



**Kiptoo v Republic (Criminal Appeal E115 of 2022)  
[2025] KEHC 10733 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E115 OF 2022  
RN NYAKUNDI, J  
JULY 23, 2025**

**BETWEEN**

**EDWIN KIPTOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the conviction and sentence of Hon. Emily Kigen  
in Eldoret Chief Magistrates Sexual Offence Case No. E153 of 2021)*

**JUDGMENT**

1. The Appellant was charged in Eldoret Chief Magistrate's Court Sexual Offences Case No. E153 of 2021 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. It was alleged that the Appellant, on 8<sup>th</sup> June 2021, at [Particulars withheld] in Kapseret Sub County, within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the vagina of FC a girl aged 4½ years.
2. He was also charged with 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.
3. The Appellant pleaded not guilty to all the charges and the case then went to full trial in which the prosecution called 7 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the [Criminal Procedure Code](#). The Appellant gave an unsworn statement and did not call any witnesses. By the Judgment delivered on 17<sup>th</sup> October 2022, he was convicted on the main charge and sentenced on the same date, to serve life imprisonment.
4. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal on 31<sup>st</sup> October 2022, against the conviction and sentence on 6 grounds reproduced verbatim as follows:



- i. That the learned magistrate erred in both law and fact by convicting (me) while not observing that there was no concrete evidence.
- ii. That the learned magistrate erred in both law and facts by failing to observe that there no forensic examination that was conducted on the appellant
- iii. That the trial learned magistrate erred in both law and facts when he did not look that investigation in the foregoing case were shoddy and unsustainable.
- iv. That the trial learned magistrate erred in both law and fact by convicting me on the case that was not proved beyond any reasonable about as the law provides.
- v. That, the learned trial magistrate erred in law and facts by convicting the appellant without observing that minimum mandatory sentences was declared unconstitutional in petition no.EOI7/2021 and petition no.97/2021 by convicting the appellant to serve life imprisonment.
- vi. That I pray to be furnished with the lower court proceeding to enable me lodge more grounds to be argued during the hearing of this appeal.

#### **Prosecution evidence before the trial Court**

5. Before the trial Court, the prosecution called 7 witnesses.
6. PW1 was the minor-complainant (victim). Because of her age, she was taken through a voire dire examination after which the Magistrate recorded that she was too young to understand the effect of taking an oath but that she nevertheless was aware of the importance of telling the truth. Under such circumstances, the Magistrate directed that the minor would give unsworn evidence which she then proceeded to do.
7. She testified that the accused person is her neighbour and on the material date, the appellant removed her clothes, when she was on the way home and touched her private parts using his fingers. She did not feel any pain or bleed but she told her mother who took her to hospital.
8. PW2 was [ name withheld ], PW1's mother. She stated that on 8<sup>th</sup> September 2021 the children were released from school early but she was not aware. That she was called by her husband who asked her to rush to Simat police station as her child had been defiled. She found the appellant who told her he was sorry for the incident although he was unable to complete his mission. She proceeded to the office where the minor told her what had happened. She produced the child health card as PMFI-1 and the P3 form as PMFI-2. She however did not witness the incident.
9. PW3 was Dr. Irene Simiyu from Moi teaching and Referral Hospital. She produced the medical report on behalf of Dr. Taban. She stated that as per the examination, the doctor concluded that she had been defiled.
10. PW4 was (name withheld) the father of the complainant. He testified that on 8<sup>th</sup> June 2021 when his daughter came home later than the other children. After she was asked where she had been she started crying and PW6 told him that the appellant had taken the minor to a neighbouring school. They went to look for him and found him hiding in the toilet.
11. PW5 was RK, a minor. The trial magistrate conducted a voire dire and the magistrate determined that he would give unsworn evidence. He stated that he knew the accused and the complainant. That on the material date while on the way home with the complainant the accused called them and asked the minor to accompany him to the school to see initiates. She dropped her bag and they followed them to



the school after collecting the same. When they arrived they saw the accused helping the complainant wearing clothes. She was crying and stated that the accused had removed her clothes.

12. PW6 was HK, a minor aged 8 years old. The court conducted a voire dire and determined that he shall give unsworn evidence. He testified that on the material date when they were from school, the accused called PW1 who dropped her bag and went. When they went to look for her at Paul Bitok School, where the accused had gone with her, they found her with him, crying. When he asked her why she was crying, she told him that the accused had removed her clothes. He stated that the accused was their neighbour.
13. PW7 was PC Solomon Wahome attached to Simat police station. He testified that on 8<sup>th</sup> June 2021, the complainant was brought to the station with an allegation of having been defiled. He referred them to Moi Teaching and referral Hospital and by that time the suspect had been arrested. He produced the child immunisation card as PExh-1 and stated that the child was 4 ½ years old.

### **Defence evidence**

14. After the Prosecution case, the Court found that the Appellant had a case to answer and placed him to his defence. Pursuant thereto, the Appellant gave sworn testimony as DW1 and called no witnesses. He denied committing the offence.

### **Judgment of the trial Court**

15. After analysing the evidence, on 17<sup>th</sup> October 2022 the trial Court found the Appellant guilty as charged and convicted him. The Appellant was then given an opportunity to mitigate which he did. On the same date, the trial Court then sentenced the Appellant to serve life imprisonment.

### **Hearing of the Appeal**

16. The Appeal was canvassed by of written Submissions. The Appellant filed his Submissions on 11<sup>th</sup> June 2025 in person while the State filed on 1<sup>st</sup> July 2025 through Prosecution Counsel, G. Kirenge.

### **Appellant's Submissions**

17. Counsel for the Appellant submitted that the prosecution was required to prove that there is penetration of the victim's genitalia, the age of the victim and that it is the accused who committed the offence. Counsel highlighted the evidence of PW1 and the opinion of the magistrate, urging that it is evident that no penetration was committed on the date alleged as indicated on the charge sheet. The actions described by PW-1 related to removal of her school uniform clothes and her panty, besides allegedly touching her private parts using fingers which does not amount to an offence preferred against the Appellant. He pointed out that PW-1 did not state that the alleged fingers were inserted in her genital organ (vagina). Such evidential details having been adverse to the charge sheet particulars means that the Charge is defective hence by the conviction and life sentence null and void. The appellant relied on the decision of *John Mutua Munyoki Vs. Republic* in this regard.
18. On credibility of the evidence of PW1, counsel cited the case of Akumu vs Republic (1954) 21 EACA and urged that although the minor gave the story of the events, the verification of the story is questionable as earlier submitted. Her statement lacked specificity of what transpired and it cannot be ascertained what took place, at what time, and how it happened. Further, that the scanty evidence of PW-3 did not implicate the Appellant about the core aspect of penetration in this case since PW-1 as earlier highlighted was emphatic that she never cried or screamed and therefore the EX-2 findings were not sourced from personal information given by the complainant to Dr Taban or her Mother as



deduced from her wordings in court that, "I did not witness I was told by the minors father as well as the minor. The minor screamed" There was no explanation as to what compelled the complainant not to confirm in court the allegation of forceful penetration committed to her if it ever happened by the Appellant. Counsel submitted that there was no tangible evidence advanced implicating Appellant to establish the allegations of an offence of defilement as charged in this case.

19. Counsel submitted that the defence raised by the appellant was plausible and displaced the prosecution case. The appellant took the court to the scene of crime where the alleged offence took place. The court did not make any recommendation as to the corroboration of the defence as to the prosecution to make the ends meet so to the credible conclusion of the side that was truthful. He cited Section 111 (1) of the *Evidence Act* and urged that the trial magistrate rejected his plausible defence without giving any cogent reason. He cited the case of *Elizabeth Waithiegeni Gatimu* (2015) eKLR and the case of *Victor Mwendwa Mulinge vs Rep.* Crim. Appeal no. 357 of 2012 urging the court to interfere with the trial courts finding and admit my defence and find otherwise in my favour.
20. On the sentence of life imprisonment, counsel submitted that the principle of a fair trial must be accorded to sentencing which is geared towards the impact of sentence on the entire community. He urged the court to consider the prescriptive ratio decidendi of the Supreme Court case of *Muruatetu 2*, to wit; 'Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right.'
21. Counsel submitted that considering the prescriptive ratio of *Muruatetu 1* and *2*, life sentence is unconstitutional as it does not give the offender an opportunity to reform and have a second chance after rehabilitation to show his effort to amend his unlawful way and be a law-abiding citizen. Further, he urged the court to embrace the guidelines given by New Sentencing Policy Guidelines 2023 as a litmus to be applied by the courts when resentencing and prescribes the least possible sentence as prescribed under Article 50 (2) (q) of the *Constitution* of Kenya 2010. He urged the court to allow the appeal.

### **Respondents' Submissions**

22. Learned counsel for the state submitted that the prosecution proved the case beyond reasonable doubt. On age, he urged that the minor, in her sworn testimony, stated that she was in PP2. PW2 produced the child health card showing that she was born on 17<sup>th</sup> November 2016. The P3 form similarly shows the child's age as 4 and a half years. On identification, he submitted that PW1 recognized the Appellant as Edwin Kiptoo, a neighbour at their home in Simat. PW 2 identified the Appellant and even had a conversation with him after the ordeal. PW4 who is the Victim's father was one of the persons who arrested the Appellant upon being caught immediately after the child reported him. PW5 and PW6, the Victim's neighbours similarly saw the Appellant leading the victim into Paul Bitok School and where the minor was found crying in his presence. On penetration, he urged that PW1 narrated how the Appellant removed her school clothes and her panty, lay her on the ground and touched her private parts. The Doctor who was PW3 found that she had fresh tears on her 6 o'clock with pus cells indicating that she had gotten a minor infection from the ordeal. In her history she indicated that the child told her that she was defiled.
23. Counsel cited Section 8(2) of the *Sexual Offences Act* and urged that the Judiciary sentencing policy guidelines underscores the Principle of Proportionality in the sentencing process, i.e. the sentence meted out must be proportionate to the offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. He cited the holding of the Supreme Court in Petition No E018 of 2023 and the case of *Daniel Maina Wambugu vs Republic* (2018) KEHC 5656 (KLR) in



this regard. He additionally cited the case of *Republic v Ayako* (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment) and urged that the appeal bears no merit and should be dismissed in its entirety.

### Determination

24. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Okeno vs. Republic* [1972] E.A 32)

Issues for determination

- a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
- b. Whether the sentence of life imprisonment imposed against the Appellant was justified.

25. I now proceed to analyse and determine the said issues

#### a. Whether the charge was proved case beyond reasonable doubt

26. It is trite law that for the offence of defilement to be established, 3 ingredients must be proved, namely, the age of the victim, penetration and positive identification of the offender.

27. Section 8(1) and 8(2) of the *Sexual Offences Act* provides as follows:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

28. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR, as follows:

“The importance of proving the age of the victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In *Alfayo Gombe Okello v Republic* Cr. App 203 of 2009 (Kisumu) this Court stated as follows: -

“In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. This must be so because dire consequences flow from proof of the offence under section 8(1)”.

29. In instant case, PW2, the complainants’ mother, testified that she was 5 years old and also produced PW1’s clinic health card. The certificate indicates that PW1 was born on 17<sup>th</sup> November 2016. The



alleged offence having occurred on 8<sup>th</sup> June 2021, PW1 was indeed 5 years old or thereabout. This dispenses with the first ingredient as adequately proven.

30. On the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic* [1989] eKLR expressed itself as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

31. In the instant case, the complainant knew the victim as a neighbour and therefore the identification was by recognition. The identification was corroborated by PW5 and PW6. I find that this element was proved to the required standard.

32. With regard to penetration. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

33. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.” (Emphasis added).

34. Medical evidence was provided by PW3, the doctor who produced the P3 form on behalf of Dr Taban who conducted the examination. Notably, the details relevant to the offence as stated in the form are consistent with the evidence of the complainant.

35. The medical doctor noted injuries such as fresh tears at 6 O’clock and concluded that the findings were consistent with defilement. I take issue with this remark as the purpose of the medical examination is simply to establish whether there was penetration, not to determine whether the offence of defilement had occurred. It is the courts’ duty to determine whether there has been defilement and therefore, the conclusion by the doctor that there was defilement establishes the offence as known in law. Additionally, the trial court did pronounce itself on the issue of penetration.

36. It is my considered view that the Appellant unlawfully penetrated the genital organs of his victim including use of his fingers which the doctor confirmed occasioned the tears of the private parts of the minor. The manipulated parts of his body were used as a devise to cause penetration of the genital organ of the aforesaid minor.

37. Defilement as known in law under the *Sexual Offences Act* can cause physical injuries inside and outside of the body including cuts, tears, severe bleeding, and damage to the Internal Reproductive Organs of the victim. In the case at hand the minor gave evidence on the circumstances surrounding the defilement by the Appellant. That evidence was never controverted by the Appellant during his defence case.



38. Regarding sentence, Majanja J, quoting Muruatetu, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

“The *Sentencing Policy Guidelines, 2016* (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case* (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

39. The Court of Appeal gave guidelines on the factors to consider in regard to exercise of discretion to review the sentence Imposed by the trial court in the case of *Bernard Gacheru Kimani* (2002) eKLR which states as follows: “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a wrong principle. Even if, 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.”

40. Similarly, in the case of *Daniel Kipkosgei Letting Vs. Republic* [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”



**Final Order**

- 41. With regard to sentence, there are no compelling or substantial circumstances to interfere with the sentence imposed by the trial court as prescribed being life imprisonment. As a consequence, the Appeal on both conviction and sentence is dismissed.
- 42. 14 days Right of Appeal explained.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 23<sup>RD</sup> DAY JULY 2025**

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**R. NYAKUNDI**

**JUDGE**

