and PW2 what had happened to them. When she inquired from the two children, they told her that nothing had happened.

30. PW3 explained to the trial court that later that evening, she prepared dinner and the two children ate. She then noticed that PW2 was limping or walking with an unusual gait but did not take it seriously. The children retired to bed that evening and woke up the next morning and left for school. Again, PW3 noticed that PW2 had a limp.

31. The witness told the court that when the children returned in the evening, she learnt from PW2's mother that the child had told her that the Appellant had defiled both PW1 and PW2 on 16th July, 2024. PW1 was taken to hospital by her (PW1's) father. The witness stated that the Appellant was well known to her.

32. Upon being cross examined, PW3 told the court that although PW1 walked with a limp, she did not see blood in her daughter's genitalia but added that the doctor who examined her found that she had indeed been defiled.

33. The fourth prosecution witness (PW4) was CKK (name withheld), a farmer and a resident of [Particulars withheld] village. The witness told the trial court that he was PW1's father and that he learnt that his daughter and niece (PW2) had both been defiled by the Appellant, who was a neighbour, on 16th July, 2024. The matter was reported to the police and Pw4 and PW2's mother then took the two children to Fort Ternan Hospital, under the escort of a police officer, where they were examined and treated. The witness stated that the doctor at the hospital confirmed that the two minors had been defiled.

34. The witness identified the following documents before the trial court:Treatment notes for PW1 – PExh2.Medical examination report (P3) form for PW1 – PExh3.Post rape care (PRC) form for PW1 – PExh4.

35. On being cross-examined, PW4 told the trial court that her daughter was in pain after the ordeal.

36. The prosecution called JM (name withheld) as the fifth witness (PW5), who told the court that PW2 was her daughter. The witness narrated the events of 16th July, 2024 and told the court that on that day at about 1700hrs, PW2 returned home from school and was limping and appeared to be in pain. The minor declined to disclose what had happened to her.

37. The witness noticed that PW1, who was in the company of PW2, was also limping and in pain. The witness told the trial court that her younger sister disclosed to her that she had seen the two minors going into the Appellant's house, whereafter it was locked, and had then heard the Appellant asking "nani ataanza?"

38. PW5 testified further that on 17th July, 2024, her daughter returned home after school and took a bath. On questioning her, PW2 told her that she and PW1 had indeed gone to the Appellant's house the previous day and that the Appellant had defiled both minors. PW5 immediately informed PW5 and arrangements were made and the two minors taken to Fort Ternan Hospital for treatment. The witness identified her daughter's certificate of birth that bore her date of birth as 14th October, 2016 (PExh5).

39. PW5 explained to the trial court, on being cross-examined that the examination of the two minors at Fort Ternan confirmed that they had indeed been defiled.

40. Kipyegon Alex Ngetich, a clinical officer at Fort Ternan Subcounty Hospital testified as PW6 told the trial court that he examined and treated PW1 and PW2 on 17th July, 2024 at about 1930hrs. The two minors were presented to the facility by their parents, who were accompanied by a police officer. The two minors presented history of having been defiled.

41. The witness told the trial court that on examining PW1, he noticed that she had difficulty in walking and walked with her legs apart. There was no laceration noted on her labia majora. Her labia minora had a bilateral and teary cogent laceration. The clitoris and urethral area were reddish in colour and inflamed and other parts pinkish. The minor's hymen was freshly torn and had blood spots on the surface. There was a smelly, clear discharge from the vagina. Urinalysis test disclosed leucocytes, of three pluses, signifying an infection.

42. PW6 further told the trial court that on examining PW2, he noted that she walked with a limp. Her labia majora was intact. Her labia minora had bilateral lacerations. No spermatozoa was seen in her genitalia. There were numerous epithelial and pus cells.

43. The witness reached the conclusion that there had been penetration into the genitalia of both PW1 and PW2.

44. PW6 produced the following documents that were later filled at the hospital after the two minors were examined and the matter reported to the police:Treatment notes/clinical attendance card for PW1 – PExh2.Medical examination report (P3) form for PW1 – PExh3.Post rape care (PRC) form for PW1 – PExh4a.Treatment notes/clinical attendance card for PW2 – PExh6.Medical examination report (P3) form for PW2 – PExh7.Post rape care (PRC) form for PW2 – PExh4b.

45. On being cross-examined, PW6 told the trial court that the minors were escorted to the hospital by their parents.

46. The last witness that the prosecution called was Police Constable Diana Ouko, the investigating officer, who testified as PW7.

47. In her evidence, PW7 told the trial court that the matter was reported to Fort Ternan Police Station on 16th July, 2024 by PW4, PW5 and PW6, who presented PW1 and PW2 to the station.

48. The witness then recorded the report and witness statements and issued P3 forms to the two minors, which were later completed, together with the two minors' PRC forms, at Fort Ternan Hospital. The witness apprehended the Appellant on 18th July, 2024 and visited the locus on 20th July, 2024, where he saw the Appellant's one-bedroomed mabati house. The bedroom had one bed and one blanket.

49. Upon concluding her investigations, the witness presented the Appellant before the trial court for plea.

50. The witness produced the following documents:PW1's certificate of birth – PExh1.PW2's certificate of birth – PEhx5.

51. The prosecution closed its case at that stage and in its considered ruling that was rendered on 29th October, 2024, the trial court found that a prima facie case had been established against the Appellant and he was placed on his defence.

52. The learned trial Magistrate complied with the provisions of Section 211 of the Criminal Procedure Code and the Appellant elected to tender a sworn testimony and call one witness.

53. The Appellant testified as DW1 and told the trial court that he resided at Fort Ternan and was a farmer by occupation.

54. In his defence, the Appellant told the trial court that on the material day, PW1 and PW2 were with his children at his home while he and his witness (DW2) were at a nearby farm weeding for beans. He explained that DW2 was his neighbour and being a casual labourer, he had requested her to help him in weeding and that he would pay her Ksh.200/-, which he did, in cash. The two then left the farm at about 1300hrs.

55. The Appellant stated that he could not comprehend how the allegations against him came to be, adding that he had a dispute with PW2's mother.

56. The Appellant was cross-examined and told the trial court that the dispute pitting him and PW2's mother involved land. He stated that he had no differences with PW1's parents. He denied defiling the two minors and stated that had he done so, they would have screamed. He stated that his wife was also at home on the date that he was accused of sexually violating the two minors.

57. The Appellant called JC (name withheld) (DW2) as his witness. In her evidence in chief, DW2 told the trial court that she was a casual worker and a resident of Kokwet. She stated that the Appellant was her husband.

58. DW2 explained that on 16th July, 2024, she was with the Appellant at their farm, where the two worked and planted beans from 0800hrs to 1600hrs. She was not paid any money as the farm belonged to her and the Appellant.

59. DW2 told the trial court that PW1 and PW2 went to her house at about 1730hrs when she and the Appellant had already left the farm. She then went to look for onions as the Appellant went to untether cows that were grazing by the roadside. On returning, DW2 found that the children had poured githeri that was cooking and the two minors told DW2 that it is her child who had done so. The two minors then left.

60. It was DW2's further testimony that moments later, PW1's mother called her and informed her that there was a person who was selling maize. DW1 proceeded to PW3's home while carrying a sack. PW3 told her to wait for the person who was selling maize. Shortly thereafter, PW2's mother arrived and

asked DW2 to join her for a meeting at a pastor's place. DW2 did not attend the meeting but left for her home where she found her husband – the Appellant – by the roadside, who cautioned her against going to the pastor's place.

61. Dw2 stated that on 17th July, 2024, she went to PW3's place and PW3 gave her maize. It is then that PW3 told DW2 that PW1 and PW2 had been defiled by her husband. She stated that when she confronted the Appellant on the issue, he denied having violated the two minors.

62. On being cross-examined, the witness denied that the Appellant had requested her to help him to weed for beans for a wage of Ksh.200/- and stated that she was his spouse and not a neighbour or worker. She stated that she left the farm with the Appellant, who went straight home as she went elsewhere to look for vegetables and that the two minors were at her home at the time. She did not know what transpired at home when she went to look for vegetables.

63. The Appellant closed the defence case at that stage.

64. In her judgement rendered on 26th November, 2024. the learned trial Magistrate reached the finding that the prosecution had proved the principal charges in the first and second counts against the Appellant beyond reasonable doubt and proceeded to convict him on the same in line with Section 215 of the Criminal Procedure Code. The Appellant was subsequently sentenced.

65. The instant appeal proceeded by way of written submissions. I have perused and carefully considered the grounds raised in the petition of appeal, the submissions by the two sides and the record in its entirety. From the grounds of appeal, the record and the submissions, the following issues arise for determination:

    a. Whether the charge sheet was defective for indicating in the particulars under count I and II that the Appellant defiled both complainants at 1630hrs, which the Appellant contends was not possible.

    b. Whether the trial court fell into error in failing to consider and appropriately act on the pre-sentence report, particularly the apparent indication that the Appellant suffered from a mild mental condition.

    c. Whether the trial court erred in failing to provide the Appellant with a pro bono Advocate despite facing serious charges.

    d. Whether the ingredients of the offence of defilement under Section 8(1) as read with Section 8(2) were proved in respect of both complainants (PW1 and PW2) against the Appellant beyond reasonable doubt, the same being:

        i. Whether the ages of the two complainants (PW1 and PW2) were sufficiently established to meet the statutory threshold for the offence of defilement.

        ii. Whether the prosecution proved penetration of the two complainants beyond reasonable doubt.

        iii. Whether the identification and/or recognition of the Appellant by the two complainants was reliable and free from error.

    e. Whether the evidence as a whole proved the Appellant's guilt beyond reasonable doubt.

    f. Whether the defence was adequately considered and properly rejected by the trial court.

g. Whether the sentences imposed by the trial court, including the order holding one life sentence in abeyance, were lawful, proper and in accordance with established principles of sentencing.

66. I will proceed to address the issues seriatim.

67. On the first issue, the Appellant contends that the charge sheet was defective on the basis that both count I and count II purportedly indicated that the offences were committed at 1630 hours, which he alleges was impossible. This complaint, however, misapprehends the structure of the charge sheet.

68. A careful examination of the record shows that the principal counts for which the Appellant was convicted – count I and count II – did not specify the exact time of commission of the offences. The mention of 1630 hours appeared only in the alternative counts, which related to indecent acts under Section 11(1) of the *Sexual Offences Act* and on which the Appellant was not convicted.

69. Be that as it may, the law is settled that the particulars of an offence, particularly in sexual offences involving children, must convey sufficient information to inform the accused of the nature of the charge to enable a proper defence, but need not specify the exact hour unless time is an element of the offence.

70. In the present case, the principal counts clearly identified the dates, location, names and ages of the complainants and the acts constituting defilement. The fact that the alternative counts indicated a specific time does not translate into a defect in the charges that formed the basis of conviction on the principal counts.

71. Minor discrepancies between the time stated in the charge sheet and the evidence adduced at trial do not render a charge defective. In Republic v Omondi [2002] KLR 1017, the ourt held that:

> " A charge is not fatally defective merely because the particulars of time or place do not exactly correspond with the evidence, so long as the accused is sufficiently informed of the nature of the allegations to enable a proper defence."

72. Similarly, in R v. Njenga [1980] KLR 292, it was emphasized that the essence of the charge is to inform the accused of the act alleged, and minor variances in time are not material where they do not mislead or prejudice the defence.

73. In the circumstances, the Appellant's challenge to the validity of the charge sheet is without merit. The principal counts, on which the convictions were based, did not specify the 1630 hours, and therefore the trial court correctly proceeded to determine the case on the basis of the evidence adduced.

74. The reference to a specific time in the alternative counts, which were not the subject of conviction, cannot render the convictions on the principal counts invalid. There is no defect in the charge sheet that would warrant quashing the convictions.

75. The second issue for me to determine is whether the trial court fell into error in failing to consider and appropriately act on the pre-sentence report, particularly the apparent indication that the Appellant suffered from a mild mental condition.

76. A critical legal issue raised by the Appellant is the contention that the trial court erred by not calling for and adequately considering the full pre-sentence report, particularly the apparent indication that he suffered from a mild mental condition. This challenges both the fairness of the trial and the appropriateness of the sentence imposed.

77. To address this complaint, it is necessary to examine the legal principles concerning mental capacity in criminal responsibility, the presumption of sanity under the law and the role and purpose of a pre-sentence report.

78. Under our jurisdiction, every person charged with a criminal offence is presumed to be of sound mind until the contrary is proved. Section 11 of the Penal Code provides that:

> " 11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

79. This statutory presumption is a foundational principle of criminal responsibility that applies at all stages of the criminal process.

80. In Hirbo v Republic [2023] KECA 249 (KLR), the Court of Appeal reaffirmed that the presumption of sanity attaches to all accused persons and that sanity is the normal and usual condition of mankind unless evidence to the contrary is brought before the court.

81. The law further recognizes that an accused who seeks to rebut the presumption of sound mind must bring clear and credible evidence that at the time of the alleged offence they were incapable of understanding the nature of their actions or discerning that the act was wrong or unlawful. Section 12 of the Penal Code codifies the defence of insanity, which, if proved, results in a person being found not criminally responsible for the act or omission.

82. In the present matter, the pre-sentence report, prepared after conviction, is a tool primarily used to assist the sentencing court in understanding the background, character, social circumstances and any mitigating or aggravating factors relating to the convicted person. Such reports offer guidance on rehabilitation prospects, community ties and risk factors relevant to tailoring a just sentence. The report is not a substitute for evidence admissible at the trial stage nor does it, by itself, displace the statutory presumption of sanity unless it contains clear expert findings on mental incapacity relevant to criminal responsibility.

83. In the case of Republic v Lewis [2021] KEHC 272 (KLR), the High Court emphasized that while mental assessment reports may inform issues such as fitness to stand trial or understanding of the charges, the presumption of sanity remains intact unless disproved by cogent evidence.

84. On the facts of this appeal, there is no evidence that the Appellant's mental condition was raised at the trial stage as a matter bearing on his criminal responsibility. The trial court record shows that the Appellant engaged with the trial process, cross-examined prosecution witnesses in detail, testified on oath and was cross-examined without objection as to his understanding or capacity. The Appellant did not, at any stage prior to or during the trial, request a mental assessment under Section 162 of the Criminal Procedure Code or otherwise bring evidence to rebut the statutory presumption of sanity.

85. In Wangui v Republic [2022] KEHC 17017 (KLR), the High Court reiterated that where there is no timely application for a mental assessment and no evidence rebutting the presumption of sanity, the trial court is entitled to proceed on the basis that the accused was of sound mind at the time of the offence and throughout the proceedings.

86. Furthermore, the pre-sentence report indicating a mild mental condition does not, in itself, prove that the Appellant was unsound of mind at the time of the alleged offences or that he was incapable of understanding the nature and quality of his acts or engage in the trial. The presumption of sanity remains operative and the onus was on the Appellant to adduce evidence to the contrary. Because no

such evidence was placed before the trial court at the appropriate stage, the trial court was under no obligation to treat the report as establishing a legal incapacity affecting criminal responsibility.

87. Accordingly, this court finds that the trial court did not err in declining to act upon the pre-sentence report as though it raised a substantive issue of mental incapacity affecting guilt or sentencing.

88. The pre-sentence report's role in informing mitigation or other circumstances relevant to sentencing does not override the statutory presumption of sanity nor substitute for admissible evidence relevant to the foundational issue of criminal responsibility. Consequently, the Appellant's complaint on this ground fails.

89. The third issue for determination is whether the trial court erred in failing to provide the Appellant with a pro bono Advocate despite facing serious charges.

90. In considering the Appellant's complaint that he was not provided with a pro bono Advocate despite facing serious charges, it is necessary first to restate the constitutional and statutory framework governing the right to legal representation in Kenya.

91. Article 50(2)(g) of *the Constitution* guarantees every accused person the right "to be represented by an advocate of the person's choice" and that this right must be "promptly" explained.

92. Article 50(2)(h) further provides that an accused person is entitled to have an advocate assigned by the State "at State expense, if substantial injustice will otherwise result".

93. The *Legal Aid Act*, No. 6 of 2016 gives effect to these constitutional rights and, under Section 43, imposes a duty on the trial court to inform an unrepresented accused of both the right to legal representation and the right to state-assisted representation where substantial injustice is likely to occur. The Act also lists factors the court ought to consider in assessing whether substantial injustice is likely, including the severity of the charge and sentence, the complexity of the case and the capacity of the accused to defend themselves.

94. In the present case, the record does not show that the trial court was called upon to consider the Appellant's need for a state-assigned Advocate, nor was there any indication that the Appellant ever informed the trial court that he was indigent or unable to afford legal representation. The right to have an advocate assigned at public expense is not absolute and the mere fact that a charge is serious, even one carrying a mandatory life sentence, does not automatically trigger a constitutional obligation to appoint counsel.

95. In the case of Mwakitau v Republic (Criminal Appeal E036 of 2022) [2023] KEHC 19716 (KLR), the High Court emphasized that the right to state-assisted legal representation under Article 50(2)(h) is contingent upon a showing that substantial injustice would otherwise result and that a trial court must take into account the severity of the charge, the complexity of the case and the accused's capacity to defend themselves in deciding whether to inform and apply for legal aid services.

96. The court further confirmed that "lack of legal representation shall not be a bar to the continuation of proceedings against a person" where the conditions for state-assisted representation are not made out.

97. While *the Constitution* and the *Legal Aid Act* envisage state-assisted representation, the entitlement arises only upon establishment that substantial injustice would result absent such assistance. It is the duty of an accused a person to demonstrate to the trial court how the lack of an advocate prejudices their ability to conduct a defence. The Appellant did not make out such a case before the trial court.

98. It follows that the trial court's silence on the matter of state-assigned counsel cannot, without more, be impugned as an error. The record does not disclose that the Appellant made any representation

to the trial court about his inability to afford counsel, nor that he sought an order for state-provided representation.

99. In the absence of such an application or evidence of incapacity to defend himself effectively, the trial court was not obliged to proactively assign counsel at State expense. At worst, the obligation under Article 50(2)(g) of *the Constitution* and Section 43 of the *Legal Aid Act* was to inform the Appellant of his right to legal representation and the possibility of state-assisted counsel if he stood to suffer substantial injustice.

100. Accordingly, I find that the trial court did not err in not providing a pro bono advocate where the Appellant neither sought one nor demonstrated that substantial injustice would otherwise have occurred. The complaint on this issue accordingly fails.

101. The fourth issue for determination is whether the ingredients of the offence of defilement under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* were proved in respect of both complainants (PW1 and PW2) against the Appellant beyond reasonable doubt.

102. The first element – the age of the complainants – is a critical element in offences of defilement under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

103. In the matter before the trial court, the prosecution produced birth certificates for both minors. PW1's birth certificate indicated a date of birth of 29th June, 2017, while PW2's indicated 14th October, 2016. As the offences are said to have occurred on 16th July, 2024, the minors were therefore six and seven years old respectively.

104. In Hadson Ali Mwachongo v Republic [2016] eKLR (Court of Appeal), it was stated that:

> "Age of the victim of defilement is a critical component which must be proved beyond reasonable doubt."

105. The ages in the matter before the trial court were corroborated by the children's own testimony and the observations of their parents. The documents were produced without objection and were consistent with the children's statements. I find that the prosecution discharged the burden of proving age beyond reasonable doubt, placing the Appellant's conduct squarely within the statutory framework of the offence of defilement.

106. The second element is that of proof of penetration. Penetration is defined in Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another. Both complainants provided detailed, consistent and spontaneous accounts of sexual intercourse with the Appellant. PW1 described being forcibly undressed and penetrated, sustaining pain and bleeding. PW2 gave similar testimony regarding the Appellant's acts.

107. The Appellant contended that penetration was not proved because PW1's hymen was reported intact. This contention is both factually and legally untenable. In Fappyton Mutuku Ngui v Republic [2012] eKLR (Court of Appeal), it was held that:

> "Penetration need not be complete; even the slightest penetration is sufficient to constitute the offence. The presence or absence of an intact hymen is not decisive."

108. The Appellant further challenged the probative value of the complainants' evidence on the ground that they used non-technical and colloquial expressions such as "tabia mbaya" and "dudu" in describing the acts allegedly committed against them. It was argued that such language was vague and incapable of establishing penetration to the required legal standard.

109. This complaint must be considered against the settled principle that evidence of children of tender years is to be received with due regard to their age, level of development and limited capacity to articulate events using anatomical or scientific terminology. A child is not expected to describe sexual acts using precise medical language. What the law requires is that the evidence, when taken as a whole, clearly conveys the nature of the act complained of.

110. In this case, the complainants did not merely rely on the phrases "tabia mbaya" and "dudu" in isolation. They went further to explain, in simple and age-appropriate terms, that the Appellant inserted his penis into their private parts, which they described as "the part I use to pee," and that the act caused them pain and discomfort.

111. The evidence of the two complainants was internally consistent and mutually reinforcing when considered in its entirety. Each child described being taken from the road to the Appellant's house, led into a bedroom, placed on a bed and undressed before the act complained of occurred. Their accounts followed a clear and logical sequence of events, demonstrating coherence rather than confusion.

112. In that setting, the reference to "the part I use to pee" was an age-appropriate description of the genital area and viewed contextually, left no ambiguity as to the nature of the act alleged.

113. Viewed against the entire body of evidence, the expressions "tabia mbaya" and "dudu" did not introduce any uncertainty as to the nature of the acts complained of. The trial court was duty-bound to assess the testimony of children of tender years with sensitivity and common sense, paying regard to substance rather than the use of technical or anatomical language.

114. The clinical officer examined both minors and documented physical findings consistent with sexual penetration. PW1 had a freshly torn hymen with blood spots, inflammation of the clitoris and urethral area and bilateral lacerations on the labia minora. PW2 had bilateral labial lacerations and a limp consistent with trauma. The findings were recorded contemporaneously in treatment notes, P3 forms and post-rape care forms.

115. When the complainants' age-appropriate descriptions are read together with their further explanations and the corroborative medical findings as were presented by the clinical officer and in the treatment notes and the P3 and PRC forms, the meaning of their evidence became clear and unmistakable. I am therefore satisfied that the acts described amounted to penetration as defined in law and that the trial court neither misunderstood nor misapprehended the complainants' testimony in arriving at its finding.

116. In the premises, the complaint that the evidence of penetration was vague or imprecise on account of the language used by the complainants is without merit. The trial court properly evaluated the evidence before it, appreciated the age and capacity of the witnesses and correctly drew guidance from the surrounding circumstances and corroborative medical findings.

117. I find no misdirection in the manner in which the learned trial Magistrate interpreted and relied upon the complainants' testimonies and I am satisfied that the finding that penetration was proved beyond reasonable doubt in respect of both complainants was well founded and supported by the evidence on record.

118. The third element concerns the identification and/or recognition of the Appellant by the victims as the perpetrator. From the evidence in the record of the trial court, the offences occurred in broad daylight, in a location familiar to the complainants and involved a person well known to both minors, whom they both described as a neighbour. PW1 and PW2 identified the Appellant by name and by pointing him

out in court. Recognition by a person known to the witness has consistently been held to be reliable in our jurisprudence. In Anjononi & Others v Republic [1980] KLR 59 (Court of Appeal), it was held:

> " Recognition of an assailant is more reliable than identification of a stranger, but even then, mistakes can be made."

119. Here, the recognition evidence was clear, consistent and corroborated by the parents' accounts and the Appellant's own relationship with the victims. The Appellant confirmed that the complainants were regular visitors to his home and that they knew him well. There is no reasonable basis to challenge the accuracy of the identification by recognition.

120. The fifth and sixth issues for determination are whether the learned trial Magistrate properly evaluated the whole of the prosecution case and whether she properly considered the defence case in reaching the finding that the evidence as a whole proved the Appellant's guilt beyond reasonable doubt.

121. The complainants' evidence, the independent medical reports, the immediate reporting to parents and subsequent hospital treatment collectively provide a coherent and credible account of the offences. The Appellant's defence consisted primarily of a weak alibi, which was inconsistent and contradicted by DW2's testimony, who also denied any knowledge of any differences or grudge between the Appellant and the parents of the complainants.

122. In Sawe v Republic [2003] KLR 364 (Court of Appeal), it was emphasized that suspicion alone cannot sustain a conviction; however, cogent and credible testimony, especially when corroborated by medical evidence, is sufficient. The prosecution's case, in this instance, meets that standard. I am satisfied that the trial court properly concluded that the Appellant's guilt was proved beyond reasonable doubt.

123. The seventh issue for this court to address, which the court raised sua sponte, is whether the sentences imposed by the trial court, including the order holding one life sentence in abeyance, were lawful, appropriate or proper and in accordance with established principles of sentencing.

124. Section 8(2) of the *Sexual Offences Act* mandates life imprisonment for defilement of a child. The trial court correctly imposed life sentences on both counts. This was a mandatory requirement and the Appellant's position that the sentences were too severe falls apart.

125. However, the order holding the second life sentence in abeyance is irregular. The principle of holding sentences in abeyance is applicable only to death sentences, as clarified in Charles Amkhono v Republic [2021] eKLR (High Court):

> " A sentence in abeyance is appropriate only where multiple death sentences are imposed, as a convict can only be executed once."

126. Under our sentencing law, the doctrine of a sentence being held in abeyance is specific to multiple death sentences and does not apply to life imprisonment. The Judiciary Sentencing Policy Guidelines, 2023 expressly state that:

> " Where an accused person is convicted of several counts of capital offences each attracting the death sentence, the court shall pass the death sentence on each count but direct that the second or subsequent sentences be held in abeyance."

127. This rule reflects the practical reality that a person can only be executed once, so holding redundant death sentences in abeyance avoids meaningless duplication of sentences.

128. The reasoning underlying that practice has also been reflected in case law. In Charles Amkhono (supra), the High Court explained that where multiple counts attract the death penalty, imposing more than one death sentence would make no sense because:

> "If the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance."

129. This reasoning is inherently tied to the uniqueness of the death penalty and does not translate, and is not applicable, to life imprisonment.

130. By contrast, life imprisonment is not a capital sentence and the law contemplates that a court may impose and manage multiple sentences of imprisonment. Sections 12 and 14 of the Criminal Procedure Code, Cap 75 Laws of Kenya govern how multiple sentences of imprisonment should be imposed and executed.

131. Section 14(1) provides that when a person is convicted at one trial of two or more distinct offences, "the court may sentence him for those offences to the several punishments prescribed," and that the imprisonment terms "shall commence the one after the expiration of the other ... unless the court directs that the punishments shall run concurrently."

132. This statutory framework shows that the law anticipates the imposition of multiple imprisonment terms and the mechanism for reconciling them is concurrency or consecutiveness, not abeyance.

133. The Court of Appeal authority of Peter Mbugua Kabui v Republic [2016] eKLR (Court of Appeal) further explains how sentences should be structured. In that case, the court held that the general principle is that where offences arise from the same transaction, concurrent sentences should be given, but where they are separate and distinct transactions, even if charged in one indictment, it is not illegal to impose consecutive imprisonment terms.

134. This jurisprudence reinforces the idea that courts have discretion to determine whether multiple imprisonment sentences run concurrently or consecutively, guided by principles of proportionality and the nature of the offences, not by any rule akin to "holding in abeyance."

135. Simply put, abeyance as recognized in the sentencing guidelines and case law applies to death sentences because of their finality and singular enforcement, not to life imprisonment. Where an accused is convicted on two counts each requiring life imprisonment (as under Section 8(1) read with Section 8(2) of the *Sexual Offences Act*), the court must impose a life sentence on each count of conviction and then, in exercise of its discretion under Section 14 of the Criminal Procedure Code, direct whether these sentences run concurrently or consecutively. There is no legal basis for holding one life sentence in abeyance as though it were a death sentence.

136. Life imprisonment is therefore intended to run either concurrently or consecutively, but there is no provision under the law permitting the holding of one life sentence in abeyance. The proper order would have been to direct that the sentences run concurrently, ensuring the statutory punishment is properly enforced.

137. In light of the foregoing analysis, the persuasion that I reach is that the convictions on both counts are therefore safe and supported by overwhelming evidence. Accordingly, the appeal against conviction on the two counts is dismissed.

138. However, on the sentences, the order holding the second life sentence in abeyance is set aside and substituted with an order that the Appellant is sentenced to life imprisonment on both counts and that the sentences shall run concurrently for the reason that the offences were committed in the same transaction.

139. This disposes of the appeal in its entirety.

140. This file is hereby closed.

DELIVERED, SIGNED & DATED THIS 17th day of February, 2026.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

For the Appellant: Mr. Towett.

For Respondent: Ms. Muema.

Court Assistant: Mr. Ngoge & Mr. Juma.