



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khaliabusa v Republic (Criminal Appeal E063 of 2021)  
[2026] KECA 190 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 190 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E063 OF 2021  
DK MUSINGA, PO KIAGE & GV ODUNGA, JJA  
JANUARY 30, 2026**

**BETWEEN**

**CHRISANTUS ODUOR KHALIABUSA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (D. S. Majanja, J.) dated and delivered on 15th November 2017 in Criminal Appeal No. 82 of 2014)*

**JUDGMENT**

1. This is a second appeal from the original conviction and sentence of the appellant by the Chief Magistrates' Court at Busia in *Criminal Case No. 108 of 2018*. 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*. The particulars of the offence were that on 21<sup>st</sup> September 2018 at [Particulars Withheld] Sirekesi sub-location of Busia County, he caused his penis to penetrate the vagina of a girl child, AK, aged 11 years. The appellant was sentenced to life imprisonment. Being dissatisfied by the conviction and sentence, he preferred an appeal to the High Court of Kenya at Busia, but the appeal was unsuccessful. Undeterred the appellant preferred this second appeal.
2. In a second appeal the jurisdiction of this Court is limited to a consideration of matters of law only as required under section 361 of the *Criminal Procedure Code*.
3. The brief facts of the case as narrated by the prosecution witnesses were as follows: PW 1, the complainant, testified that on 17<sup>th</sup> September 2018 at about 2.00 pm she was playing outside their home when the appellant, who she knew, appeared, grabbed her and took her to her grandmother's house, undressed her and placed her on a chair, then inserted his penis into vagina. She screamed and neighbours responded, chased and apprehended the appellant and brought him back to her grandmother's home. At the material time her grandmother, PW 2, was bathing.



4. The complainant's grandmother testified that on 21<sup>st</sup> September 2018 at about 2.00 pm the appellant, who she also knew, found her seated outside her house and joined her for a short while before he left. PW 2 went into the bathroom and while bathing she heard PW 1 screaming. She dressed up quickly and dashed out, only to see the appellant fleeing from her house. She screamed for help and neighbours responded. She also realized that her granddaughter was bleeding from her vagina. PW 1 was taken to Nangina dispensary on 21<sup>st</sup> September 2018 where she was examined by Edwin Imoo, PW 5, a clinical officer. According to the P3 form that was produced by PW 5, the complainant had dry whitish discharge on the labia majora; a tear on the vaginal fornix; bruises on the labia majora, torn hymen and bruised vaginal wall which was hyperemic. The witness said that from the examination there was no dispute that the complainant had been defiled.
5. The evidence of PW 5 was corroborated by Collins Oriama Kapadet, PW 4 and James Wandera, PW 7.
6. PC Immaculate Ogutu, PW 6, who was based at Funyula Police Station, testified that on the afternoon of 21<sup>st</sup> September 2018 she was asked by the Officer Commanding Station to investigate the defilement case. She conducted investigations and recorded statements of all the relevant witnesses. The complainant's grandmother gave her the child's birth certificate which showed that she was born on 3<sup>rd</sup> July 2007.
7. In his defence, the appellant stated that on 21<sup>st</sup> September 2018 he went to the house of PW 2's son to take some alcohol in the company of some other people. On his way home he stopped at the house of PW 2 to ask for some drinking water, which was served upon him by PW 1. Thereafter as he proceeded to his home he met some people who apprehended him and took him back to PW 2's home, and together with PW 1 and PW 2, they proceeded to a police station, where he was locked up and eventually charged for an offence which he never committed.
8. In his appeal before this Court, the appellant, who was unrepresented, raises several grounds of appeal which may be summarized as follows: that the ingredients of the offence of defilement were not established; that the prosecution evidence was incredible; that he was not accorded a fair trial as enshrined under Article 50 (2) of the Constitution; and that the mandatory nature of the life sentence that was imposed by the trial court and affirmed by the first appellate court is unconstitutional.
9. When the appeal came up for hearing on 4<sup>th</sup> September 2025, the appellant entirely relied on his written submissions. The respondent was represented by Ms. Mutellah, Assistant Director of Public Prosecutions, who also relied on the respondent's written submissions, albeit with minimal oral highlight of the same.
10. In his written submissions, the appellant first argued that the ingredients of the offence of defilement were not established. He cited section 8 (1) of the Sexual Offences Act which defines defilement in the following terms:

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

The appellant submitted that an offence of defilement is established only when the prosecution proves that there was penetration of the complainant's genitalia; that the accused was the perpetrator; and that the age of the victim is below 18 years. In his view the evidence of PW 1 and PW 5 did not prove that there was any penetration.
11. Secondly, the appellant submitted that there was no conclusive evidence of the age of the minor in that no age assessment was done and there was no satisfactory documentary evidence as to her age.



12. Regarding credibility of the prosecution evidence, PW 1 submitted that the complainant alleged that the offence took place on 17<sup>th</sup> September 2018, which is contrary to the date stated on the charge sheet. He further submitted that although PW 1 testified that she was placed on a chair where she was defiled, no blood was observed on the alleged chair. The appellant further discredited the evidence of PW 2, saying that it was not possible for her to recognize the person that she saw running away from the scene as she only saw his back. Regarding his arrest, the appellant alleged that he was arrested simply because he was seen coming from the home of PW 2 where he had gone to imbibe a local brew.
13. Regarding breach of the constitutional right to a fair trial under Article 50, the appellant submitted that he was not furnished with all the necessary documentary material like witness statements, investigation diary and exhibit memo before the commencement of the trial.
14. On the last ground of appeal regarding sentence, the appellant submitted that the provisions of section 8 (2) of the Sexual Offences Act do not grant courts liberty to exercise any discretion because they prescribe a mandatory sentence of life imprisonment. He cited this Court's decision in *Odonde v Republic* (Criminal Appeal No. 293 of 2019) [2025] KECA 201 (KLR) (7<sup>th</sup> February 2025) Judgment.
15. For those reasons he urged us to allow the appeal.
16. On the part of the respondent, it was submitted that all the ingredient of the offence of defilement were well proved. Counsel cited this Court's decision in *Shitula v Republic* 2025 KECA 12 (KLR) where it was held that:

“the main ingredient of the offence of defilement are, proof that the victim is a minor; that there was penetration of the victim's genital organs with the genital organ of another person, and that the accused person was the person who penetrated the victim's genital organs. For the purpose of the penal section under section 8 (3) of the *Sexual Offences Act* there must be proof that the age of the victim fell between 12 and 15 years.”
17. It was submitted that the complainant's age was proved through a birth certificate and medical records. The birth certificate indicated that the complainant was born on 3<sup>rd</sup> July 2007, and the offence was committed on 21<sup>st</sup> September 2018, meaning that the child was just about 11 years at the time of the commission of the offence.
18. Regarding penetration, the respondent submitted that the evidence of the child and that of PW 4, PW 5 and PW 7 was conclusive that there was penetration of the complainant's genitalia. Further, the evidence of PW 1 and PW 2 also revealed that the appellant was the person who penetrated the complainant's genitalia.
19. On grounds three and four, the respondent submitted that the prosecution evidence was credible, and that any contradictions as to dates or other facts were minor and inconsequential. The issue of alleged breach of the appellant's constitutional right to a fair trial was not raised, either before the trial court or the first appellate court, and therefore cannot be raised before this Court.
20. As regards the sentence to life imprisonment, the respondent submitted that it was in accordance with section 8 (2) of the *Sexual Offences Act* where the victim is under 11 years. The respondent added that the Supreme Court in *Francis Karioko Muatetu & Another v Republic* [2017] eKLR clarified by way of the Guidelines pronounced in 2021 that the decision applies only to murder cases.
21. On those submissions, we were urged to dismiss the appeal in its entirety.



22. We have considered the record of appeal as well as the submissions by the appellant and the respondent. The appellant's first ground of appeal relates to the ingredients of the offence of defilement. We agree with both the appellant and the respondent regarding the ingredients as set out in various decision of this Court, including *Shitula v Republic* (supra). In our view, there is no dispute that PW 1 was a minor and that there was penetration into her vagina. As per the charge sheet, the appellant was charged under section 8
- (1) as read with section 8 (2) of the *Sexual Offences Act*. Section 8
  - (2) stipulates that: "A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life." It was therefore necessary to prove that the complainant was 11 years or less. The birth certificate that was produced showed that the complainant was born on 3<sup>rd</sup> July 2007, which implies that as at 21<sup>st</sup> September 2018 she was 11 years and 2 months or thereabout. We shall return to the issue of the complainant's age later on.
23. As to who defiled the complainant, we do not entertain any doubt that it was the appellant. PW 1 knew the appellant and she was able to recognize him when he grabbed her in broad day light outside her grandmother's house, and proceeded to undress and defile her. Equally, PW 2 had seen the appellant, (whom she also knew) shortly before the incident, and when she came out of the bathroom in response to the screams of PW 1, she saw the appellant running away. This was in broad day light and she was able to recognize him, even if she saw his back, having been with him just a few minutes earlier.
24. Regarding the credibility of the evidence that was tendered by prosecution witnesses, we are satisfied that all the witnesses gave true and credible evidence. The charge sheet indicated that the offence was committed on 21<sup>st</sup> September 2018 and that is the same day that PW 1 was examined at Nangina dispensary and is also the same date that the matter was reported to the police. However, PW 1 said that apart from the defilement that occurred on that particular day, the appellant had also defiled her earlier on 17<sup>th</sup> September 2018. However, the charge that the appellant faced was not in respect of the alleged earlier defilement. Apart from that, we find no other inconsistencies as to the date of commission of the offence.
25. Turning to the alleged violation of the appellant's rights under Article 50 of the Constitution, contrary to the respondent's submission that that ground was not raised either before the trial court or the High Court, a perusal of the appellant's Petition of Appeal that was filed on his behalf by N. K. Nambulindo & Company Advocates, we note that the first ground alleged that "the appellant was not afforded a fair hearing as enshrined in the Constitution 2010." During the hearing of the first appeal by the High Court, the appellant's advocate as well as the respondent's representative indicated that they will rely on their written submissions, but the submissions are not contained in the record of appeal before us.
26. In the impugned High Court judgment, all that was stated by the learned judge regarding the alleged breach is as follows:
- "7. Article 50 of the *Constitution* of Kenya provides for fair hearing. Other than stating that the appellant was not accorded a fair trial, it was not demonstrated in what instances this right was breached. My perusal of the record does not reveal any instance when the appellant was denied a fair hearing. This ground is therefore baseless."



27. In the appellant's submissions before this Court with regard to the alleged breach of his rights to fair hearing, the appellant states as follows:

“The appellant's mitigation was unlawfully ignored. The appellant was not furnished with all the documentary evidence like all witness statements, investigation diary and exhibit memo which was to be used against him before the onset of case.”

We think the issue of mitigation having been disregarded by the first appellate court is improperly raised under this ground. We shall however deal with it at a later stage, but as regards the alleged failure by the prosecution to provide the appellant with the various documents that he stated, this issue was not raised before the trial court and was not properly canvassed before the first appellate court. Whether the documents were availed or not is a question of fact, which is not for our consideration in a second appeal, but the effect of failure to do so, (if at all), is an issue of law which we would have dealt with had it been demonstrated that the said documents were not availed to the appellant. However, the appellant was represented by an advocate in the High Court, and if the said documents had not been availed to the appellant or his advocate, the appellant's advocate ought to have raised the complaint at the earliest opportunity. Having perused the proceedings, it is evident that the appellant and his advocate participated fully in the trial, and we do not think that they were prejudiced in any way by the alleged non-production of the documents referred to, if at all. We therefore dismiss this ground of appeal.

28. Lastly, on the issue of sentence, we wish to reiterate that in cases of defilement the exact age of the victim must be proved because sentence is based on the age of the victim. In *Hadson Ali Mwachongo v Republic* 2016 KECA 521 this Court held:

“the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gain said. 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.”

29. We have already established that PW 1 was older than 11 years, and so the appellant could not be sentenced to the term prescribed under section 8 (2) of the *Sexual Offences Act*. There is a lacuna in the law as regards sentence of a person who defiles a child aged between 11 and 12 years because section 8 (3) of the *Sexual Offences Act* states as follows:

“(3) a person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.”

30. Considering that PW 1 was 11 years and two months or there about, it was improper in law for the trial court to sentence the appellant to imprisonment for life as prescribed under section 8 (2) of the Act. We are therefore inclined to interfere with the sentence that was passed by the trial court and affirmed by the first appellate court. We set aside the appellant's sentence to imprisonment for life and substitute therefor imprisonment for a term of 20 years. The sentence shall run from 21<sup>st</sup> September 2018 when the appellant was put in custody. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**D. K. MUSINGA, (PRESIDENT)**



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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

