



**Yan v Republic (Criminal Appeal 145 of 2019)  
[2024] KECA 1655 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1655 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 145 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
NOVEMBER 15, 2024**

**BETWEEN**

**JULIUS ODIPO YAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the High Court of Kenya at Siaya (Aburili, J.) dated 12th June, 2018 in HCCRA No. 156 of 2016)*

**JUDGMENT**

1. The appellant, Julius Odipo Yan, was the accused person in the trial before the Principal's Magistrate's Court at Bondo in Criminal Case No. 1003 of 2015. He 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. The particulars of the offence were that on the 18<sup>th</sup> day of October, 2015, at around 9.00 am at West Ramba Sub-location, within Siaya County, he intentionally caused his penis to penetrate the vagina of PAO, a child aged 8 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act No. 3 of 2006*. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.
3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment.
4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.
5. The High Court (R.E. Aburili, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 12<sup>th</sup> June, 2018.



6. The appellant was, again, dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised four (4) grounds in his Memorandum of Appeal, which reproduced verbatim are that:
  1. The first appellate judge erred in law and fact by not considering that the medical evidence adduced in court was too weak hence exonerated the appellant from the alleged offence.
  2. The first appellate judge erred in law and fact by not considering the appellant's defense evidence which was cogent enough to award the appellant an acquittal.
  3. The first appellate judge erred in law and fact by basing the appellant's conviction and sentence on the prosecution evidence that was marred with contradictions and inconsistencies.
  4. The first appellate judge erred in law and fact by convicting and sentencing the appellant on mere allegations whereby no investigations were carried out and if it was carried out, then it was shoddy.
7. The appellant also filed Supplementary Grounds of Appeal which, in summary, were that the learned judge erred in law by failing to note that: the medical evidence adduced was questionable and insufficient; the elements of age and penetration were not proved conclusively; voir dire examination did not meet the required threshold to make it reliable; and some crucial witnesses mentioned by the prosecution were not called to testify. Lastly, the appellant stated that both lower courts erred in meting out a sentence that was harsh. Wherefore, the appellant prayed that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.
8. A summary of the evidence that emerged at the trial through four (4) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.
9. The complainant, PAO, was a class two pupil at [particulars withheld] Primary School at the time of the incident. She testified as PW1. After conducting voir dire, the trial court concluded that while she was sufficiently intelligent to appreciate the proceedings, she was too young to give sworn evidence and that she should, therefore, give unsworn evidence.
10. On the witness stand, PW1 recalled that on the material day at around 9.00am, her grandfather sent her to go and call someone from the appellant's home to pick charcoal from PW1's home. On reaching there, the appellant, in turn, sent her to bring him sugar from her mother. Upon returning, the appellant told her to sit on his bed and proceeded to remove her panties. Thereafter, the appellant removed his underwear and slept on top of her, inserted "his thing for urinating" inside her vagina and started "shaking." She said she felt pain and she also felt some wet substance on her private parts and vagina. After the incident, the appellant washed her private parts and told her not to tell anyone, lest he would kill her. He, then, promised to give her an andazi. However, two days later, PW1 told her mother what had happened and the appellant was arrested. She was then taken to hospital where she was treated.
11. The record shows that after PW1 gave her evidence, the trial court did not give the appellant an opportunity to cross-examine her but, instead, invited the evidence of PW2 immediately.
12. GOO, the complainant's father, testified as PW2. He told the court that on 31<sup>st</sup> October, 2015, PW1 woke him up complaining of stomach pains and asked him to take her outside for a short call. It was then that he noticed that she walked while stooping and stood while pressing her knees together. The following morning as PW2 prepared himself to go to the shamba, PW1's mother drew his attention to PW1's unusual stooped walking style. Upon inquiry, PW1 at first said that she had a stomachache.



- Later that day, however, when he took PW1 to a neighbour for treatment, PW1 narrated what had happened between her and the appellant the day her grandfather sent her to the appellant's home.
13. Thereafter, PW2 took PW1 to Rambugu Dispensary where she was treated and referred to Akala Hospital for examination. Later, he reported the matter to the police and the appellant was arrested. In addition, PW2 stated that PW1 was born in 2007 and identified her baptismal card which showed that she was born 16<sup>th</sup> December, 2007.
  14. The third witness was Jared Obiero Opondo, a clinical officer at Bera Sub-County Hospital. He testified that PW1 went to their facility on 2<sup>nd</sup> November, 2015, with a history of having been defiled on 18<sup>th</sup> October, 2015, by a person who was well known to her. She had previously been treated at Rambugu Dispensary. The medical examination showed that she had septic bruises on the vaginal orifices and the hymen was torn. The lab test showed the presence of pus cells; and Syphilis and HIV tests were negative. In conclusion, the injuries were rated as grievous harm as a result of defilement. PW3 produced PW1's treatment book and P3 form.
  15. The last witness was PC Samson Katana, the investigating officer in the case. He testified that he interrogated and recorded PW1's statement, who alleged that the incident took place on 18<sup>th</sup> October, 2015. He also told the court that he visited the appellant's house where the incident occurred and thereafter obtained an arrest warrant for the appellant; who was later arrested and charged with the offence of defilement. He added that PW2 gave him PW1's baptismal card which showed that she was born on 16<sup>th</sup> December, 2007. He produced the said baptismal card.
  16. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charge against him and testified that on the material day, he got a call from his nephew, Justus Onyango Ogudo, requesting for his assistance, He then went to his nephew's place and assisted him for two weeks, after which he returned home. Later on 4<sup>th</sup> November, 2015, his nephew called him again requesting for his assistance, and he heeded his call. However, the following day as he went to pick some cement at Ajigo Center, two people riding on a motorbike told him that he was required at Ndori Police Station. He accompanied them to the police station and he was arrested upon arrival. Thereafter, on 6<sup>th</sup> November, 2015, he was arraigned in court and the charges herein, which he did not understand, were read to him.
  17. As aforesaid, both the trial court and the High Court found the three ingredients for defilement under section 8(1) as read with section 8(2) of the *Sexual Offences Act* - namely (i) age of the complainant as below eleven years old; (ii) penetration; and (iii) identification of the appellant as the perpetrator – were all proved.
  18. The appeal before this Court was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent. Both parties relied on their submissions.
  19. First, the appellant alleged that the prosecution failed to tender conclusive medical proof that linked him to the offence. His main complaint in this regard was that the clinical officer who testified only examined PW1 seventeen days after the alleged incident; and the doctor who first examined her was not called to testify. The appellant argued that given the nature of the injuries reported, it would have been necessary to call the medical personnel who first examined the survivor.
  20. Second, the appellant argued that the prosecution failed to prove the elements of penetration and age. In this regard, he submitted that PW1's testimony was not specific to the act of penetration and her description of what happened did not necessarily prove that penetration took place. According to the appellant, the evidence and details as to what actually happened during the act, that is, evidence of



sensory details such as what a victim heard, saw, felt and even smelt, is highly relevant to prove the element of penetration even though it may be traumatic. He argued that specificity in giving evidence of penetration strengthens the credibility of the testimony of a witness and is particularly powerful when the ability to prove a charge rests with the complainant. It was his submission that this factor was missing in present case and yet the learned magistrate in her judgment held that PW1's testimony was corroborated by medical evidence and the evidence of other witnesses, in particular, PW3. However, the appellant argued that a close scrutiny of PW3's evidence showed otherwise.

21. With regard to the age of PW1, the appellant submitted that the same was not proved as no age assessment was done and no sufficient proof was adduced to confirm how old she was. He argued that PW3 failed to prove the age of PW1 and that the prosecution seemed to have realized this fatal mistake and remedied it by "engineering a fake baptismal card" He also relied on the case *Gabriel Muchira Mwenja vs. Republic, Criminal Application No. 1224 of 2000* (Nairobi); Johnson Muiruri Mwenja vs. Republic [1983] KLR 445; Francis Omuruni vs. Uganda, *CA No. 2 of 2000*; and Kaingu Elias Kasomo vs. Republic, Criminal Appeal No. 504 of 2010,
22. Third, the appellant contended that even though voir dire examination was conducted and PW1 gave unsworn evidence, the trial court failed to ascertain that she actually understood the nature of an oath and the duty of speaking the truth. The appellant argued that from the questions and answers recorded, no question was posed to inquire whether she knew what it meant when one makes an oath. Instead, the trial court merely asked PW1 whether she went to church and what happens to children who tell lies; and based on that, it concluded that she should give unsworn evidence. He submitted that the court did not state by what means it was satisfied that she was intelligent enough or that she knew what an oath was or even whether she understood the importance of speaking the truth. Therefore, he felt prejudiced.
23. Fourth, the appellant contended that failure to call PW1's mother and the doctor who first examined PW1 as witnesses for him to cross examine them prejudiced him and should warrant his acquittal as both were essential witnesses.
24. Lastly, the appellant submitted that the life sentence meted upon him was manifestly harsh and excessive considering the circumstances that prevailed during the commission of the offence and the applicable law on sentencing.
25. Opposing the appeal, Mr. Okango reminded the court of its duty as the second appellate court, which is limited to a consideration of matters of law only, by dint of section 361(1) of the Criminal Procedure Code, as was held in the case of *Njoroge vs. Republic* [1982] KLR 388.
26. Counsel rejected the appellant's allegation that no medical evidence linked him to the offence. He argued that this ground was raised before the first appellate court which determined that section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples for tests including for DNA, to establish linkage between the accused person and the offence, but the provision is not couched in mandatory terms. In other words, the trial court has discretion to order for a DNA test on an accused person but it is not mandatory.
27. Further, counsel argued that it was worth noting that it is now trite jurisprudence that defilement is proved by oral evidence of witnesses and not medical evidence. However, if medical evidence is available, it would be an added advantage to the prosecution case, as it is the best evidence. He cited *Boaz Nyanoti Samwel vs. Republic* [2022] eKLR, in support of this position. In this regard, counsel reiterated that PW3 examined PW1 and concluded that she had been defiled and infected with a sexually transmitted infection; and a P3 form was produced which proved the same. Counsel also added



- that penetration was equally proved by the evidence of PW1 which was corroborated by that of PW2, who noticed how she was walking.
28. On the age of PW1, counsel submitted that this was proved as the first appellate court determined that the complainant's apparent age was proved by the P3 form and the baptismal card, as confirmed by her father, PW2, who said that she was born on 16<sup>th</sup> December, 2007.
  29. On the issue of voir dire, counsel submitted that this was the first time the appellant was raising this ground; hence it was not properly before this Court. Be that as it may, he argued that the record shows that an elaborate voir dire was conducted and there is no strict format on how it ought to be conducted. In this regard, he relied on the case of *Maripett Loonkomok vs. Republic* [2016] eKLR, wherein it was held that it is firmly settled that not in all cases that voir dire is not administered or is not administered properly, the entire trial would be vitiated. The questions depend on the peculiar circumstances and the particular facts of each case, as was held in the case of *James Mwangi Muriithi vs. Republic, Criminal Appeal No. 10 of 2014*. The court in *Maripett Loonkomok vs. Republic* (supra) further held that section 19 of the Oaths and Statutory Declarations is concerned with the reception and admissibility of evidence of a child of tender years. Also, the evidence which is taken down in writing amounts to a deposition under section 233 of the Criminal Procedure Code. However, the Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth.
  30. Consequently, counsel submitted that the voir dire conducted in the present case was sufficient and urged this Court to dismiss this ground of appeal.
  31. On the issue of failure to call crucial witnesses, counsel argued that failure to call the mother of PW1 as a witness did not prejudice the appellant as the appellant has not shown how her testimony would have absolved him.
  32. Lastly on sentence, counsel submitted that he was cognizant of recent cases which have declared mandatory minimum sentences in the *Sexual Offences Act* unconstitutional; and also recent cases which have held that an indeterminate life sentence is inhumane treatment and violates a person's right to dignity as provided for under Article 28 of the *Constitution*. In this regard, counsel cited *Julius Kitsao Manyeso vs. Republic, Malindi Criminal Appeal No. 12 of 2021* (Judgement 7/7/2023) (unreported).
  33. Consequently, counsel conceded that the life sentence be set aside and a term sentence of twenty-five (25) years be imposed since the nature of the offence was serious as the survivor was aged 8 years old and was infected with a sexually transmitted infection, as a result of the ordeal.
  34. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361 of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, this Court described its mandate as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R*, [1984] KLR 611.”
  35. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. The appeal turns on only one crucial procedural aspect of the



evidence recording during the trial phase. However, the case does not turn on the exact conduct of the voir dire – which the appellant ponderously argues was deficient. The law is that where a child under the age of fourteen is called as a witness, the trial court must first conduct a voir dire examination before allowing the child to give evidence. The purpose of the voir dire is to:

- a. establish if the child understands the nature of an oath, in which case the child gives sworn evidence; or
  - b. ascertain whether, if the child does not understand the nature of an oath, the child possesses sufficient intelligence and understands the duty to tell the truth. If in the affirmative, the evidence may be received though not given on oath.
36. This is by dint of section 19(1), Oaths & Statutory Declarations Act. See, also, Maripett Loonkomok (Supra) interpreting the section. Contrary to the appellant’s arguments, Maripett Loonkomok Case makes it clear that there is no required format for conducting and recording a voir dire. The only test is whether the trial court performed voir dire in a manner that satisfies an objective observer that the court obtained sufficient material to make a determination whether the minor witness understood the nature of an oath or had sufficient intelligence and understood the duty to tell the truth. We are satisfied, from our reading of the record, that the trial court acted correctly in conducting the voir dire.
37. In the present case, however, another aspect of the evidence of PW1 received by the trial court, unfortunately, is procedurally fatal to the conviction: The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (See Article 50(2)(k) of the Constitution of Kenya). Yet, in the present case, PW1 was not subjected to cross-examination.
38. The appellant did not directly raise this issue before the High Court on first appeal although he more generally complained about the conduct of voir dire. Neither did he frame the issue in these specific terms before us. We do not note, however, that the appellant is acting in person and cannot be expected to frame issues with the elegance and technocratic specificity of a trained lawyer. We also constrained to take up the issue because it is a glaring legal issue dripping with categorial implications on the appellant’s fundamental rights – the right to cross-examine his accusers – which this Court cannot ignore or wish away.
39. In *H.O.W. v Republic* [2014] eKLR, this Court has had the following to say about this:
- This provision [section 208 of the Criminal Procedure Code] is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross- examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought as we have stated that as J.S. gave unsworn evidence she would not be subjected to cross-examination. With respect, he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.”
40. The Court was similarly categorical in an earlier case: *Nicholas Mutula Wambua v Republic*, Criminal Appeal No. 373 of 2006 heard at Mombasa, where it cited with approval the decision of the Supreme Court of Uganda in *Sula v Uganda* [2001] 2 EA 556 thus: -

The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that



a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross- examined.”

41. In the present case, the record is quite clear that after the trial court had conducted voir dire, PW1 gave unsworn evidence at the conclusion of which the appellant was not afforded an opportunity to cross-examine her. It follows that her entire evidence cannot be relied on to sustain the appellant’s conviction since this was prejudicial to the appellant and in violation of his rights under the *Constitution*.
42. The only question that arises is whether there is any other evidence which would sufficiently tie the appellant to the offence. In this case, contrary to the appellant’s protestations, the medical evidence of penetration is quite strong; as is the evidence of the survivor’s age as gleaned from the baptismal card; the P3 Form and the father’s testimony. However, the case breaks at the point of identification of the appellant as the perpetrator of the penetration. The only evidence available to identify the appellant as the perpetrator is the oral evidence of the survivor (PW1). The testimonies of PW3 and PW4 about first reports made by the survivor could, at best, serve the role of corroborating the evidence of the survivor. In the present case, however, the evidence of the survivor (PW1) cannot be relied on to establish the identity of the appellant as the perpetrator of the sexual assault since the evidence was received without affording the appellant an opportunity to cross-examine her.
43. The upshot is that the conviction here was not safe. The third critical ingredient of the offence of defilement – proof of the identity of the appellant as the perpetrator – was not established beyond reasonable doubt. For this reason, we find it unnecessary to delve into the other remaining issues for determination.
44. The question that now begs is whether this Court should order for a retrial. The principles applicable to determine whether to order a retrial in a criminal case were long established in the celebrated decision, *Fatehali Manji vs Republic* [1966] EA 343 where the Court of Appeal dealing with the issue, gave the following guideline:

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

45. Similarly, in *Pius Olima & another v Republic* [1993] eKLR, this Court of Appeal stated as follows on the issue:

Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- *Ahmed Sumar v Republic*, (1964) EA 481; *Manji v The Republic*, (1966) EA 343; *Mujimba v Uganda*, (1969); and *Merali and Others v Republic*, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused



to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

46. In the present case, while the trial was defective because the cross-examination of PW1 was not permitted, the result was that it led to insufficiency of evidence linking the appellant to the offence charged. Allowing a retrial would have the effect of allowing the prosecution to seal this giant loophole in the case. Further, we note that the appellant has been in custody for about nine years and is likely to be prejudiced as a result. In the premise, we find that an order for a retrial is not appropriate in the circumstances.

47. It is, therefore, without relish, that we must allow this appeal. We, therefore, quash the conviction of the appellant and set aside the sentence imposed by the court on 11<sup>th</sup> November, 2016, and upheld by the High Court on 12<sup>th</sup> June, 2018 and substitute it with an order acquitting the appellant. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

48. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL\*\***

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

**DEPUTY REGISTRAR**

