



REPUBLIC OF KENYA



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**David v Republic (Appeal E074 of 2024)
[2025] KEHC 14766 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
APPEAL E074 OF 2024
NIO ADAGI, J
OCTOBER 22, 2025**

BETWEEN

ALEX MUTHIANI DAVID APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Decision and Judgment of Hon. P.
Wechuli Principal Magistrate delivered on 18th October 2023 in
Kithimani Principal Magistrate's Sexual Offence No. E 15 of 2023)*

JUDGMENT

1. The Appellant Alex Muthiani David was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 31st day of March 2023 in Yatta Sub- County within Machakos County intentionally caused his penis to penetrate the vagina of PM (name withheld) a child aged 10 years contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars are that on 31st day of March 2023 in Yatta Sub- County within Machakos County intentionally touched the vagina of PM (name withheld) a child aged 10 years with his penis contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
3. The Appellant pleaded not guilty to both the main and the alternative charge and the matter was set down for hearing. The prosecution called four witnesses in proving its case. Upon considering the evidence that was adduced, the Appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment on 18th October 2023.



4. Being dissatisfied with the decision of the trial court, the Appellant has lodged the instant appeal against both the conviction and sentence. The Appellant has filed seven grounds of appeal in his Petition of Appeal dated 25th August 2024. The Appellant outlines the 7 grounds of appeal as follows:
 - i. That the trial magistrate erred in law and in fact by convicting the Appellant on the medical evidence adduced by the medical doctor which the trial magistrate acknowledged was insufficient, obscure, indeterminate and professional dysfunctional and could not be linked to the Appellant.
 - ii. That the learned magistrate erred in both points of law and facts for failing to note that the prosecution's evidence was inadequate to hold a conviction.
 - iii. That the learned magistrate erred in both points of law and facts by convicting the Appellant without considering that the prosecution evidence was full of contradictions and was not corroborated.
 - iii. That the learned magistrate erred in both points of law and facts by disregarding the Appellant's defence without giving cogent reasons.
 - iii. That the trial magistrate erred in law and facts by convicting the Appellant on an alleged previous incident which its existence was never proved in court.
 - iii. That the trial magistrate erred in both matters law and facts by imposing a harsh sentence without considering the fact that being a first offender, the Appellant was lawfully entitled and qualified to benefit from Article 50(2) of *the Constitution*.
 - iii. That the learned magistrate erred in law and fact by convicting the Appellant thus amounting to a miscarriage of justice.
5. The Appellant prays that:-
 - a. The Decision and Judgment delivered on 18th October 2023 be set aside.
 - b. The appeal be allowed.
 - c. This Honourable Court be pleased to make such further and other orders as it may deem just in the circumstances of the case.
6. The Respondent/Prosecution opposes the instant appeal and majorly contends that the trial court properly evaluated the evidence and came to the right decision.
7. The appeal was canvassed through written submissions. The Appellant's submissions are dated 08/05/2025 filed by Mbuvo Mutuku & Co. Advocates whilst the Respondent's submissions are dated 01/07/2025 filed by Ms. Agatha, the prosecution counsel.

Appellant's submissions

8. In his submissions, the Appellant consolidated grounds 2 and 5 of the appeal and argued them in priority to the other grounds. The Appellant submitted that the particulars of the offence as per the charge sheet indicated that "ALEX MUTHIANI DAVID on the 31st day of March 2023 in Yatta Sub County within Machakos County intentionally caused his penis to penetrate the vagina of PM, a child aged 10 years."
9. He submitted that PW1 in her testimony stated that between January and March 2023 Wetu did bad manners to her. That a wholistic analysis of PW1's testimony indicates that there were three



incidents and its only in the first incident that the alleged defilement can be said to have taken place. The Appellant posed two questions:

- i. Was the first incident in January, February, March and/or the 31st March 2023? Clearly, the first incident if at all, allegedly, can only be said to have occurred in month January.
 - ii. Why didn't the prosecution frame the charges to indicate that the alleged offence was committed on "diverse dates" as it is always the practice in cases riddled with ambiguity?
10. That PW4, the investigating officer in her sworn testimony while referring to PW1 stated that on 31st March 2023, she was going to fetch water, she met the accused who tricked her and defiled her in his house. She took her to Matuu Level 4 hospital.
 11. The Appellant submitted that in line with Section 134 of the Criminal Procedure Code, the Appellant was charged, tried and called upon to defend himself on an alleged specific offence committed on the 31st March 2023 and not any other day. The Appellant implored this Honourable Court to find so.
 12. That the prosecution led 4 witnesses in support of their case in a matter where the Appellant was unrepresented by Counsel. The evidence of PW1 indicated that the alleged defilement occurred in the first instance. It is in the third instance where although no defilement had happened, the matter was exposed.
 13. PW1 in her testimony did not state that she was defiled on 31st March 2023 and the unsubstantiated allegation that she was in the Appellant's sister's house is insufficient evidence to justify the ingredients of defilement.
 14. It is the Appellant's submissions that, him having been convicted solely on account of the testimony of PW1 and the lower court's finding that he committed the defilement on a date different from what was indicated in the charge sheet; the Appellant's right to a fair trial under Article 50 (2)(b) was violated. That to believe in the testimony of PW1 is to hold that the charge sheet was substantially and fatally defective. Reliance was placed on *Idah Nziza Kikubi & Anor v Republic Criminal Appeal No. 30 and 31 of 2021* where *Odunga J* cited the case of *Fappyton Mutuku Ngui v Republic [2020] eKLR* in which the Court held that a charge sheet should specify the offence in a clear and ambiguous manner and should be accurate since technical defects would entitle an accused to acquittal upon appeal.
 15. The Appellant submitted that the disparity between the particulars of the offence and the testimony was completely prejudicial to the Appellant. The disparity occasioned injustice to the Appellant because he could not tell with certainty the nature of the allegations in which he would prepare to defend the allegations. The Appellant referred to the case of *Bernard Ombuna v Republic [2019] eKLR*, where the Court of Appeal while dealing with a defective charge sheet gave guidance as follows:

“...of relevance is whether the defect on the chargesheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result he was not able to put an appropriate defence.”
 16. That though the charge sheet was specific, the evidence adduced by the prosecution witnesses was riddled with ambiguity, lack of sufficient details as to the time and date of the offence.
 17. That it is important to note that the Appellant was unrepresented by counsel owing to his financial standing in the society. It was the Appellant evidence that his occupation was that of a shamba boy. It was therefore unexpected that the Appellant would have raised an objection at lower court to challenge the defective chargesheet.



18. It is the Appellant's further submissions that, the trial court did not properly evaluate, analyse and consider all the circumstances of the case otherwise it ought to have reached to a not guilty verdict.
19. The Appellant asserts that one Thiari/Thiane who featured prominently in the testimonies has having found the Appellant at the alleged scene of crime was not called to testify. The only inference/ conclusion that should be drawn by the prosecution's failure to have Thiari/Thiane testify is that his testimony would be adverse to the prosecution's case. The Appellant placed reliance in the case of *Bukenya & Others v Uganda* [1972] E.A 549.
20. That the prosecution's case relied heavily on the complainant's testimony. While Section 124 of the *Evidence Act* allows for conviction based on the uncorroborated testimony of a minor, the court must be satisfied that the child is truthful. In this instance, the trial Magistrate did not adequately assess the credibility of the complainant's testimony, nor did they provide cogent reasons for accepting it as truthful to support the charge and its particulars.
21. In summary, the Appellant submitted that the evidence of PW1 though not convincing can only be said to be in support of an alleged defilement that occurred prior to the 31st March 2023 in contrast to the charge sheet.
22. That the evidence PW2 and PW4 is largely hearsay evidence and thus inadmissible in this matter. In the case of *Kinyathi v Republic* [1984] eKLR the Court of Appeal had this to say of hearsay evidence:

“Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying offers as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.”
23. The Appellant submitted that the rule against hearsay evidence is a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of stated facts.
24. That the testimonies of PW2 and PW4 don't fall within the exceptions set out in Section 33 of the *Evidence Act*. Their evidence doesn't establish the known ingredients that are requisite to establish the offence of defilement and/or indecent act.
25. On medical evidence, the Appellant submitted that the trial Magistrate acknowledged that the medical evidence presented was insufficient, obscure, indeterminate, and professionally dysfunctional. The clinical officer's report indicated that the complainant's vagina was hyperaemic (inflamed), but there were no tears or lacerations. Importantly, the accused was not examined. The absence of conclusive medical evidence linking the Appellant to the alleged offence renders the conviction unsafe.
26. Reliance was placed on the case of *Abdi v Republic* [2022] KEHC 13025 (KLR), the court emphasized that absence of medical evidence does not preclude a conviction if other credible evidence supports the charge. However, in this case, the medical evidence itself is inconclusive and does not corroborate the complainant's testimony.
27. That having ruled out the usefulness of the medical evidence adduced by PW3, the trial court without any evidence arrived at a hypothetical finding that the hyperaemia was due to penetration.
28. As regards contradictions and lack of corroboration, the Appellant submitted that the prosecution's evidence was flawed with contradictions and lacked corroboration. For instance, the complainant's initial failure to report the alleged incidents, coupled with inconsistencies in her narration, casts doubt on the reliability of her account. The trial Magistrate erred by not addressing these contradictions and by convicting the Appellant without corroborative evidence.



29. The Appellant also submitted that his defence was not given due consideration. The trial Magistrate failed to provide cogent reasons for rejecting the Appellant's version of events. Reference was made to the case of *Murimi v Republic* [2021] KEHC 2297 (KLR) where the court held that a trial court must consider and evaluate the defence presented by the accused. The failure to do so in this case constitutes a miscarriage of justice.
30. The Appellant submitted that his sentence was harsh and without consideration of him being a first offender. Reference was made to Article 50(2) of *the Constitution*; a first offender is entitled to a more lenient sentence. The trial Magistrate's failure to consider this factor renders the sentence excessive and unjust.
31. The Appellant contended that the cumulative effect of the errors identified above resulted in a miscarriage of justice. The conviction and sentence are unsafe and should
32. In conclusion, the Appellant submitted that the conviction was based on insufficient, contradictory, and uncorroborated evidence, and that the trial Magistrate erred in law and fact in reaching the decision.

The Appellant prays that this Honourable Court finds merit in the appeal and grants the relief sought.

Respondent's submissions

33. The Respondent submitted that the offence of defilement is provided for under Section 8 of the *Sexual Offences Act*.
34. Section 8(1) provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
35. Section 8(2) provides that:

“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”
36. Reference was made to the case of *Kyalo Kioko v Republic* (2016) eKLR where the court set out the ingredients of the offence of defilement are:

“On the first issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in *Charles Wamukopa Karani v Republic*, Criminal Appeal No. 72 of 2013 as follows:

The critical ingredients forming the offence of defilement are:

 - a. age of the complainant,
 - b. proof of penetration, and
 - c. positive identification of the assailant”
37. As regards the age of the victim/complainant herein who testified as PW1, the Respondent submitted that during the voir Dire of PW1 she stated that she was 10 years old. PW2 stated that the Complainant was born in the year 2013. PW3 in testifying, indicated that the Complainant examined



was 10 years of age. PW4 testified and produced a letter from a teacher Kondo Primary confirming that the Complainant was born on 23/07/2013 (PExt.5).

38. The Respondent referred to the Court of Appeal in *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR where it was held that:

“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof”

39. The date of the offence is said to be on 31.3.2023. The Trial Court was convinced that the age was proved by the PExt.5 letter from the school and the P3 Form PExt.1 which both prove the Complainant was 10 years old. The Trial Court further relied on the finding in High Court at Meru *Dominic Mwilaria v Republic* (unreported) in which it was held that:

“I must remind that courts have said time without number that proof of age for purposes of *Sexual Offences Act* need not only be by way of certificate of birth. A failure to produce or absence of Certificate of Birth does not mean that age of the victim cannot be ascertained through other evidence, say, evidence of the victim herself, her parents, school records, treatment records, P3 Form, documents from her church/religious organisation such as baptismal cards and so on and so forth”

40. The Respondent submitted that the trial court came to the right conclusion that the age of the victim had been sufficiently proved and that the Appellant has not brought any new material facts to dispute the fact of age. This ingredient was thus proved.

41. As regards the ingredient of penetration, the Prosecution cited Section 2 of the *Sexual Offences Act* which defines “penetration” as :-

“the partial or complete insertion of the genital organs of a person into the genital organs of another person” WHILE, “genital organs” included “the whole or part of male or female genital organs and for purposes of this Act includes the anus”

42. PW1 testified that the Appellant “did bad manners to her”. She testified that the first time was when she went to fetch water and the Appellant to her to his house, he held her hand and took her to his house where he removed her clothes, removed his clothes and did bad manners. She stated that the Appellant removed her panty and he removed all his clothes. She testified that she cried as the Appellant sis so as she felt pain. PW1 further testified that the Appellant found her at his sister’s place and she was on his sister’s bed and that this was when he defiled her.

43. PW3 produced the P3 Form PExt.1, which stated that the private parts were hyperaemic and the vagina was red and inflamed. PW2 testified that the lab reports PExt.2 indicated that the complainant was defiled. The Complainant was seen days after the incident happened. We submit that the absence of medical evidence is not fatal to a case.

44. Reliance was placed on the decision in the case of *George Kioji v Republic Criminal Appeal No. 270 of 2012*, the Court of Appeal stated that:

“where available, medical evidence arising from examination of an accused linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly



be convicted for defilement. the court can convict if satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused

45. In the judgment the trial Court relied on SKM v Republic [2021] eKLR where it was stated that:

“the fact of penetration was proved by the testimony of the complainant. The prove of penetration is proved by evidence. The court has to consider the evidence of the complainant and if it satisfied that she is truthful and credible, it need not look for medical evidence. The Court of Appeal had held that penetration is proved by evidence”.

46. The Respondent submitted that the Complainant PW1 testified that the Appellant did indeed defile her and did bad manners to her which to her meant the sexual act. In Muganga Chilejo Saha v R the court held that:

“Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person. PW1 explained in a clear sequence how, once in the Appellant's house, he immediately grabbed her, covered her mouth and "did bad things. (tabia mbaya)" to her without undressing her. That he used his penis. He inserted it inside me. He inserted it at the place I pass urine through. I could not scream as he was holding my mouth and nose. I was injured at my vagina. I bled. The accused released me after hurting me. He said he would slaughter me if I told anyone”

Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE v R, Kapenguria H.C Cr. Case No. II of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinvati v R Nanyuki HC.CR.A. NC). 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R Homa Bay H.C Cr AP. No. 44 of 2015), "he inserted his ' 'dudu" into my ' 'mapaja", (Joses Kahuru v R Meru H.C' Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi N.C. Cr. Appeal No. 116 of 2011), apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R voi H.C Cr. App. No. 35 of 2014, EMM v R Mombasa Cr. Case No. 110 0/2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her”

47. The Respondent submitted that PW1 gave detailed and consistent evidence of events relating to the defilement. On the 1st occasion she was taken to the house of the Appellant by him and he defiled her. The 2nd occasion he took her to his house but he did not defile her. The 3rd occasion she was found at the Appellant's sister's house by the brother who then informed their mother, begging the question why she was there and why the Appellant chased the brother away if he did indeed have good intentions. That PW2 further corroborated the evidence of PW1 by confirming that PW1 informed her that the Appellant defiled her.

48. In cross-examination PW1 was consistent and confirmed that the Appellant defiled her by stating "you did bad manners to me”



49. The Respondent cited Section 124 of the *Evidence Act* which provides that:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

50. That the trial court after analysing the evidence came to the conclusion that the evidence therefore proved that there was penetration of the complainant.

51. The Respondent submitted that the evidence produced during the trial clearly proved the element of penetration to the required standards.

52. The trial court after analysing the evidence came to the conclusion that the evidence therefore proved that there was penetration of the complainant.

53. The Respondent submitted that the evidence produced during the trial clearly proved the element of penetration to the required standards.

54. As regards the ingredient of identify of the perpetrator, the Respondent submitted that PW1 stated that the Appellant was their neighbour. She referred to him as "Wetu" stating that is how they called him at home. PW1 was also able to identify him by his name "Alex Muthiani". PW2 further identified the Appellant as a neighbour. It was someone the victim PW1 knew quite well and the offence happened during the day thus there was daylight and she was able to see her assailant whom she knew as their neighbour. PW1 was able to identify him based on recognition which is the best form of identification. The trial court therefore came to the right conclusion that it was the Appellant who defiled the complainant PW1.

55. The Respondent submitted that from the evidence that was adduced during trial, it is clear that the Appellant is the person who defiled the victim PW1 and there was no possibility of mistaken identity as the Appellant was well known to PW1. This ingredient was therefore proved.

56. As regards the assertion by the Appellant that there were several inconsistencies and contradictions in the Prosecution case. The Respondent submitted that there were no contradictions nor inconsistencies and even if they were, they are minor and do not go to the root of the Prosecution case hence this Honourable court should ignore them. The minor inconsistencies (if any) were satisfactorily explained and this shows that the Prosecution witnesses were truthful. The minor inconsistencies (if any) do not prejudice the Appellant.

57. The Respondent cited Section 382 of the Criminal Procedure Code which states that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any



inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

58. Reliance was placed on *Muli v Republic* (Criminal Appeal E043 of 2022) [2023] KEHC 20868 (KLR) in quoting several authorities stated:

“In *MJv v Republic* [2019] eKLR, the court stated that: “The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected”.

59. Similarly, in the case of *Philip Nzaka Watu v Republic* (2016) CR APP 29 of 2015, the stated as follows:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person 's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

60. Again, the Court, in *Joseph Maina Mwangi versus Republic* Criminal Appeal No. 73 of 1993, held, inter alia, that: “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of Section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.

61. Also, the Court of Appeal decision in *Erick C)nvango Odeng' v. Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] [JGCA, 6 held as follows.:-

“With regard to contradictions in the prosecution 's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.



The role of this court is to be in the shoes of the Trial Court in evaluating, assessing and reconciling the evidence and to determine whether the said contradictions, discrepancies and/ or inconsistencies are prejudicial to the Appellant.

According to Black's Law Dictionary 2nd Edition, contradiction means: In practice. To disprove. To prove a fact contrary to what has been asserted by a witness.

62. In the Court of Appeal of Nigeria in the case of David Ojeabuo v Federal Republic of Nigeria [2014] LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA where the court stated as follows: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of; or contains a little more than what the other piece of evidence says or contains. ”

63. The Respondent submitted that pursuant to the above decisions this Court shall consider and determine on the above issue. The Counsel for the Appellant submitted that the prosecution case was riddled with material contradictions, discrepancies and inconsistencies that go to the core and root of this case as they concern material facts relating to the case. Counsel poked holes on the absence of the siblings of the victim child as witnesses made the evidence less watertight to convict. It was submitted that Sebastian was not called to testify and so was S and D, according to the Counsel these witnesses could give the evidence of PW1, PW2 and PW3 more weight to conclude that the Appellant was perpetrator in this case.

64. The Respondent submitted that there were no contradictions nor inconsistencies and even if they were there, they are minor and do not go to the root of the prosecution case hence this court should ignore them. The minor inconsistencies (if any) were satisfactorily explained and further the contradictions, discrepancies and inconsistencies (if any) are not prejudicial to the Appellant.

65. Further as regards the charge sheet, any discrepancy can be cured by section 382 of the Criminal Procedure Code. The Appellant was well aware of the charges he was facing and was able to cross-examine the witnesses on the said charges against him. The Respondent invited this court to disregard the ground of appeal on defective charge sheet and on discrepancies and in consistency as they hold no water.

66. On sentence, the Respondent cited Section 8(1) of the *Sexual Offences Act* which provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

67. Further Section 8(2) provides that:-

“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”

68. The Respondent thus submitted that the trial court was well within their jurisdiction and discretion to sentence the Appellant as it did so. The Appellant took advantage of an innocent girl and defiled her. He owed a duty to society and to the victim and her family as a neighbour to act responsibly and



with care and not to take advantage of young girls as they go about their lives. We urge this Court not to interfere with the sentence.

69. The Respondent submitted that the appeal lacks merit and urge the honourable court to dismiss it in its entirety.

Analysis and Determination

70. This being a first appeal to the High Court, I am enjoined by the now settled principle regarding the duty of the first appellate court which was well captured by the Court of Appeal in *Kiilu & Another v Republic*, [2005] 1 KLR 174, where the Court stated thus:

“An appellant on a first appeal 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 a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

71. This court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions. Guided by the above principle, I have carefully and exhaustively considered the trial court’s record, the grounds of appeal and the written submissions filed on behalf of the Parties.

72. I have also keenly read the proceedings and judgment of the trial court. Having done so, I find that the issues arising for my determination are;

- i. whether the evidence adduced by the prosecution was sufficient to prove the charge of defilement preferred against the Appellant beyond any reasonable doubt and;
- ii. whether the trial court failed to consider the Appellant’s sworn defence.
- iii. Whether the sentence imposed upon the Appellant was harsh and excessive.
- iv. Whether the charge sheet was defective

i. Whether the evidence adduced by the prosecution was sufficient to prove the charge of defilement preferred against the Appellant beyond any reasonable doubt.

73. On the first issue, the offence of defilement is created by Section 8 (1) of the *Sexual Offences Act* No. 3 of 2006. Section 8 (1) provides as follows:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

74. The ingredients of the offence of defilement were reiterated by the High Court in the case of *George Opondo Olunga v Republic* [2016] eKLR, which are:

- i. Proof of age of the complainant to be below 18 years
- ii. Proof of penetration



- iii. Proof that the accused person was the perpetrator (identification).
75. The question which needs to be answered is whether the above ingredients were proved to the required standards?
- a. Age of minority
76. It is not in dispute that the complainant (PW1) at the time of the commission of the offence was aged ten (10) years old. PW1 stated that she was 10 years old. PW2 stated that the Complainant was born in the year 2013. PW3 in testifying stated that the Complainant examined was 10 years of age. PW4 testified and produced a letter from [Particulars Withheld] Primary School where PW1 schooled confirming that the Complainant was born on 23.7.2013 (PExt.5). The ingredient of age was therefore proved.
- b. Penetration
77. On the ingredient for proof of penetration, penetration is defined under Section 2 of the [Sexual Offences Act](#) as follows:
- “The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
78. The charge sheet reads that “ALEX MUTHIANI DAVID on the 31st day of March 2023 in Yatta Sub County within Machakos County intentionally caused his penis to penetrate the vagina of PM, a child aged 10 years.”
79. The evidence on proof of defilement herein was given by the witnesses as follows:-
80. PW1 testified that between January and March 2023, the Appellant did bad manners to her.
81. The first time, schools had closed and she had gone to fetch water at Silamba in a dam. The Appellant told her he would give her water from his house instead of her getting it from the dam. She went to the Appellant’s place where the Appellant held her hand, removed her clothes, removed his and did bad manners. The Appellant removed her panty and all his clothes. It was 3pm after she had left school. He placed her on his bed. She cried as he did so as she felt pain. He told her to keep quiet and dress up. She left and went home. She did not inform anyone as the Appellant had warned her not to tell her mum or else he would beat her.
82. On a second occasion, the Appellant pulled her again. He met her as she went for her sister in the shop and took her to his place. She told him she would call people and the Appellant asked her to leave. He didn’t do anything that time.
83. On the third occasion, the Appellant found her at his sister’s place where the sister was absent. Her brother chased him away saying her mother was coming. That time she was on the Appellant’s sister’s bed. She heard her brother’s voice. Thiari also came and asked for pilipili but he said he did not have it, Thiari then asked for a match box and left saying he was going to get food for the next day. The Appellant had stopped her from leaving but when Thiari left, she too left. Thiari asked her where she had come from and she told him the Appellant had locked her in the house. She went home and informed her brother Wambua. Her mother came and she told her. The next day they called her brother who stays in Sofia and on Monday she went to hospital and also to the police.
84. PW2, EN was PW1’s mother. She testified that on 31.3.2023 she was at work where she usually went in the morning and PW1 went to school and came back at 3.00pm. she reached home at 7.00pm and



- found PW1 with her brother Wambua who told her to come and hear this. PW1 said the Appellant had defiled her. They decided to look for the Appellant and found him at Thiari's place. She asked the Appellant but he denied. Thiari said he had seen the Appellant. He asked PW1 if she was in the house where he went and she said yes. He asked PW1 what he had said and PW1 answered he had asked for pilipili but was given a match box. He asked for food but the Appellant told him his mother was coming. The next day she asked Thiari who confirmed PW1 was with the Appellant in the house. She called the Assistant Chief and Appellant's mother. They said PW2 was after money. She went and reported the incidence and was referred to Matuu hospital with PW1. She always found the Appellant at her place with PW1 and other children. The doctor confirmed to her that PW1 had been defiled.
85. PW3, Riziki Zanab the clinician specialized in reproductive health at Matuu level 4 hospital for 5 years testified and produced the P3 Form (PExt.1), Lab results (PExt.2). PW3 stated that she filled the P3 Form on 4/4/2023. It was of a 10-year child. Her clothes were not availed the day she was taken by her mother for examination. On examination, she was well groomed and oriented in time and place. Her private parts were normal but hyperaemic. It was red instead of pink, urinalysis was negative. High vaginal swab was negative, vDRL and HIV was negative. There were no tears or lacerations but the vagina was red. It was inflamed but PW3 did not know why.
86. PW4, No. 25xxx, PC Pauline, the Investigating Officer from Yatta police station testified that on 3.4.2023 she was assigned this case to investigate by the OCS. The complainant was a 10-year child. She came with her mother and brother and told her she had been defiled by Alex Muthiani. On 31st March she was going to fetch water, she met the Appellant who tricked her to his house. She took the child to Matuu level 4 hospital where she was treated and a P3 Form was filled.
87. My careful and cautious consideration of the foregoing analysis of the evidence on the alleged penetration herein raises concerns and incongruencies that are inconsistent with the truth. PW1 from her testimony did not state that she was defiled on the 31st March 2023 as was testified by her mother PW2 and the Investigating Officer PW4 and as it appears in the charge sheet.
88. Of great concern is the evidence of PW3 the clinician who stated that PW1's private parts were normal but hyperaemic. It was red instead of pink, urinalysis was negative. High vaginal swab was negative, vDRL and HIV was negative. There were no tears or lacerations but the vagina was red. It was inflamed but PW3 did not know why.
89. PW3 was categorical that she did not know why PW1's vagina was red and not pink as normal. She did not at all allude the same to have been caused by defilement. She further testified that there were no tears or lacerations but the vagina was red.
90. The trial magistrate in his judgement stated that: "the clinician corroborated the complainant's evidence since he saw proof of penetration".
91. The definition of "penetration" under Section 2 of the [Sexual Offences Act](#) which is as follows:
"The partial or complete insertion of the genital organs of a person into the genital organs of another person."
92. Following the above, I observe that there were no tears or lacerations on the complainant's vagina which according to me confirms that there was no complete or partial penetration and this rules out the element of defilement in the circumstances of this.
93. I have read the authorities cited by the Respondent on medical evidence in *George Kioji v Republic* Criminal Appeal No. 270 of 2012 and *SKM v Republic* [2021] eKLR and I find them to be distinguishable to the circumstances of this case. In those cases, the complainant stated to have been



defiled on the particular dates and there was no medical evidence that was presented before court unlike in this case where there is medical evidence.

94. On the foregoing, I find that penetration was not proved to have occurred on 31st March 2023 as alleged.

c. Identification

95. PW1 stated that the Appellant was their neighbour. She referred to him as "Wetu" stating that, that is how they called him at home. PW1 was also able to identify him by his name "Alex Muthiani". PW2 further identified the Appellant as a neighbour. It was someone the victim PW1 knew quite well and the offence happened during the day thus there was daylight and she was able to see her assailant whom she knew as their neighbour. Having found that the ingredient of penetration was not proved beyond reasonable doubt and that the charge sheet was defective, identification of the Appellant cannot be said to have been proved beyond reasonable doubt.

ii. whether the trial court failed to consider the Appellant's sworn defence.

96. In the judgement, the trial court stated that it had analysed the defence by the Appellant to see whether it brought any doubt on the State's case. In doing so, the trial court placed in mind the fact that the burden of proof does not shift to the Accused. It was always on the State. However, the Appellant did not shake the strong and credible prosecutions case herein. He mostly 9

97. On the above, I find that the trial court considered the Appellant's defence.

iii. Whether the sentence impose upon the Appellant was harsh and excessive.

98. Section 8(1) of the [Sexual Offences Act](#) which provides that:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

99. Further Section 8(2) provides that:-

"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"

100. The Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to life imprisonment. I find that that the trial court was well within the law to sentence the Appellant as it did.

iv. Whether the charge sheet was defective

101. Again, the charge sheet reads that "Alex Muthiani David on the 31st day of March 2023 at Kondo village in Yatta Sub County within Machakos County intentionally caused his penis to penetrate the vagina of PM, a child aged 10 years."

102. The lower court's finding that the Appellant committed defilement on a date different from what was indicated in the charge sheet and convicting him solely on account of the testimony of PW1 who testified that the alleged defilement took place on a different date than on the one indicated in the charge sheet. I hold that the charge sheet was substantially and fatally defective and prejudiced the Appellant who was defending the allegations of 31st March 2023 and not any other date that the trial court based the conviction and sentence. I am guided by the holding in *Idah Nziza Kikubi & Anor v Republic*



Criminal Appeal No. 30 and 31 of 2021 where Odunga J cited the case of Fappyton Mutuku Ngui v Republic [2020] eKLR in which the Court held that a charge sheet should specify the offence in a clear and ambiguous manner and should be accurate since technical defects would entitle an accused to acquittal upon appeal.

Disposition

103. In view of the foregoing, I find that there was no sufficient evidence for convicting the Appellant for the offence of defilement herein therefore:
- a. The appeal herein is upheld. The conviction of the Appellant is hereby quashed and the life sentence imposed on him set aside.
 - b. The Appellant is set at liberty forthwith unless otherwise lawfully held.
 - c. Orders accordingly. File closed.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 22ND OCTOBER 2025.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 22ND OCTOBER 2025

In the presence of:

Ms. Odhiambo hb for Mr. Omburo..... for Appellant

Ms. Agatha..... for Respondent

Milly..... Court Assistant

