



**Kiptoo v Republic (Criminal Appeal E055 of 2024)
[2026] KEHC 1118 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E055 OF 2024
RN NYAKUNDI, J
FEBRUARY 5, 2026**

BETWEEN

SAMWEL KIPKORIR KIPTOO APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the Judgment of Hon. H. Barasa, delivered on 12/03/2019
in Eldoret Chief Magistrate's Court Criminal Case (SO) No. 22 of 2018)*

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#), 2006. The particulars were that on the 26th day of January 2018 at [Particulars Withheld] within Elgeyo Marakwet County, he unlawfully caused his penis to penetrate the vagina of HJK, a girl aged 5 years. The Appellant was also charged with the alternative 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 were that on the same date, time and place, he unlawfully and indecently caused his penis to come into contact with the vagina of the same girl aged 5 years.
2. The Appellant pleaded not guilty to the charges, and the case proceeded to full trial, in which the Prosecution called 8 witnesses. At the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. He opted to keep silent and left it to the court to make a decision. By the Judgment delivered on 12/03/2019, he was convicted on the main charge, and sentenced to life imprisonment.
3. Dissatisfied with the decision, the Appellant, through Messrs Tarigo Kiptoo & Co. Advocates, filed this Appeal on 18/10/2024 against both conviction and sentence. He listed the following 7 grounds that:
 - i. The Learned trial Magistrate erred both in law and fact by convicting (me) to a manifestly excessive sentence in the circumstances not sufficiently proved.



- ii. The Learned trial Magistrate erred in convicting (me) whereas the prosecution failed to adduce critical witnesses in their case.
 - iii. The Learned trial Magistrate erred in law and fact when he convicted (me) against the weight of the charges meted against me.
 - iv. The Learned trial Magistrate erred in law in convicting (me) whereas my right to a fair trial were violated.
 - v. The trial Magistrate convicted (me) whereas the prosecution did not establish that penetration was proved beyond reasonable doubt.
4. I will now recount the testimonies and/or evidence of the witnesses before the trial Court.
 5. PW1 was CCK the mother to the minor victim HC who stated that the minor was aged five years and was born on 31/10/2013 as per the child health monitoring book she produced in court. She stated that on 26/01/2018 she had gone to look for firewood and came back at 12.00 and started preparing lunch. Her children were playing outside and the appellant told her to allow him to go with HC to buy mandazi. She allowed it and when the other children came back, they told her they had seen the appellant with HC at the center. On her way to look for her she met the minor with mandazi and she said she wanted to urinate on the way home. She told her she was feeling pain when urinating and when she asked her what the matter was she told her she had been touched on her vagina by the appellant. When she checked, she saw sperm like fluid on her thighs and vagina.
 6. She took the minor to the dispensary where the doctor examined her and determined that she had been defiled. On Monday the appellant was arrested and she took the child to MTRH on Tuesday where she was further examined and treated. The doctor filled a P3 form which she produced in court. She stated that the appellant was her neighbour.
 7. PW2 was the minor complainant and upon conducting a voire dire the court established that she was competent to give sworn statement. She stated that she knew the appellant and that he took her to an abandoned house, removed her pant and spat on her in her crouch area. He then put his hand on the thing she used to urinate and put the thing he uses to urinate into hers. She stated that she felt pain when he did that then he took her and bought her mandazi.
 8. PW3 was a minor, KK who the court determined was competent to give sworn evidence after conducting a voire dire. He stated that on the material date he saw the appellant and the victim at the shopping center. He tried to call HC to go home with him but she refused and when he told home he told her mother what he had seen.
 9. PW4 was DKK, a minor who the court determined was competent to give sworn evidence after conducting a voire dire. He stated that on the material date he saw the appellant and the minor at the shopping center and that they were outside Chepkorir's house. He asked her where they were going and the victim said they were going to buy mandazis. He then went back home.
 10. PW5 was Felix Kimutai, a neighbour who did not witness the incident but he helped apprehend the appellant.
 11. PW6 was Mathew Koskei, a village elder who was also informed of the incident and upon apprehending the appellant, he admitted he had committed the offence and asked for time to seek forgiveness.



12. PW7 was PC Sophia Ramadhan who testified that she received the appellant when he was arrested by the members of the public and recorded statements. She took the child to hospital and issued the P3 form. She then charged the appellant.
13. PW8 was Dr. Taban Lilian Tokosan who produced the P3 form filled by Dr. Temet. She stated that the child was examined by the doctor and on examination, she observed that the child had a fresh hymeneal tear at position 3 and 9 O'clock and had redness of the hymen and vestibule. Her findings were that the injuries were consistent with defilement.
14. As aforesaid, at the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. The Appellant opted to maintain silence and accordingly, he was convicted of the main charge and sentenced to life imprisonment.
15. The Appeal was canvassed by way of written Submissions. Both parties' Submissions are dated 3/06/2025.

Appellant's Submissions

16. The Appellant filed hand written submissions. He stated that he was accorded an unfair trial as he was not made aware that he required legal representation during the trial which was in contravention of article 50 of *the constitution* of Kenya. Further, that the witnesses' testimonies and the evidence were not sufficient to meet the burden of proof and therefore the trial court erred in convicting him. He reproduced the evidence of the doctor and urged that the birth certificate produced was unstamped. That the court did not consider the variance of the age of the victim and reiterated that the prosecution failed to prove that he committed the offence of defilement. He urged that there was a contradiction on the alleged time of the offence and that the evidence was contradictory to the medical report and other documentary evidence.
17. On sentence, he urged that the sentence meted out was in contravention of the principles on sentencing and further, that given his age, it was a violation of his human rights that he was sentenced to life imprisonment.
18. The appellant faulted the evidence on identification, stating that the fact that the complainants and witnesses were known to him made the evidence impure and unreliable. He reiterated that the investigation was poor and urged the court to allow the appeal.

Respondent's Submissions

19. On his part, Prosecution Counsel Mr. Mugun, laid down the background of the case and urged that the court proved the offence to the required standard.
20. Counsel urged that this being a case of defilement, the key ingredients of which were defined in *Dominic Kibet Mwarena v Republic* [2013] eKLR. On Proof of penetration counsel submitted that a P3 Form was produced as Exhibit 2 and shows that the complainant had fresh hymeneal tears at positions 3 and 9 o'clock. She also had erythematous (reddened) vestibule, oedematous and erythematous hymen and tenderness on the perineum. These findings were confirmed by the doctor who testified as PW8 on page 51 para 5-6 of the record of appeal.
21. On identification of the accused. Counsel urged that the complainant testified that the person who put his genital organ in hers was the Appellant. The Appellant was a neighbour to the complainant's family. That PW1 the complainant's mother confirmed this. The complainant's brother (PW3) also confirmed this. He submitted that this is an issue of recognition and not identification of a stranger.



Regarding the evidence of recognition, he placed reliance on the decision of the Court of Appeal has previously stated in the case of *Anjononi & Others v Republic* [1976-1980]. He pointed out that at no point in the cross-examination of any of these witnesses, did the Appellant cast doubt that he was not a neighbour of the complainants.

22. On the failure to produce a crucial witness, counsel urged that there is no legal provision that the prosecution should call a particular number of witnesses. This is explicitly provided under section 143 of the *Evidence Act* which provides that “no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any act.” What matters is that the prosecution calls a number of witnesses that is sufficient to establish their case, which requirement the prosecution duly complied with. In fact, we dare say that the prosecution could have dispensed with the attendance of several witnesses whose testimony had little probative value.
23. On the right to a fair trial, counsel urged that it is not easy to discern what the Appellant meant by this in ground no 4 of the petition of appeal. Because the trial was conducted in Keiyo language and the Appellant actively participated by cross-examining the witnesses, we can only speculate that he is cross that he did not testify. It is noted that the rights of the Appellant under section 211 were explained to him in Keiyo language. He responded, “I choose to remain silent. I leave it to court to give its judgement.” It was well within the Appellant’s rights to elect not to testify. Compelling him would have infringed Article 50(2)(i) of *the Constitution*. The requirement under section 211 CPC is for the court to re-inform the accused of the charge and inform him of the option he has in giving his defence, should he elect to. The court fully complied with this requirement. The accused made his bed, he must then lie on it.
24. On sentence, counsel urged that there are various decisions on sentences under the *Sexual Offences Act*. He cited the decision of the Court of Appeal in the case of *Athanas Lijodi v Republic* [2021] eKLR ; *Onesmus Safari Ngao v Republic* [2021] KECA 154 (KLR) and *John Bundi Koome v Republic* [2022] KECA1965(KLR) and *Hassan Mutwiri v Republic* [2022] KECA 47i(KLR). Counsel also cited *Joshua Gichuki Mwangi v Republic* [2022] KECA 1106 (KLR) and urged the court not to disturb the sentence.

Determination

25. As a first appellate forum, 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).
26. The issues that arise for determination in this matter are evidently the following:
 - 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.
27. 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 (see the case of *George Opondo Olunga v Republic* [2016] eKLR), and also the case of *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013.
28. In a charge of defilement, the age of the victim is important for two reasons:
 - (i) defilement is a sexual offence against a child; and
 - (ii) age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence. In this case, the minor’s



child monitoring certificate produced in evidence indicates that she was born on 31/10/2013. There being no contrary evidence, and the alleged offence having reportedly been committed on 08/01/2018, it was established that the minor was indeed, at the material time, about 4 years and 3 months years in age, thus within the category of “a child aged eleven years or less” stipulated in Section 8(2) of the *Sexual Offences Act*.

29. In respect to “penetration”, Section 2(1) of the *Sexual Offences Act* defines the term as:

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

30. In this case, medical evidence was provided by PW8, Dr. Taban, who testified that the minor told the doctor who examined her, Dr. Temet who testified that according to the report, on examination, the child had a fresh hymeneal tear at 9 O'clock and had redness of the hymen and vestibule. She concluded that the injuries were consistent with defilement. She also confirmed that there was evidence of penetrate.

31. The minor testified further that the Appellant inserted his penis into her vagina and in the process and pointed at her private parts. And stated that she felt a lot of pain. On the basis of her testimony and the contents of the medical report and P3 form it was clear that she had been defiled.

32. 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”.

33. In this case, there is no dispute that the Appellant is known to the minor, and her mother who allowed him to go with him to the center. The minor’s identification evidence is therefore one of recognition, rather than that of a stranger. In respect to this nature of identification and its reliability, the Court of Appeal, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, stated that:

“..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

34. Additionally, the witnesses corroborated the sequence of events and were consistent. It was clear that he took her to the center and bought her mandazi as he was seen by various witnesses. It follows that the identification was proper and corroborated.

35. Regarding the allegation of contradictions and inconsistencies in the Prosecution witnesses’ testimonies, it has also not been demonstrated that there were any serious contradictions that could create doubt on the credibility of the Prosecution witnesses. I have found none. In respect to slight



contradiction and excusable inconsistencies in testimonies, the Court of Appeal, in the case of Philip Nzaka Watu v Republic [2016] eKLR guided that:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in 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.

In *Dickson Elai Nsamba Shapwata & Another v The Republic*, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

36. The Appellant contended that the prosecution did not call crucial witnesses. Section 143 of the *Evidence Act* provides that

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”

37. The Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR stated :-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

38. The upshot of the foregoing is that the prosecution has the discretion in deciding the witnesses to call and as a result the same cannot be a ground for appeal. The witnesses produced were sufficient and provided cogent credible evidence.

39. On the second issue, sentence, the applicable principles in re-considering sentence on appeal, were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

“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 stated is shown to exist”.



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

“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.”

41. Section 8(2) therefore prescribes only one mandatory sentence – life imprisonment. In view thereof, it is clear that the sentence imposed by the trial Court, although the maximum stipulated, was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged, and that Courts should retain the discretion to depart from such mandatory sentences, where justified. This was stated in the Supreme Court case of Francis Karioko Muruatetu and Another v Republic [2017] eKLR.

42. By the subsequent clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. The Supreme Court reiterated and restated these directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), in which the Supreme Court set aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside a mandatory minimum sentence of 20 years imprisonment imposed on the Appellant.

43. The upshot of the foregoing is that the appeal fails in its entirety and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 5TH DAY OF FEBRUARY 2026

.....

R. NYAKUNDI

JUDGE

