Emuro v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 312 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E005 OF 2024

WM MUSYOKA, J

JANUARY 24, 2025

BETWEEN

PASCAL EMURO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from conviction and sentence by Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E027 of 2022, of 28th February 2024)

JUDGMENT

1. The appellant, Pascal Emuro , had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 22nd March 2022, at [Particulars Withheld], within Busia County, he unlawfully caused his penis to penetrate the vagina of MA, a child aged 11 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.

2. PW1, MA, was the minor complainant. She testified that at the material time, the appellant went to a classroom, where she was, covered her mouth, laid her down, removed her underwear, and inserted his penis into her vagina. She did not immediately inform anyone of the ordeal, until 5 days later, after she started feeling pains in her lower abdomen. She disclosed to her teacher, about what happened, and she was taken to hospital. A report was subsequently made to the police. She identified the appellant as a watchman at their school. PW2 and PW3, JO and JA, were the parents of PW1, to whom she disclosed that the appellant had sexually assaulted her.

3. PW4, Daniel Opiyo, was the clinical officer who examined and treated PW1. He noted that PW1 did not have a sexually transmitted disease, STI. Her genitalia had blood and there were bruises. The

vaginal entry had reddened and had bruises, and her hymen was perforated. PW5, No. 101061, Police Constable Caroline Wango, was the arresting and investigating officer.

4. The appellant was put on his defence, vide a ruling that was delivered on 21st August 2023. He made a sworn statement, on 22nd November 2023, and called 1 witness. He denied the charges but conceded that he worked as a watchman at the school where the incident allegedly happened. DW2, AA, was the wife of the appellant, who testified on how the appellant was arrested.

5. In its judgment, delivered on 5th February 2024, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to 40 years imprisonment, on 28th February 2024.

6. The appellant was aggrieved, and brought the instant appeal, revolving around the medical evidence not linking him to the offence; the investigations being shoddy and bogus; and the prosecution failing to call crucial witnesses.

7. Directions were given on 9th October 2024, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions.

8. In his written submissions, the appellant has introduced new grounds of appeal, around the trial being irregular and unconstitutional; the appellant not being informed of his constitutional rights on legal representation; a translator not being availed; the sentence being excessive; evidence being irrelevant, hearsay and uncorroborated; medical evidence not supporting the charge; crucial witnesses not being called; among others. The submissions turn on whether the proceedings were regular and constitutional; whether the voire dire examination was conducted; proof of the age of the complainant; whether the medical evidence supported the charge; whether the evidence was relevant, inconsistent and uncorroborated; whether the scene of crime was misinterpreted; whether the appellant was sufficiently identified; and whether the sentence was harsh. The appellant has cited Kenga Hisa vs. Republic [2020] eKLR (Nyakundi, J), Wilson Kipchirchir Koskei vs. Republic [2019] eKLR[2019] KEHC 10851 (KLR)(Mativo, J), Pett vs. Greyhound Racing Association [1968] 2 All ER 545 (Master of the Rolls, Lord Justice Davies & Lord Justice Russel), Kibagendi Arap Kolil vs. R [1959] EA 92 (Forbes VP, Gould & Windham, JJA), Fransisio Matovu vs. R [1961] EA (Sir Kenneth O'Connor P, Gould Ag VP & Newbold, JA), Muiruri vs. Republic [1983] KLR 445 [1983] eKLR (Abdullah, J), Muraguri vs. DPP [2024] KEHC 4034 (KLR)(Mohochi, J), Kaingu Elias Kasomo vs. Republic Criminal Appeal No.504 of 2010 (unreported) and Republic vs. Buruk [2023] KEHC 25729 (KLR) (Musyoka, J).

9. I will first consider the issues raised in the petition of appeal. The appellant avers that the medical evidence, which was collected from the complainant, did not link him to the offence. It is true that no deoxyribonucleic acid (DNA) material was collected from the complainant and tested, alongside material collected from the appellant, to connect him to the offence. However, it is trite that a sexual offence need not be based only on DNA evidence. It can be founded on other evidence, including, exclusively, the testimony of the complainant. The complainant knew the appellant prior to the incident, and identified him as the perpetrator, describing in detail what transpired. There was forensic evidence which demonstrated that defilement happened at about the same time as that the complainant alleged.

10. On the investigations, that preceded his prosecution, being shoddy and bogus, it is not immediately clear to me what the basis of this ground is. A court is not concerned with the investigations into a matter, but the material or evidence that is placed before it. Whether the investigations were done shoddily or comprehensively would usually be of little relevance, for the role of the court is not to audit the conduct of the investigations, but to evaluate the evidence presented before it. A shoddy

investigation may still provide adequate material upon which a conviction may be founded. Looking at the record, I am persuaded that the material placed on record, at the trial, covered all the aspects of a defilement case, the age of the complainant, penetration and whether that penetration was by the appellant. All those elements of the offence were addressed in the matter that was prosecuted at the trial court. Whether the investigations, conducted in the matter, were shoddy or otherwise, was not a matter to be determined by the trial court.

11. On whether all the witnesses were called, I note that the key witnesses were all members of the same family, the complainant and her 2 parents, and only 2 were technical witnesses. That of itself, however, did not rob the prosecution of credibility. The 3 related witnesses were all privy to the happenings in question. What mattered was not the blood relationship between the witnesses, but the credibility of the evidence that they presented. It is trite that the prosecution is not required to present any number of witnesses to prove its case, and that what matters would be the quality or sufficiency of the evidence adduced, and not the number of witnesses.

12. I will now advert to the matters raised in his written submissions. The first relates to compliance with constitutional dictates. 2 are raised, 1 concerns the language used at trial, and the other about legal representation. Both touch on fair trial principles. It is trite that justice must not only be done, it must also be seen to be done. It would be done when looked at from the perspective of the content and substance of the process, in terms of the weight of the case, based on the evidence marshalled and presented before the court. There ought to be evidence that establishes, beyond reasonable doubt, that the accused person committed the offence. The second level is also important, the process through which the accused person is taken. Whereas the evidence marshalled against the accused may be strong enough to establish his guilt, the process of his trial must also be fair, in terms of affording all the safeguards for a fair trial. Where the trial process is not fair, justice would not be seen to be done, even where the evidence presented is sufficient to support a conviction. An unfair trial cannot support a conviction, regardless of the weight of the evidence presented. Where unfairness is established, the trial, leading up to conviction, would be vitiated and rendered invalid.

13. Whether or not the trial was affair or observed the fair trial principles is dependent on the record kept or maintained by the trial court. The fair trial principles are stated in *the Constitution* of Kenya, at Article 50, and cover what happens at the time the accused is presented in court, during the trial and immediately thereafter. It includes being informed of the charges sufficiently to assist him decide on how to plead; the plea-taking exercise and the trial itself being conducted in a language that the accused understands, so that he is able to fully participate in the proceedings, so as to challenge the evidence adduced against him; being informed of his right to an Advocate of his own choice, and if he cannot afford one, one being availed by the State, depending on the gravity of the charges; being furnished, in advance, with the evidence to be adduced at the trial, to enable the accused prepare adequately ahead of the trial, for his defence; among others. Whether there has been adherence to these principles should be apparent from the trial court record. Where the record is silent on any of these fair trial items, the presumption would arise that there was no compliance, even if the trial court had tried to comply. There only way to detect compliance is by looking at the trial record. The only way the trial court can demonstrate that it complied is by recording the compliance. I have repeatedly held, in other cases, that the promulgation of the new Constitution of Kenya, in 2010, reconfigured how pleas are to be taken henceforth, as it requires a strict compliance with fair trial principles, as enumerated in Article 50 of *the Constitution*.

14. Let me start with language. The official languages of the court are English and Kiswahili, and trials in Kenya are routinely in these languages, either exclusively in 1 of them, or a mixture of both. Although these 2 are said to be the official languages in Kenya, and of the court in particular, fluency in both is not

common. Not every Kenyan, or Kenyan resident, is able to speak in English, or Kiswahili, or both. Both are not indigenous. English is an import from England. It came with colonisation and Christianisation of Kenya. Kiswahili has its origins in Arabic, and it is traceable to the coming of the Arabs to the east coast of Africa centuries ago. So, much as these 2 languages are said to be the official languages, it should be appreciated that they are not necessarily spoken by all individuals within the Kenyan borders, and a court trying any person in Kenya should be sensitive to that, and seek to establish the language with which the person presented before it is familiar with, and should he be unfamiliar with the 2, then establish which other language he is familiar with, and make an effort to get a person, familiar with it, to translate or interpret the language of the court to the accused.

15. Language is critical, for communication is at the heart of any trial. The trial is of the accused person, to establish his guilt or innocence. The medium of trial is through presentation of witnesses in court, who then testify orally, by narrating the events around the alleged offence. That is through communication. As it is the accused being tried, the language used at the trial ought to be one that he is familiar with, so that he can understand what would be happening in court. Understanding is at 3 levels. Firstly, so that he understands the charges themselves. He should understand what it is that he is exactly accused of having done, which was wrong. Secondly, it is about being able to follow what the witnesses presented by the prosecution are telling the court. Thirdly, it is about him, upon understanding the case against him and the evidence tendered in support of the charges, being able to ask relevant questions, to the witnesses, by way of challenging the charges and the evidence. He can only be effective in that respect if there would be effective communication, between him, the court and the prosecution. In the absence of that the trial would be a charade. As the trial is mounted for the purpose of the accused person, it must be relevant to him. It must not be done for the sake of it, or for the purpose of just to go through the motions. It must be made relevant to the accused person. The trial court must be sure that it is communicating with the accused person. The language, with which the accused person most comfortably communicates, is critical.

16. The issue of interpretation or translation was not introduced by *the Constitution*, 2010. It preceded it. The courts had pronounced themselves on it, particularly at plea-taking, in such cases as Wanjema vs. Republic [1971] EA 493 (Trevelyan, J), Adan vs. Republic [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA) and Ombena vs. Republic [1981] eKLR [1981] KLR 450 (Law, Miller & Potter, JJA), where it was stated that translation or interpretation, to inform the accused of the charges against him, especially at plea-taking, is so fundamental that a breach of it should invite declaration of a mistrial. A mishandling of a trial, by way of not establishing the language that the accused person being tried is familiar with, would be fatal to the trial. It would be fatal to the trial, not the prosecution, and, for that reason it should lead to a declaration of a mistrial, but not an acquittal, for it would be a mistake of the court, and not of the prosecution.

17. So, what happened here? The charge was read to the appellant on 5th April 2022, in Kiswahili. The trial court recorded that that was the language that the appellant understood. However, there is no minute in that record, indicating that the trial court ever enquired from the appellant about the language that he understood, and there is nothing stating that the appellant said that he understood the Kiswahili language, with such sufficiency as to be subjected to a trial exclusively in Kiswahili language. The only way to gauge whether an accused person is comfortable with the language adopted by the trial court for the purposes of the trial, would be by the trial court recording that it made enquiries about the language that that the accused would be comfortable with, as between the official languages, English and Kiswahili, and once it transpires that he is uncomfortable with both, try to establish the language that he is familiar with, outside of the 2, and to try to find a translator or interpreter for that other language.

18. The appellant now says, on appeal, that he was not familiar with the official languages. Why did he not raise it at trial? Is it not too late to raise it on appeal? I do not think that it would be too late. The court environment is strange for anyone who has had no prior experience with the courts. It would not be just to expect a person who is dragged to court for the first time, to fully appreciate what happens there, so much as to be in a position to fully participate in that exercise, especially where the language in use is not his everyday language. In any case, the trial court is obliged to establish that the accused person understands the charges, and there is a duty to provide a translator where he does not. It would not be too late to argue, on appeal, that one was subjected to a trial where he was handicapped, as he could not understand the language used at the trial.

19. Is it possible that the appellant was prejudiced by the use of a language that he was unfamiliar with? Is it possible that he was unfamiliar with Kiswahili? The appellant was first produced in court on 4th April 2022, when he informed the court: "I only know Teso." The court then deferred plea-taking to another date, 5th April 2022, and directed that a Teso translator be availed. On 5th April 2022, the appellant was presented before another magistrate, who, curiously, did not advert to what had transpired on 4th April 2022, and proceeded to have the appellant plead to the charges in Kiswahili, without first enquiring into the question of whether he was familiar with it, given that the other magistrate had on 4th April 2022 directed that a Teso translator be availed. There is no other record, between 4th April 2022 and 5th April 2022, where the appellant is recorded as stating that he was abandoning the quest for a Teso translator, and that he was comfortable with the trial going forward in Kiswahili. The court that took the plea ignored the order by the other court, of 4th April 2022, for a Teso translator to be availed, and the trial thereafter proceeded in ignorance of that order, to the possible detriment of the appellant. I say "ignored," as the said court did not address itself to that order, in terms of getting compliance to it, or revising it, upon the appellant indicating that trial could proceed in Kiswahili. There was something untidy about the way the court that handled the matter on 5th April 2022 proceeding as if the court sitting on the matter on 4th April 2022 had not made any order on a Teso translator.

20. For avoidance of doubt, it is recorded as follows, based on the handwritten notes of the trial court, and not the typescript provided:

> " Date: 4/4/22
>
> Magistrate: Hon. Mrs. Lucy Ambasi – CM
>
> Prosecutor/State Counsel: Namasake
>
> Court Clerk: Diana
>
> Accused: I only know Teso.
>
> Ct. Pleas before the duty - Court on 5/4/2022 and C/A to arrange for Teso translator.
>
> Signed.
>
> 4/4/2022
>
> 5/4/22
>
> Before: Hon. PY Kulecho – SRM
>
> S/C: Chepkonga
>
> C/A Akinyi
>
> Accd: present

The charges and particulars read out to the accused in Swahili language which the accused understands.

Main charge - si kweli

Alternative charge - si kweli

Court

Main charge is not guilty plea entered.

Alternative charge is not guilty plea charge entered.

Mn on 20/4/2022 for w/s and for fixing hg date.

Accused may be released on bond of Kshs. 50,000.00 with a similar surety.

R/C

Signed.

5/4/2022"

21. Was the appellant prejudiced, by the trial court proceeding in Kiswahili, without a Teso translator as he might have desired? It may be hard to tell. However, an indication could be gotten from the length of the answers given at cross-examination, compared with what was rendered at examination-in-chief. The brevity of the answers would suggest that not many questions were asked, pointing to some handicap. I have perused the record and noted that the cross-examination of the prosecution witnesses was fairly brief, which would suggest that the appellant was probably constrained by language, from engaging in a far-reaching confrontation of his accusers on the evidence they were tendering. If the proceedings had been conducted in Teso, perhaps, he would have been more comfortable in asking more questions on all the aspects of the testimonies given by the prosecution witnesses.

22. The material on record depicts the appellant as an elderly person. In mitigation he said that he was 60, while the probation report places his age at 70. He was employed as a watchman at the school attended by the complainant, and where the offence was allegedly committed. Those are factors that the trial court should have used to probe, from the appellant, into whether he was familiar with the language of the court, and also about his level of education, to assess whether or not there was justification for him to insist on a trial in Teso. He should have been given the benefit of the doubt, and a translator provided, to ensure that he and the trial court were at the same level of communication, for the purposes of the trial. That should have been particularly crucial, noting that he was charged under section 8(2) of the *Sexual Offences Act*, which prescribes a penalty of up to life in prison. His trial should have been to the highest possible standards, in terms of both the process and the substance of the evidence presented.

23. The other element of the fair trial principles relates to legal representation. *The Constitution* casts a duty on the court at 2 levels. The duty is to inform the accused person of his right to legal representation by an Advocate of his own choice, at 1 level; and at the other level, to inform him of his right to an Advocate provided by the State, should he be unable to afford an Advocate of his own. These are new rights under *the Constitution*, 2010. Prior to that the trial court was under no obligation to inform accused persons of these rights, for it was presumed that they knew about them. Now it is a constitutional obligation. Failure to comply, by the trial court, would render the trial unfair, for not keeping to the constitutional dictates. The provisions are not decorative. They must be complied with. Non-compliance should invite consequences. The principal consequence is to vitiate the trial, by rendering it a nullity, under Article 2(4) of *the Constitution*. Sadly, the trial courts continue to proceed in the pre-2010 mode, where there was no obligation to communicate those 2 twin rights to

the accused. In a sense, it would amount to ignoring the command by *the Constitution*, that trial courts inform accused persons of their rights in that regard. *The Constitution* of Kenya is the supreme law in the land, by dint of Article 2. It cannot be ignored.

24. I have, in other cases, discussed the importance of the right to legal representation, particularly in cases where the charges are serious, in terms of the penalties prescribed. See Ogombe vs. Republic [2023] KEHC 21011 (KLR) (Musyoka, J), Ojiambo vs. Republic [2023] KEHC 24201 (KLR) (Musyoka, J), Kinyua vs. Republic [2024] KEHC 9469 (KLR) (Musyoka, J), Ochume vs. Republic [2024] KEHC 9470 (KLR) (Musyoka, J) and Tom vs. Republic [2024] KEHC 14939 (KLR) (Musyoka, J), among others. For today, I will contend myself with stating that this principle has its roots in international law and is of universal application.

25. In Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) vs. Burundi - 231/99 (2000), that right was explained in the following terms:

> "Legal assistance is a fundamental element of the right to a fair trial, more so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words be able to argue their cases on equal footing."

26. In Pett vs. Greyhound Racing Association [1968] 2 All ER (Master of the Rolls, Lord Justice Davies & Lord Justice Russel), it was said:

> "It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "you can ask any questions you like;" whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"

27. In the instant case, the offence was allegedly committed on 22nd March 2022. The appellant was arraigned in court on 4th April 2022. These events happened some 12 or so years after *the Constitution* of Kenya was promulgated in 2010. The trial court was obligated to bend to the demands and commands of *the Constitution*, particularly regarding Article 50(2)(g)(h). The *Legal Aid Act*, Cap 16A, Laws of Kenya, became operational on 30th May 2016, to give effect to Article 50(2)(g)(h) of *the Constitution*. Section 43 of the *Legal Aid Act* requires the court to inform the accused person of his right to an Advocate provided by the State at State expense, after assessing the circumstances of the accused person. These are duties imposed on the trial court, by *the Constitution* and the relevant statute.

28. Did the trial court obey those commands? From the record before me, I have been unable to find compliance. That issue was not adverted to, on 4th April 2022, when the appellant was first produced in court, neither was it on 5th April 2022, when plea was taken. It was not dealt with thereafter by the trial court. For all practical purposes, the trial court chose to turn a blind eye to Article 50(2)(g)(h) of *the Constitution* of Kenya and section 43 of the *Legal Aid Act*. As stated above, *the Constitution* of Kenya, 2010, is the supreme law in Kenya, by dint of its Article 2. Whatever it commands must be adhered to,

and any non-adherence has consequences. A trial mounted in violation of *the Constitution* is a nullity, by virtue of Article 2(4) of *the Constitution*.

29. The other ground is on the sentence being excessive. The appellant was charged under section 8(2) of the *Sexual Offences Act*, which prescribes the sentence for defilement, where the victim is aged 11 years and below. The offender, upon conviction, would be liable to imprisonment for life. It is not a mandatory sentence. It is discretionary. The court may impose sentences ranging from 1 day and life in prison. So, the trial court was within discretion to award a sentence of 40 years. Was it excessive? I do not think so. Under section 8 of the *Sexual Offences Act*, the sentences are graduated, depending on the age of the victim. Subsection (2) is with respect to child victims of tender years. Subsection (3) covers the child above 11, that is aged 12 and 15. The minimum prescribed punishment is 20 years imprisonment. Subsection (4) prescribes punishment where the victims are aged between 16 and 18, and it is a minimum of 15 years. Given these minimums, provided under section 8, the trial court properly exercised discretion.

30. The minor victim, in the instant case, was aged just 11 years or thereabouts. A sexual assault on her would leave her with lifelong physical and psychological scars. A stiff penalty would be called for, to make the perpetrator atone for his wrongs, and to keep him away from small children for a long time. The appellant was an elderly person, who should have known better. Moreover, as a watchman at the school, he was placed in the role of a guardian and protector of the children. By turning predator against them, he breached the trust imposed upon him, by his employer, the children and the community at large. The fact that he was an elderly man should, in my view, not attract sympathy or leniency, instead it should invite a harsher penalty, and I wholly agree with the trial court on the sentence that it imposed.

31. On the trial court relying on the evidence tendered by the minor without conducting a voire dire examination, I have perused the original trial court record, the handwritten one, and I am satisfied that a voire dire examination was conducted. That was done on 19th September 2022. There is a voire dire examination proforma, of that date, duly signed by the trial court, complete with a ruling, to the effect that the court was of the opinion that the minor understood the nature of an oath, and was possessed of sufficient intelligence, to justify reception of her sworn evidence. Nothing, therefore, should turn on this ground. I have compared the typescript of the proceedings, and noted that the person, who made the transcript of the handwritten proceedings, omitted to incorporate the substance of the voire dire examination proforma into the typescript of the proceedings, and thereby distorted the proceedings, by creating an impression that the trial court had not conducted a voire dire examination of PW1, before receiving her evidence.

32. On the age of PW1, the complainant, the charge indicates that she was 11 years at the material time of the commission of the offence. Her mother, PW3, said that she was 11 years old, having been born on 6th December 2011. A certificate of birth, serial number 8871307, dated 15th March 2018, was produced as an exhibit, marked MFI-3/P. Exh-3, in support. The offence was allegedly committed on 22nd March 2022. That meant that, as at 6th December 2021, PW1 was 10 years old, and as at 22nd March 2022, she was aged 10 years, 3 months and 16 days. She was, therefore, under 11 years old, bringing the case within section 8(2) of the *Sexual Offences Act*. The certificate of birth on record was not impeached by the appellant, and there would be no basis to find and hold that the age of PW1 was not established beyond reasonable doubt.

33. On the medical evidence not supporting the charge, the appellant targets the Police Form 3, popularly known as the P3 form, and the Post Rape Care (PRC) form, both of which were put in evidence. On the P3 form, he points at reference numbers, and the fact that the weapon used age of injuries treatment received and degree of injury are not disclosed, to argue that the said form was defective and could

not be basis for a conviction. I have perused the P3 form, and I do not find anything untoward about it. Reference numbers are administrative. The P3 form is generated and issued by the police, and the police reference number indicated is 35, of 31st March 2022. The medical part is filled by the doctor or medical officer, and his reference is indicated as 26th February 2022. The 2 reference numbers are different. The form has no column for a reference number for the victim, as none was required, for the victim did not have to handle the form administratively at any stage, for the document is prepared and issued by the police, to be filled by the doctor, for use by the police in court proceedings.

34. On Section B of the P3 form not being filled, I have perused that section. I am not persuaded that the failure or omission to fill that section should render the form defective. Section B relates to injuries to the neck, head, thorax, abdomen, upper limbs and lower limbs. It is in respect of those injuries that the approximate age of the injury, probable weapon used to inflict it and the treatment given with respect to it, ought to be indicated, with classification as to the degree of the injury. The complaint by PW1 had nothing to do with the injuries in Section B of the P3 form. Her case fell under Section C, which is on alleged sexual offences, and it is that section that the medical officer filled. I find nothing in the document which makes it invalid, and bereft of evidential or probative value.

35. Regarding the PRC form, I would reiterate what I have stated above. The PRC is not a police record. It is a document prepared by the medical institution. It is not meant for use in court, unlike the P3 form. It is only meant to guide in the filling of the P3 form. It is drawn from the medical treatment notes. Once the P3 form is produced in court, there would be no need for the PRC to be produced.

36. On the substance of the contents of the 2 documents, as to lacking explanations as to why the hymen was perforated, or why there was blood in the vaginal walls, or the reddening of the walls, I will state that medical evidence is opinion evidence. It presents what medical personnel observed when they examined the person. Medical personnel would not be present when the alleged event occurred and would have no answers to questions as to what exactly happened, or what exactly caused a certain occurrence. They can only render opinions based on what they observed. Since their reports are based on opinions, they do not bind the court. They are to be considered alongside other evidence, such as that which was provided by PW1, PW2 and PW3. The questions, that the appellant raises, in his written submissions, on the substance of the P3 form, the PRC and the oral testimony by PW4, should have been posed to PW4 when he was presented in court. They are questions that cannot be answered on appeal.

37. In any event, even if the medical evidence were to be found wanting, the trial court could still convict, based on the testimony of the complainant, PW1. The law has been settled, to the effect that, despite section 36 of the *Sexual Offences Act*, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim, and that of corroborative witnesses, or circumstantial evidence, is usually enough to establish sexual offences, such as rape and defilement. That position was stated by the Court of Appeal in Fappyton Mutuku Ngui vs. Republic [2014] eKLR (Kihara Kariuki (PCA), Maraga & Mohammed, JJA), where it was said that medical evidence was usually not necessary. A similar position was taken in AML vs. Republic [2012] eKLR KEHC 2554 (KLR)(JV Juma, J), Kassim Ali vs. Republic [2006] eKLR KECA 156 (KLR) (Omolo, Bosire & Githinji, JJA), Lumbasi vs. Republic [2016] KEHC 2942 (KLR)(Mwita, J), Robert Mutungi Muumbi vs. Republic (2015) eKLR KECA 584 (KLR)(Makhandia, Ouko & M'Inoti, JJA), Williamson Sowa Mbwanga vs. Republic (2016) eKLR KECA 147 (KLR) (Makhandia, Ouko & M'Inoti, JJA), among others. Section 124 of the *Evidence Act*, states the need for evidence of children to be corroborated before it is relied upon, but it also goes on to provide that, with regard to sexual offences, that the trial court may rely or depend on the uncorroborated evidence of the alleged victim of the crime, so long as it is satisfied that the alleged victim of the offence was telling the truth.

38. On contradictions and inconsistencies, I have gone through the record, and noted the inconsistencies pointed out by the appellant. However, the principle is that not every inconsistency or contradiction should vitiate a prosecution. The Criminal Procedure Code has not dealt directly with the question of inconsistencies and contradictions, but the courts have interpreted section 382 thereof, to say that whether inconsistencies or contradictions are to affect the decision will depend on whether they are so fundamental as to cause prejudice to the appellant, or they are so inconsequential as to have no effect to the conviction and sentence. See Joseph Maina Mwangi vs. Republic [2000] eKLR (Tunoi, Lakha & Bosire, JJA), Twehangane Alfred vs. Uganda [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007(unreported), John Cancio De SA vs. VN Amin [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ) and Philip Nzaka Watu vs. Republic [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA). It has not been demonstrated that the said inconsistencies or contradictions are so grave as to go to the heart of the matter.

39. There is a submission that the trial court misconstrued the scene to be within the school, as opposed to the classroom referred to by PW1, PW2 and PW5. I believe that this is a storm in a teacup. A classroom would be part of a school, and something happening within a classroom would have happened within the school. In any event, even if the trial court were not making such a misconstruction, the same would fall within the inconsistencies and contradictions that I have discussed above. Whether the misconstruction would be of importance, would depend on whether it goes to the core of the matter. The appellant has not sought to demonstrate that that would be so. He has merely highlighted it, without seeking to show how the same should have an impact on the overall outcome.

40. There is also the issue as to whether the appellant was sufficiently identified. In his submissions, the appellant targets the evidence of PW5, when she went to the school to arrest the suspect and found 2 individuals and a minor. The issue of identification should be by the complainant. The complainant was PW1, and not PW5. The appellant does not complain that PW1 was mistaken about the perpetrator. PW1, in her testimony, was not mixed up, at all, about who the perpetrator was. She referred to him, throughout her testimony, by his first name, Pascal, and identified him as a watchman or soldier at their school. She did not make any mention of a second person in the testimony. PW5 went out to arrest the person that PW1 had identified as the perpetrator. So, the issue of the appellant being inadequately identified should not arise.

41. The appellant submits, lastly, on whether the conviction should be quashed, and the sentence set aside. On the substance of the charge, I will not say much, for my final determination should turn on the preliminary issue as to whether fair trial and constitutional principles were complied with. I have already found that *the Constitution* was not complied with, with respect to fair trial principles, around the appellant being provided with a translator or interpreter, to enable him navigate the trial process with ease, and also about being informed of his twin rights to an Advocate of his own choice, and where he could not afford one, an Advocate being provided paid for by the State. I have concluded that whatever *the Constitution* commands must be done, and where it is not done, then the whole exercise would be a nullity, by dint of Article 2(4). As the Constitutional commands were not followed or complied with by the trial court, the entire exercise, purported to be the trial of the appellant, became a nullity, and I hereby declare it to be so.

42. So, what should I do, after my finding that the trial was a nullity? Should I quash the conviction, set aside the sentence imposed on the appellant, and set him free? Or should I order a mistrial? The logical thing should be to quash the conviction and set aside the sentence, as both are founded on a nullity. However, the mistake that led to that was by the trial court, and not the prosecution. The verdict above is not on the prosecution, but on the trial. There was no wrongdoing on the part of the prosecution.

Of course, this turn of events would be painful to the prosecution, for it did its duty, but we have a Constitution to obey, uphold and protect.

43. I shall, accordingly, declare a mistrial, and order a retrial. The appellant shall be released from prison custody, forthwith, and handed over to the police, so that he can be presented before the magistrate's court, at the soonest time possible, for the purpose of a retrial. The trial was conducted at Busia, but there has been established a court at Malaba/Amagoro, with jurisdiction over the Teso North Sub-County, where the offence was allegedly committed. I shall direct, as I hereby do, that the retrial be done at the new court at Malaba/Amagoro. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 24 TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Otieno, instructed by Masiga Wainaina & Associates, Advocates for the appellant.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.