Kiio v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 14397 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 14397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E027 OF 2024

NIO ADAGI, J

JULY 23, 2025

BETWEEN

PETER KAVEVA KIIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Peter Kaveva Kiio was charged with 5(five) Counts.

Count 1

2. 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. The particulars are that on diverse dates between 1st day of July 2018 and 11th July 2018 at [Particulars withheld] Village at Matetani Location on Kangundo Sub-county within Machakos County, intentionally touched the buttocks of PMM (PW3) a child aged 9 years old with his genital organ (penis).

Count 2

3. The Appellant was charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on the diverse dates between the 1st day of July 2018 and the 11th day of July 2018 at [Particulars withheld] village at Matetani location in Kangundo Sub-County within Machakos County, intentionally touched the buttocks of NMK (PW1), a child aged 13 years old with his penis.

Count 3

4. The Appellant charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on the diverse dates between

the 1st day of July 2018 and the 11th day of July 2018 at [Particulars withheld] village at Matetani location in Kangundo Sub-County within Machakos County, intentionally touched the buttocks of BKP (PW2), a child aged 13 years old with his penis.

Count 4

5. The Appellant was charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on the diverse dates between the 1st day of July 2018 and the 11th day of July 2018 at [Particulars withheld] village at Matetani location in Kangundo Sub-County within Machakos County, intentionally touched the buttocks of BMA, a child aged 13 years old with his penis. (He did not testify).

Count 5

6. The Appellant was charged with the offense of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on the diverse dates between the 1st day of July 2018 and the 11th day of July 2018 at [Particulars withheld] village at Matetani location in Kangundo Sub-County within Machakos County, intentionally touched the buttocks of PKN (PW4), a child aged 8 years old with his penis.

7. The Appellant pleaded not guilty to the charges and the matter was set down for hearing. The prosecution called four witnesses in proving its case.

   At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave unsworn evidence and did not call a witness in aid of his defence.

8. At the conclusion of the trial, the Appellant was found guilty as charged in Counts 1, 2, 3, and 5, and accordingly he was convicted under Section 215 of the CPC.

9. The Appellant was however acquitted under Section 215 of the CPC of the charges in Count 4 as the prosecution did not avail the victim to testify.

10. The Appellant was sentenced to 10 years imprisonment for each Count on 8th March 2024. Sentences were to run concurrently as from 14/2/24.

Petition of Appeal

11. Being dissatisfied with the conviction and sentence, the Appellant appealed to this court through a Petition of Appeal dated 2nd April 2024 raising 8 grounds of appeal which are paraphrased as follows:

    i. the learned trial magistrate erred in law and in fact in convicting the appellant in four of the charges he faced in the absence of consistent and no contradictory corroborative evidence.

    ii. the learned magistrate erred in law and in fact in convicting the appellant in four of the charges he faced in the absence of evidence of a doctor and a police investigating officer

    iii. the learned trial magistrate erred in law and in fact in convicting the appellant in four of the charges he faced in the absence of evidence that the four complainants were indeed minors

    iv. the learned magistrate erred in law and in fact in convicting the appellant on the basis of materially contradicting prosecution evidence that was insufficient to meet the required standard of proof which is proof beyond reasonable doubt

v. the learned magistrate erred in law and in fact in her application of the law and its principles to the evidence adduced by the prosecution witnesses

vi. the learned trial magistrate erred in law and in fact in her interpretation and application of the case law she relied on in convicting the appellant

vii. the learned magistrate erred in law and in fact in according the appellant a very harsh and excessive sentence considering the total circumstance of the case and the mitigation offered by the appellant

viii. the learned trial magistrate erred in law and in fact in believing the prosecution evidence and disregarded the testimony of the appellant

12. Directions were given for the appeal to be canvassed through written submissions. The Appellant's submissions dated 27/07/2024 are filed by King'oo Wanjau & Co. Advocates while the Respondent's submissions dated 14/03/2025 are filed by Ms. Agatha Abang, learned prosecution counsel for the State.

Appellant's Submissions

13. In his written submissions, the Appellant submitted that the learned trial Magistrate erred in law and in fact in her application of the law to the evidence presented. That the question that begged an answer was if the evidence before her met the standard of proof required to establish the charges levelled against the Appellant.

14. The Appellant submitted that for the first charge or Count 1, the question was if there was evidence to show that the Appellant deliberately made his penis come into contact with complainant's anus? The Appellant quoted the evidence in chief of the complainant which was that:-

> " I told the police I watched pornography on the phone. I watched for a short while like one minute and as I watched, he was touching me on the back using his hands. His legs were also crossed over my legs. I was still dressed; I did not remove my clothes. I kept holding the phone the whole time, we were on the bed, a big bed that two people can sleep. I also many pairs of shoes in the bedroom, I saw sandals and some white shoes. He then released me and went in the sitting room and I told the others we should go home but we did not go home yet since Ngao went to the bedroom and then came out and Bosco entered the room."

15. It was submitted that this complainant testified as PW3. He is called PMM. There is nowhere he said the Appellant touched his buttocks with his penis yet for this Count 1 the Appellant was found guilty and sentenced to 10 years imprisonment. That this conviction was based on nothing and ought to be set aside.

16. For Count 2, the Appellant submitted that the complainant NMK who testified as PW1 had this to say on being cross examined by counsel for the Appellant:

> " I saw two rooms where we were seated and where we entered. Kaveva was lying on his back facing the roof and I lied on top of him facing him. I was watching his phone alone as we looked at the roof. He moved my trouser down as I would pull it up. My legs were trapped under his legs. We were lying across the bed and he released my legs and I managed to stand and left the bedroom. He did not follow me and he called another one to enter the room, Brian. Nothing else happened."

17. It was submitted that the above answer came after he was asked to state what happened in the bedroom. That the above and nothing else happened according to him. That in his evidence in chief he tried to say the Appellant touched his anus with his penis but note what he stated in cross-examination.

18. The Appellant submitted that such a contradiction is highly material and urged this court to find that this Count was not proven beyond reasonable doubt and acquit Appellant of the same.

19. For Count 3, the Appellant submitted that the complainant is BKP who testified as PW2 and told the court in his evidence in chief that the Appellant pulled his trousers down and touched his buttocks with his penis, he sated that:

> " he inserted his penis into my buttocks into anus, he did that once".

20. That in cross examination this complainant said this:

> " He did not remove my trousers fully, he inserted his penis into my anus for about two minutes, I felt pain, a lot of pain, I complained and told him I was feeling pain. He penetrated my anus, I shouted. After that I had difficulty walking, I could not stand straight because of pain I did not see any blood, it was my first time anyone had done that to me. I was standing with a slight bend and I felt pain while walking for 4 days".

21. The Appellant asserted that the above evidence discloses the following legal points that:

    i. This is not an offence of indecent act but a higher offence of defilement if the complainant is a child and rape if the complainant is an adult.

    ii. In an offence of defilement penetration needs to be supported by a medical report which lacks in this case.

    iii. The age of the complainant required proof which was not done. There was no medical report given to prove that this complainant was a child of thirteen years.

22. It was submitted that had the trial Magistrate applied the law correctly to this evidence she would have found that there was penetration being alleged and could not bring the offence of defilement down to that of an indecent act because she lacked medical evidence. She simply should have held that the evidence before her did not support the charge.

23. For Count 5, the Appellant submitted that this complainant was very clear that the Appellant touched him on his back with his hands. He was not indecently assaulted, yet the trial court found Appellant guilty of this count as charged.

24. This complainant is called PKN. He testified as PW4. That on page 39 in evidence in chief and stated that;

> "He put the TV on and I watched Machachari program. He called me to the bedroom and showed me the porn video on his phone and I saw people men and women who were naked and were doing bad manners. I was lying on top of him as I watched and he was looking at me, he did not touch me, it lasted for about one minute. I was alone not with friends; I did not tell anyone. The police requested our head teacher to send us to the station. The head teacher asked us if we went to James house and I told him that I had gone and I told them what happened. He told me his name was James, the ACC is James, he is not Peter. The ACC in court is the one who invited me to his house and showed me a porn video, it

cannot be someone else, I remember him well, I am not mistaken about him. I was taken to hospital and the doctor examined my anus."

25. That from the above there is no allegation anywhere that the Appellant subjected this complainant to any indecent act of touching his anus with his penis. Despite that the court still proceeded and convicted the Appellant of Count 5 of the charge sheet. This complainant was said to be 12 years old. This age too was not proven.

26. That this witness stated the Appellant did not touch him yet the trial court convicted him of Count 5. That there was no evidence the complainant was subjected to the indecent act stated in the particulars of charge. The witness was clear that the Appellant did not touch him.

27. The Appellant submitted that from the above it is clear that the court did not apply the law correctly to the evidence adduced. The evidence of indecent act may not need corroboration as much as that of defilement does. All the witnesses testified that they were examined by a doctor yet no such evidence was called. Reliance was placed on the case of Abdullahi Sahal Issack vs Republic, High Court Criminal Appeal case no. 27 of 2017 where the High Court held that in a case where a penetration occurs or it is alleged the charge cannot be that of indecent act but that one of defilement or rape and the court cannot attempt to find otherwise. In the words of Judge Abida Aaron at page 3/3, the court in arriving at the opinion that there was indecent act stated:

> " Although according to the clinical officer the accused person did not manage to penetrate the complainant; I have no doubt that he touched the complainant's anus with his penis in an attempt to penetrate him. Therefore, the offence of indecent act has been proved beyond reasonable doubt."

28. It was submitted that it is not automatic that on failing to prove the offence of defilement or rape then the next thing is to convict on indecent assault even in the absence of evidence that the accused unlawfully and intentionally caused contact with his body, the genital organ, breast or buttocks of another. That there was no evidence from the complainant that the Appellant touched his genitalia or his buttocks or even his body and since the trial court found no evidence of penetration it is not for the court to theorise in the absence of such evidence.

29. The Appellant added that the afore made submission does not however mean that there is concession that the offence of defilement was proven here in respect of one count. It just goes to show that the evidence of a doctor to prove penetration and also the age of the complainant was vital. That it was also not enough to say the complainants were in primary school and so they were children. There are adults in Kenya in primary schools that the court can take judicial notice of. The Appellant asserted that it was also defeating to understand why the investigating officer did not testify in the case to be cross examined on the investigation undertaken.

30. The Appellant submitted jointly on ground 1 and 4 of the Petition that there was no consistency in the evidence of the complainants for the court to find that each complainant's evidence corroborated the others. It was submitted that there was no consistency for example in the sequence followed as they entered the Appellant's bedroom. That there was no consistency in the description of the observations made of Appellant's homestead and more so the house they were in. There was no consistency in the evidence they gave about how the Appellant met them and led them to his home.

31. It was further submitted that the charges the Appellant faced are very serious and they required good evidence to avoid ending up with the wrong person in jail for a long period of time.

32. The Appellant posed questions; why were the P3 forms not produced yet all the witnesses said that they were examined by a doctor; Why were birth certificates not produced yet some complainants said they had them at home; Why wasn't there an assessment of age report produced yet it was very easy to obtain one. The Appellant urged this court to find that none of the Counts the Appellant was convicted of were proven beyond reasonable doubt and set aside the conviction and the sentence thereof.

Respondent/Prosecution's Submissions

33. On its part, the Respondent submitted that the prosecution proved all the ingredients of the charges of indecent act with a child. Unlawful intentional act of contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include penetration or exposure, display of any pornographic material to any person against his or her will, Age of minority and Identity of the Appellant as the perpetrator were established by the corroborated minors' evidence. Further, there were no contradictions or invariance in the evidence. It was contended that the trial court was satisfied that the evidence was sufficient to place the Appellant on his defence and gave rise to the conviction. Counsel maintained that the Respondent proved the key elements of the offence, and that the sentence imposed was lawful.

Analysis and determination.

34. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in Okeno – v– Republic (1972) EA 32 has been consistently cited as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

35. Having considered the record, the submissions and the law, the issues for determination are:

    i) whether the offence of indecent act with a child was proved beyond any reasonable doubt

    ii) whether the appellant's sentence was harsh and excessive.

36. Before determining the issues, it is necessary to set out the evidence as was laid before the trial court. Hon. D.N. Sure (PM) took over the matter under Section 200 of the Criminal Procedure Code on 18th October 2023. On 30th November 2023, the prosecution closed their case with the evidence of PW1, PW2, PW3, and PW4 who are children aged 8 years and 13 years according to the charge sheet.

37. PWl told the court that on 1st July 2018, he was playing football with PW2, PW3, and PW4 when the Appellant came and gave them what they shared between the 6 of them. The Appellant, then invited them to his house and they accompanied him. They went to his house with PW2, PW3, PW4, Brian and Collins.

38. When they reached his house in the Akamba area, they sat in the seating room. The Appellant told them he had a video that was in the bedroom and offered to show them in turn. They agreed and Kaloki Musembi was the first to enter followed by PW3, then PW2, himself, Brian and last was Collins.

39. When he entered the bedroom, he found the Appellant lying on a big bed. The Appellant told him to lie on top of him and he trapped his legs between his legs. The Appellant put a pornographic video of a naked man raping a naked woman. He watched the video for about 5 minutes during which the Appellant was caressing his buttocks. He would slip his pants down while he would pull it back up. He did not ask the Appellant anything but when he released his legs, he left. When all of them had entered the bedroom, the Appellant escorted them to Akamba and they parted ways. They discussed the issue and what the Appellant had done to them. He reported to his parents and they were taken to the police station where statements were recorded. He was taken to the hospital where his anus was examined and he was given an injection.

    In cross-examination, PW1 stated that he knew the house belonged to the Appellant because his photographs were mounted on the wall. There were 2 houses in the compound and the Appellant took them to the smallest. His house had 2 rooms; the sitting room and the bedroom.

40. PW2 reiterated the evidence of PWl and further stated that when he entered the bedroom, the Appellant was seated on the bed. The Appellant told him to sit and he lay diagonally. The Appellant gave him a phone and he saw it was a video of white men and women having sex. He watched the video for about 2 minutes during which the Appellant was touching his hand and leg. The appellant pulled his pants down and also pulled the shorts he was wearing down. The Appellant touched his anus with his penis and lay on top of him. He inserted his penis in his anus once and when the video ended, he left the bed and went to the seating for another boy to enter.

41. In cross-examination, PW2 stated that he felt pain when the Appellant inserted his penis in his anus and he complained. He had difficulty walking for about 4 days. He told his mother the following day and he was taken to the police station. He was not couched on what to say in court.

42. PW3 reiterated the evidence of PWl and PW2 and further stated that when he entered the bedroom, the Appellant gave him a phone. The Appellant told him to lie on top of him. The Appellant told him to watch a video and it was of men and women doing bad things. He told the police he was made to watch pornography. The Appellant was touching his back while his legs were crossed over his. When the Appellant released him, he went to the sitting room. They did not leave because PW4 entered the bedroom.

43. PW4 reiterated the evidence of PWl, PW2, and PW3 and further stated that when he entered the bedroom, the Appellant showed him a pornographic video of naked men and women who were doing bad manners. He was lying to the Appellant who was looking at him while he was watching the video for about 5 minutes. PW4 told the court that he met the Appellant, for the first time, while walking to Kilalani and he was given Kshs.10/=.

44. The prosecution did not produce the parents or guardians of PWl, PW2, PW3 and PW4, and further closed their case without the doctor or the investigating officer testifying for reasons that the doctor had not been summoned and that the investigating officer was sent the court link and the prosecutor had sent him a text but he had not responded. Further, BM, the complainant in Count 4 was not produced to give evidence in support of the charges for the reason that his whereabouts were unknown.

45. Having considered the recorded evidence, the Appellant was placed on his defense, and on 14th February 2024, he gave an unsworn statement and stated that there was no evidence implicating him in this case where the witnesses did not come to court.

    i) whether the offence of indecent act with a child was proved beyond any reasonable doubt

46. The offence of indecent act with a child is defined under Section 2 of the Sexual Offence Act that:

> " indecent act" means any unlawful intentional act which causes-
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> (b) exposure or display of any pornographic material to any person against his or her will;

47. To prove the offence of indecent act with a minor the following ingredients must be met:

a. unlawful intentional act of contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include penetration

b. exposure or display of any pornographic material to any person against his or her will

c. Age of minority

c. Identity of the accused

a. unlawful intentional act of contact

48. . PW1 (NMK) was one of the complainants in Count 2. He stated that on 1/7/2018 the Appellant found him and Kilonzo, Brian, Peter Kaloki and Ngao playing in the field and gave them bread, chewing gum and orange. He then asked them to go to his home. (PAGE 10 MISSING) PW2 states also states that on 01/07/18 the Appellant found him, Nicholas, SK, PM, Ngau at Kilalani field playing and asked them to go to his house. While at the Appellant's house, he asked him to go to his bedroom. He told him to lie down on the bed diagonally and the Appellant gave him his phone. PW2 held the phone and he indicated there was a "porn" video playing. PW2 said while he was watching the video the Appellant was touching him on the hands and legs. he was lying on his stomach and the Appellant was lying on top of him and he also touched his buttocks. The Appellant then pulled down his trouser and inner pants and inserted his penis into his buttocks and into his anus.

49. For Count 2, I must pause here as I observe that the complainant PW2 admitted to have been penetrated by the Appellant inserting his penis into his buttocks and into his anus thus this throws out the offence of indecent act with a child pursuant to provisions of Section 2 of the *Sexual Offences Act* which does not include penetration. I therefore find that Count 2 was not proved beyond reasonable doubt.

50. PW2 (BKM) was the complainant in Count 3. He stated that the Appellant pulled his trousers down and touched his buttocks with his penis, he stated that the Appellant inserted his penis into his buttocks and into his anus, he did that once.

51. That in cross examination this complainant stated that the Appellant did not remove his trousers fully, he inserted his penis into his anus for about two minutes, he felt pain, a lot of pain, he complained and told him he was feeling pain. He penetrated his anus, PW2 shouted. After that PW2 had difficulty walking, he could not stand straight because of pain. He did not see any blood; it was his first time anyone had done that to him. He was standing with a slight bend and he felt pain while walking for 4 days.

52. Again, for Count 3, I find that penetration is said to have occurred which rules out the offence of indecent act with the child as earlier found and I am also convinced that the offence here ought to have

been defilement and not indecent act with a child. The alleged act under this count by the Appellant was beyond indecent act with a child. I find that the offence of indecent act with a child in Count 3 was thus not proved.

53. PW3 (PMM) was the complainant in Count 1. He stated that he told the police he watched pornography on the phone. He watched for a short while like one minute and as he watched, the Appellant was touching him on the back using his hands. His legs were also crossed over his legs. He was still dressed; He did not remove his clothes. He kept holding the phone the whole time, they were on the bed, a big bed that two people can sleep. The Appellant also had many pairs of shoes in the bedroom, he saw sandals and some white shoes. The Appellant then released him and he went in the sitting room and he told the others they should go home but they did not go home yet since Ngao went to the bedroom and then came out and Bosco entered the room.

54. For Count 1, there is nowhere PW3 stated that the Appellant touched his buttocks with his penis as particularized in the charge sheet. Again, I find this count was not proved beyond reasonable doubt.

55. PW4 (PNK) was the complainant in Count 5. He stated that the Appellant gave him his phone to watch a video in his house, he was alone with him in his bedroom, the video was pornography and he watched for 5 minutes. There was no one else in the house, just the two of them. He lied on top of the Appellant on his bed as he watched the video and the Appellant was looking at him. The Appellant did not touch him. It lasted for about one minute.

56. For Count 5, I must say PW4 categorically testified that the Appellant did not touch him. I find therefore that the offence of indecent act with a child as particularized under Count 5 in the charge sheet was not proved beyond reasonable doubt.

57. Clearly, it can be observed that on the four Counts contained in the charge sheet, all the four Complainants firmly testified on having been shown pornography videos by the Appellant, it is my considered view that in the circumstance the Investigating Officer ought to have been candid enough and more cautious and diligent while charging the Appellant with the Counts in this case. As testified by PW1 and PW2, the Appellant ought to have been charged with the offence of defilement and the doctor availed to corroborate the same. Accordingly, it is my opinion that the Investigating Officer did extremely shoddy investigation in this case. No wonder the said Investigation Officer failed to attend court even after being summoned and the prosecution counsel even sending him a court link and a text message to attend. It is disheartening and sad that the complaints have to suffer injustice as a result of the extremely shoddy investigations in this case. The manner in which the investigation was done and the charges framed is wanting. See Nanyuki Criminal Case No. 1 of 2016, Republic v Nicholas Wanjohi Gakuya where the court decried the extreme shoddy investigation carried out by the prosecution and further the repeated act of failing to present before court of witnesses who could possibly have assisted the court reach a just determination.

b. Age of minority

58. PW1 testified he was in class 6 and he was 13 years, PW2 testified that he was in class 6 and he was 13 years, PW4 stated he was 12 years. However, no evidence of birth certificate, birth notification, baptismal/clinic cards or age assessment reports were produced in evidence. This is however not a bar to determine the age. The complainants were aged between 12-18 years and are able to express themselves well. The complainants were able to narrate they were school going children and were able to inform the trial court of their age as they testified. The trial court further heard the testimony of the victims PW1, PW2, PW3 and PW4 and observed they were minors and recorded the same in the trial court

proceedings. The issue of the age of the victims was not challenged during cross examination neither did the Appellant ask or seek to get any documentation to prove the age of the victims.

59. I am persuaded by the cases cited by the Respondent in High Court of Uganda Case No.HCT-05-CR-SC-0136 of 2003 Uganda vs Mwebaze Wilber it was stated that though the best evidence to prove age would be birth certificate, age could also be determined by observation and common sense and in Daniel Kamau v Republic [2019] KEHC 4591 (KLR) it was stated:

> " In the case of Fappyton Mutuku Ngui vs Republic (supra) it was held:... that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.....The two judgments tend to suggest that that failure to prove the age of the victim is fatal to the prosecution case. Is it in the interest of justice to set an accused person free just because the age of the victim has not been proved with mathematical accuracy? This would only add salt to a wound that the complainant has been inflicted. My proposal is that a pragmatic approach ought to be adopted to the issue where age has not be established through evidence but the other ingredients of the offence have been proved.....My opinion is guided by the decision the Ugandan Court of Appeal in the case of Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 where it was held thus:..... In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense [emphasis mine]....."

60. Failure to avail the birth certificate and/or age assessment or any documentation to prove age was not fatal to the prosecution case. The trial court observed the victims and recorded the aged of the victims in the court proceedings. I find that the trial court was correct in finding that the victims were minors thus the evidence on proof of age was safe.

b. Identity of the Appellant as the perpetrator

61. PW1 indicated he knew the Appellant as he used to pass the field where they played every day. PW2 stated he knew the Appellant as he used to go to Kilalani several times and he was not a stranger to them. PW3 and PW4 identified the Appellant as the one who came to the field and called them to his house. It was during the day thus the visibility was good. The complainants were able to positively identify the Appellant as the one who called them, took them to his house and showed them the pornographic videos. Identification was by recognition which is the best form of identification. The proof of identity was therefore solid and safe.

Of importance to note

62. Upon thorough peruse the trial court's proceedings and I did not seem to see where voire dire examination was conducted on all the 4 minor witnesses who were said to be between 12 years and 13 years

    It is trite law that a child under the age of 13 years is considered of tender age as was explained in the case of Kibangeny Arap Korir v Republic [1951] EA 92.

63. Consequently, voir dire examination ought to have been conducted on the minors in order to establish if their testimony was safe for reliance by the Court as mandated by Section 19 of the *Oaths and Statutory Declarations Act*.

64. The principles that have been applicable when it comes to a child of tender years are summarized at pages 54-57 of the Judiciary Bench Book for Magistrates in Criminal Proceedings. The first principle is that where a child of tender years is called as a witness, the court must first conduct a voir dire examination before allowing the child to testify. This is meant to find out whether the child understands the meaning of an oath.

65. In the case of Haji v Republic (Criminal Appeal E020 of 2023) [2023] KEHC 26498(KLR) (15 December 2023) (Judgment), the Court held that:

> " 36. In the instant case, there was no independent evidence to support that the appellant committed the offence. The evidence of the clinical officer was to the effect that the complainant had injuries in the anus but not that the appellant is the one who committed the offence. The evidence of the clinical officer thus was not independent corroborative evidence that the appellant committed the offence. His evidence could not corroborate the defective evidence of the child, PW2. The conviction of the appellant on the basis of the evidence of the child, PW2, was therefore not safe.
>
> 37. The state conceded the appeal on the ground that the conviction was not safe for lack of voir dire examination on the key witness for the prosecution. I find that they were right in conceding to the appeal.
>
> 38. The upshot is that the appeal is allowed and the conviction and the sentence are hereby set aside."

66. In the case of Abdi Abdiraham & another v Republic (2013) eKLR in which the Appellant's conviction and sentence was set aside on account of failure on the part of the Trial Magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence. The Court in that case stated:

> " Having reached the above conclusion, it follows that the acceptance of the evidence of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case. The child testified that he was 13 years old and, in our view, the said child was one of "tender years" and voir dire examination ought to have been administered on the witness."

67. The fact that the victims' evidence was not directly corroborated by any witness during the trial further creates serious doubts as to its reliability. It is trite that where voir dire examination is not conducted, the evidence of the minor(s) cannot be used as the basis of a conviction unless there is some other independent evidence to support the charge. The conviction of the Appellant was, therefore, not safe as it was based on the sole evidence of victims of tender ages who had not been subjected to voir dire examination.

68. That in the instant case, there was no direct and or independent evidence linking the Appellant to the charges levied against him at the Trial Court. The evidence of the minor complainants was that they were shown pornographic videos by the Appellant and PW1 and PW2 did indeed testify that the Appellant defiled them, but the Appellant was not charged with defilement and the particulars of the offence of indecent act with a child he was charged with were that he touched the buttocks of the complainant with his penis which fact was not proved.

69. On the foregoing, failure to subject all the minor complainants who were between 12 years and 13 years to voire dire examination was fatal to the prosecutions case and for this reason, the Appellant's appeal ought to be allowed.

(ii) Whether the Sentence preferred against the Appellant was manifestly excessive, harsh and severe.

70. In Bernard Kimani Gacheru -v- Republic (2002) eKLR, the Court of Appeal stated that: -

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist".

71. In this case the Appellant was charged under Section 11(1) of the *Sexual Offences Act*. The provision state: -

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

72. In mitigation, the Appellant sought for forgiveness. He indicated that he was an orphan and that he did not do the act.

73. The court has discretion in issuing of sentences but this discretion is limited in the minimum mandatory sentences in sexual offences as provided for under the *Sexual Offences Act* No. 3 of 2006 and the minimum nature of the 10 years sentence imposed on the Appellant does not make it illegal. In the Supreme Court case of Francis Karioko Muruatetu and Another VS Republic, Petition NO. 15 & 16 (Consolidated) of 2015 it was held that:

> " We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other Statute".

74. Had this court disallowed the Appellant's appeal herein, it would have affirmed the sentence.

75. In effect, the appeal is upheld, the conviction is quashed and the sentence set aside. The Appellant shall forthwith be set at liberty unless he is otherwise lawfully held in prison.

76. Orders accordingly.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 23RD JULY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 23RD JULY 2025

In the presence of:

Ms Kingóo..... for Appellants

Ms Agagtha..... for Respondent

Milly..... Court Assistant