



**Kimani alias Wamiti v Republic (Criminal Appeal 16 of 2023)
[2026] KEHC 2024 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 16 OF 2023
H NAMISI, J
FEBRUARY 20, 2026**

BETWEEN

JERALD KAMWARO KIMANI ALIAS WAMITI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against sentence of twenty (20) years imprisonment for the offence of defilement by the Senior Resident Magistrate's Court at Ruiru, Hon. C.K. Kisiangani dated 1st July 2022)

JUDGMENT

1. The present matter comes before this Court as a first appeal challenging the judgment and sentence of the Senior Principal Magistrate's Court at Ruiru, delivered on 1 July 2022. The Appellant was arraigned before the trial court on 23 February 2021, facing a primary charge of Defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#).
2. The particulars of the primary charge alleged that 19 February 2021, at Gatongora Location within Ruiru Sub-County in Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of N.W., a female child aged four (4) years. In the alternative, the Appellant was charged with committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the alternative charge alleged that on the same date and at the same locale, the Appellant intentionally and unlawfully touched the vagina of the said minor using his penis.
3. The Appellant pleaded not guilty to the charges, prompting a full trial. The prosecution called a total of 7 witnesses to discharge its evidentiary burden. Upon the close of the prosecution's case, the trial court found that the Appellant had a prima facie case to answer and placed him on his defence. The Appellant elected to give unsworn testimony and called no witnesses. Ultimately, the trial court found the prosecution's evidence compelling and proved beyond a reasonable doubt. The learned trial Magistrate convicted the Appellant on the primary charge of defilement and sentenced him to serve



twenty (20) years of imprisonment. Having made a finding on the main charge, the trial court elected not to comment on the alternative charge.

4. Aggrieved by both the conviction and the sentence, the Appellant lodged this appeal, initially as an appeal against sentence only, but subsequently amended to challenge both the conviction and the sentence on matters of law and fact. Conversely, the State filed a Notice of Enhancement of Sentence, urging this Court to substitute the twenty-year sentence with a mandatory sentence of life imprisonment pursuant to section 8(2) of the [Sexual Offences Act](#), given that the victim was a minor aged 11 years or less at the time of the offence.

Brief Background

5. The prosecution's case was anchored on oral testimonies, medical evidence, and police investigative reports. PW1, the victim, testified as a child of tender years. She testified that the Appellant took her to his house and inserted his fingers between her legs around the vaginal area. PW1 confirmed reporting the incident to her mother upon returning home.
6. PW2, the victim's brother, was an 11-year-old minor left in charge of the victim while their mother went to the clinic. He testified that the victim left to use the outside toilet but did not return. He searched the plot and eventually saw the victim exiting the Appellant's house. When he questioned the victim, she confirmed that she was coming from the Appellant's house.
7. PW3, the victim's father, returned from work at midnight to find the victim sleeping abnormally with her legs raised. He was informed by his wife and PW2 about the incident involving the Appellant. When he examined the minor's genitalia, he observed a discharge. PW3 reported the matter to the Police, sought medical care for the child and later participated in a citizen's arrest of the Appellant.
8. PW4, the victim's mother, returned from the clinic at around 2pm to find the child sleeping abnormally. She was informed by PW2 that the minor had been seen at the Appellant's house. PW4 testified that the minor disclosed that the Appellant locked her in his house, inserted a "black thing" in her genitalia, and poured a cold substance on her. The witness confirmed checking the genitalia and finding a discharge.
9. PW5, a clinical officer, produced the P3Form, Post Rape Care (PRC) Form and treatment notes from Ruiru sub-county Hospital. PW5 testified that the examination revealed an inflamed labia minora and majora, a partially broken and reddish hymen and a foul-smelling discharge. The witness confirmed that the findings were consistent with penetration.
10. PW6 was the arresting Officer attached to Ruiru Police Station. He testified that he received a distress call from PW3, proceeded to Gatongora Police Post and escorted the Appellant to the station after he was apprehended by neighbors.
11. PW7 was the Investigating Officer. He confirmed the recording of the complaint, the issuance of the medical documents and the visiting of the crime scene. PW7 noted that the Appellant lived in house number 1 while the complainant lived in house 3 or 4. PW7 confirmed the minor pointed out the specific seat in the Appellant's house where the assault had occurred.
12. When placed on his defence, the Appellant gave unsworn evidence and vehemently denied the charges. He raised a defence of alibi, asserting that at the time of the alleged incident, he was completely absent from the vicinity of the crime scene.
13. The Appellant testified that he was unemployed and struggling to pay his house rent. Consequently, he had vacated the residential plot to search for his estranged wife, remaining away for 4 days. He



claimed that upon his return to the plot, he encountered an angry caretaker who accused him of absconding without paying rent and damaging the rental unit. A verbal altercation ensued, which attracted neighbours, including the complainant's parents (PW3 and PW4).

14. According to the Appellant's testimony, PW4 owed him a debt of Kshs 1,500/=. He alleged that he demanded repayment of this debt so that he could settle his rent arrears. Suddenly, the landlady arrived in the company of police officers, and he was handcuffed. He averred that the charges of defilement were maliciously fabricated by the complainant's family and the landlord to avoid repaying the debt and to force him to repair the damaged roof of the rental house.

The Appeal

15. Through a Memorandum of Appeal and detailed written submissions filed by his legal representatives, the Appellant challenges the trial court's judgment on three principal grounds:
- i. That the learned trial Magistrate erred in both law and facts by holding that the evidence of the prosecution was watertight yet failed to find that the charge of defilement was not supported by the evidence of the prosecution but went ahead to convict the Appellant on the different facts of the case;
 - ii. That the learned trial Magistrate is faulted for failing to subject the medical evidence exhaustively in relation to whether it was penile penetration or sexual assault;
 - iii. That the learned trial Magistrate erred in law and facts by not exhaustively appreciating the defence case which was credible from the prosecution case hence the failure occasioned a miscarriage of justice.
16. On the first ground, the Appellant asserts that the learned trial Magistrate erred in law and fact by convicting him of defilement under section 8(1) of the [Sexual Offences Act](#) when the prosecution's evidence fundamentally contradicted the particulars of the charge. The Appellant argues that the charge sheet explicitly particularized penile penetration, stating that he caused his penis to penetrate the vagina. However, the prosecution's primary evidence, specifically the testimony of the complainant (PW1) and the corroborating hearsay evidence of her father (PW3), established that the assailant inserted his fingers into her genitalia. Relying on the statutory definitions provided in section 2 of the [Sexual Offences Act](#), the Appellant contends that a finger cannot legally be construed as a genital organ. Therefore, the element of penetration required for the specific offence of defilement was entirely unproven. Citing section 134 and section 214 of the Criminal Procedure Code, the Appellant argues that this misdescription in the particulars misled the defence, rendering the charge defective and the subsequent conviction a nullity. He relies on the persuasive authority of *Yongo v Republic* (1983) KLR 324 and *State of Uganda v Wagara* (1964) E.A. 366 to argue that the prosecution is strictly bound by the particulars in the charge sheet.
17. On the second ground, the Appellant challenges the medical evidence adduced by PW5, the Clinical Officer. He argues that the medical examination occurred days after the alleged incident, and the finding of a foul-smelling discharge could have numerous biological causes unrelated to sexual violence. He further contests the medical conclusion that partial penetration occurred, arguing that some females are biologically born without a hymen, and inflamed genitalia is insufficient to conclusively prove penile penetration. Relying on *Mutie Musauli v Republic* (2019) and *Omari Ismael Mazzha v Republic* eKLR, the Appellant submits that contradictory or inconclusive medical evidence regarding penetration must be resolved in favour of the Accused, as the prosecution bears the burden of proving penetration beyond a shadow of a doubt.



18. On the third ground, the Appellant forcefully contends that the trial magistrate abdicated their judicial duty by failing to adequately analyze and evaluate his alibi defence alongside the prosecution's case. He notes that the trial judgment merely summarized his defence without providing reasons for discarding it. The Appellant submits that his alibi was plausible and untested by the prosecution. Relying on the binding precedents of *Kiarie v Republic* KLR 739 and *Osiwa v Republic* KLR 469, the Appellant argues that an accused person who pleads an alibi assumes no burden to prove it; the evidential burden rests squarely on the prosecution to dislodge the alibi by placing the accused at the scene of the crime. He submits that the prosecution's failure to rebut the alibi occasioned a gross miscarriage of justice.
19. The Respondent vehemently opposes the appeal, submitting that the prosecution discharged its burden of proof to the requisite standard. The Respondent asserts that the trial court correctly identified and applied the essential ingredients of defilement as enumerated in *Kyalo Kioko v Republic* eKLR and *Charles Wamukoya Karani v Republic*: namely, the age of the complainant, proof of penetration, and positive identification of the assailant.
20. The Respondent submits that the age of the minor (4-5 years) was conclusively proven via the age assessment report (PEXh 5a), aligning with the jurisprudence in *Mwalango Chichoro Mwanjembe v Republic* eKLR. On the issue of penetration, the Respondent relies on *Mark Oiruri Mose v Republic* eKLR to argue that penetration need not be deep, and the absence of spermatozoa is immaterial. The Respondent contends that the ocular evidence of PW1, coupled with the medical findings of a broken hymen and inflamed labia by PW5, conclusively established penetration. Regarding identification, the Respondent submits that the Appellant was well-known to the victim and the witnesses, ruling out any possibility of mistaken identity.
21. Crucially, the Respondent argues that the 20-year sentence imposed by the trial court was overly lenient and fundamentally illegal. Relying on section 8(2) of the *Sexual Offences Act*, the Respondent points out that the statute prescribes a mandatory sentence of life imprisonment for the defilement of a child aged 11 years or less. Guided by the recent Supreme Court decision in *Republic v Joshua Gichuki Mwangi* (Petition No. E018 of 2023), the Respondent argues that mandatory minimum sentences under the *Sexual Offences Act* are constitutional and binding upon trial courts. Consequently, the Respondent urges this Court to dismiss the appeal against conviction, uphold the trial court's findings, and enhance the sentence to life imprisonment.

Analysis & Determination

22. The jurisdiction of this Court is invoked under section 347 of the Criminal Procedure Code, which permits an appeal to the High Court by a person convicted on a trial held by a subordinate court.
23. As a first appellate court, the legal parameters dictating the scope of review are well settled. This Court is not a mere reviewing body evaluating the trial court's decision for superficial errors; rather, it is mandated to conduct a comprehensive de novo re-evaluation, re-assessment, and re-analysis of the entire evidentiary record adduced at trial. The objective is to reach an independent conclusion on the guilt or innocence of the Appellant, ensuring that the conviction is intrinsically safe and supported by the weight of the evidence.
24. This sacred duty was profoundly articulated by the predecessor of the current Court of Appeal in the locus classicus of *Okeno v Republic* EA 32, where it was held that:

“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."

25. This principle has been consistently reaffirmed in subsequent decisions, including *Pandya v R EA 336* and *Wathiaka & Another v Republic KLR 1*. However, while exercising this expansive mandate, the appellate court must constantly bear in mind that it did not have the distinct advantage of seeing or hearing the witnesses testify. Therefore, the appellate court must make due allowance for the trial magistrate's superior position in observing the demeanour, hesitation, or candour of the witnesses. An appellate court will generally hesitate to interfere with findings of fact based purely on witness credibility unless it is apparent that the trial court failed to account for particular circumstances or probabilities, or if the impression based on demeanour is inconsistent with the rest of the evidence.
26. Guided by these immutable principles, and having carefully read the trial court record, the Petition of Appeal, and the rival submissions, this Court isolates 4 core issues for determination:
 - i. Whether the trial court failed in its duty to evaluate the Appellant's alibi defence, and whether the visual identification/recognition of the Appellant was free from the possibility of error.
 - ii. Whether the prosecution proved the element of penetration as strictly defined under the *Sexual Offences Act*;
 - iii. If a variance exists, whether the law permits a substitution of the conviction from Defilement to a minor and cognate offence under Section 179 of the Criminal Procedure Code;
 - iv. Whether the sentence imposed by the trial court is legal and proportionate, and whether the State's Notice of Enhancement of Sentence is merited;

Visual Identification, Recognition, and the Evaluation of the Alibi Defence

27. The Appellant aggressively faults the trial court for failing to interrogate his alibi defence. A perusal of the judgment reveals that the learned Magistrate dedicated merely a single paragraph to summarize the Appellant's defence—noting his claim of absence and the subsequent dispute over rent and a Kshs 1,500/= debt—and then abruptly concluded that the prosecution has established its case beyond reasonable doubt and that the prosecution evidence was unchallenged.
28. The Appellant is legally correct in asserting that the trial Magistrate breached a procedural duty by failing to explicitly test the alibi against the prosecution's evidence in the written judgment. The jurisprudence surrounding the defence of an alibi is unequivocal. An alibi is a specific defence asserting that the accused was in a different place at the time the offence was committed, making it physically impossible for them to be the perpetrator.
29. The burden of proving the falsity of an alibi rests entirely on the prosecution. The accused person assumes no burden whatsoever to prove the alibi. In the seminal case of *Kiarie v Republic KLR 739*, the Court of Appeal emphatically stated:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."
30. This position was reiterated in *Osiwa v Republic [1989] KLR 469*, where the Court of Appeal held that a trial court errs in law if it ignores an alibi or shifts the burden of proof to the accused. Furthermore, an unsworn alibi statement, though lacking the full evidential weight of sworn testimony



subjected to cross-examination, must still be evaluated and cannot be summarily dismissed without providing reasons.

31. However, as a first appellate court conducting a de novo review, the trial Magistrate's failure to articulate this analysis does not automatically render the conviction a nullity. If the prosecution's evidence, upon fresh re-evaluation, completely destroys the alibi, the conviction remains safe. The destruction of an alibi is inherently tied to the strength of visual identification or recognition. If the prosecution firmly and positively places the accused at the scene of the crime through watertight evidence of visual identification, the alibi inevitably collapses. As noted in *Kiarie v Republic*, evidence of identification must be absolutely watertight to justify conviction.
32. In the present case, the evidence placing the Appellant at the scene is more accurately characterized as evidence of recognition. It is a well-established tenet of evidence law that recognition of a known person is generally far more reliable than the identification of a stranger. The record demonstrates that the Appellant and the victim's family were not strangers; they resided in the same enclosed residential plot. The Appellant occupied House Number 1, while the victim's family occupied House Number 4.
33. PW1, the 4-year-old minor, positively identified the Appellant by his known alias, "Wamiti," and pointed him out in court as the person who took her into his house. While the evidence of a child of tender years must be treated with caution, her identification was corroborated by compelling circumstantial evidence. PW2, the minor's 11-year-old brother, testified that when the minor failed to return from the toilet, he initiated a search within the plot. Crucially, PW2 testified that he visually observed the minor physically exiting the Appellant's specific dwelling (House Number 1).
34. The incident occurred during the day, providing optimal natural lighting conditions for clear observation. The proximity was intimate, as the parties shared a communal living space. The Appellant's alibi—that he had vacated the premises for 4 days to search for his wife—is directly and fatally contradicted by the ocular evidence of PW2, who saw the minor leaving the Appellant's room, and the testimony of PW4, who stated that PW2 saw the Appellant placing the child outside his door.
35. The prosecution witnesses were subjected to cross-examination, and their testimonies regarding the Appellant's presence at the plot on the material day remained unshaken. The Appellant's alternative theory—that the charges were a malicious fabrication to avoid a Kshs 1,500/= debt—strains credulity. It is highly improbable that parents would subject their 4-year-old toddler to the trauma of invasive medical examinations, which objectively confirmed severe genital inflammation and a broken hymen, merely to evade a trivial financial debt.
36. Therefore, applying the strict standard set in *Kiarie v Republic* requiring watertight identification, this Court finds that the circumstances of recognition were exceptionally favorable. The witnesses were intimately familiar with the Appellant, the incident occurred in broad daylight within a shared residential compound, and the minor was seen exiting the Appellant's specific room. This overwhelming evidence of recognition securely places the Appellant at the scene of the crime, effectively and conclusively dislodging his unsworn alibi. The trial Magistrate's procedural failure to articulate this specific legal analysis, while noted, did not occasion a miscarriage of justice that would warrant an acquittal on this ground.

Proof of Penetration and the Variance Between the Charge and the Evidence

37. The most profound legal controversy in this appeal lies in the nature of the actus reus proved by the prosecution versus the specific offence preferred in the charge sheet. This ground goes to the very root of the conviction.



38. The Appellant was charged with defilement contrary to section 8(1) of the *Sexual Offences Act*. The particulars of the charge stated unequivocally that the Appellant caused his penis to penetrate the vagina of the minor. However, the evidentiary record paints a starkly different factual picture regarding the instrument of penetration.
39. During the trial, PW1 testified explicitly that the Appellant inserted his fingers between her legs. PW3 corroborated this by testifying that upon waking up, the minor disclosed to him that Wamiti inserted his fingers in her 'susu'. PW4 testified that the minor said the Appellant inserted a black thing. PW5, the clinical officer, confirmed that physical penetration of the genitalia occurred, noting an inflamed labia minora and majora, a partially broken and reddish hymen, and a foul-smelling discharge. However, the medical evidence, while confirming physical trauma consistent with penetration, could not and did not definitively prove penile penetration over digital penetration.
40. The Appellant forcefully submits that this variance is fatal. He argues that the use of fingers does not constitute defilement under the law. To adjudicate this issue, the Court must engage in a rigorous statutory interpretation of the *Sexual Offences Act*.
41. Section 8(1) of the Act stipulates: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".
42. The operational word defining the actus reus is penetration. The legislature did not leave this term to broad judicial interpretation; it provided a highly specific, restrictive definition. Section 2 of the Act defines penetration meticulously as: "the partial or complete insertion of the genital organs of a person into the genital organs of another person".
43. Furthermore, section 2 defines genital organs to include: "the whole or part of male or female genital organs and for purposes of this Act includes the anus".
44. The legislative intent is crystal clear: the offence of defilement is statutorily ring-fenced to encompass only instances where there is genital-to-genital (or genital-to-anal) penetration. The human finger is categorically an appendage, an extremity of the upper limb; it is biologically, medically, and legally excluded from the definition of a genital organ.
45. Consequently, the insertion of fingers into a minor's vagina—while a horrific and unlawful violation—does not satisfy the strict statutory definition of penetration required to ground a conviction for defilement under section 8(1). This nuanced but critical distinction is not an exercise in judicial pedantry; it is the strict application of penal statutes, which must be construed strictly and narrowly in favour of the liberty of the subject unless the statutory language explicitly dictates otherwise.
46. If the act proved by the prosecution is not defilement, what offence is it? The legislature envisaged this precise scenario involving non-genital penetration when drafting section 5 of the *Sexual Offences Act*, which creates the distinct offence of sexual assault.
47. Section 5(1)(a)(i) provides that a person commits sexual assault if they unlawfully: "penetrates the genital organs of another person with any part of the body of another or that person".
48. The dichotomy created by the *Sexual Offences Act* is, therefore, stark and deliberate. Penile penetration constitutes Rape (section 3) if against an adult, or defilement (section 8) if against a child. Digital (finger) or object penetration constitutes sexual assault (section 5), regardless of whether the victim is an adult or a child.
49. In the instant case, the prosecution's own star witness (PW1) explicitly testified to digital penetration. The trial court gravely misdirected itself in law by convicting the Appellant of defilement based on



evidence that explicitly proved sexual assault. The prosecution fundamentally failed to establish the specific actus reus required for defilement. The Charge Sheet was indeed defective in relation to the evidence adduced. Therefore, the conviction for defilement contrary to section 8(1) of the *Sexual Offences Act* cannot be sustained and must be quashed.

Substitution of Conviction under Section 179 of the Criminal Procedure Code

50. Having found that the primary charge of defilement collapses due to the variance in the evidence regarding the instrument of penetration, the immediate inquiry is whether the Appellant must be entirely acquitted, or whether the law permits a curative substitution of the conviction.
51. Section 214 of the Criminal Procedure Code governs the variance between a charge and evidence. While a gross variance that deceives or misleads an accused in mounting their defence can vitiate a trial, the law provides a robust safety valve where the variance reveals the commission of a lesser but intimately related offence.
52. Section 179(1) encapsulates the doctrine of minor and cognate offences. It empowers a trial or appellate court to substitute a conviction for the offence charged with a conviction for a minor and cognate offence, provided the evidence adduced substantiates the latter, even though the accused was not formally charged with it.
53. The parameters for deploying Section 179 are twofold: the substituted offence must be minor and it must be cognate. An offence is minor if it attracts a lesser maximum statutory penalty than the major offence charged. Defilement of a child aged 11 years or less under section 8(2) attracts a mandatory, inflexible penalty of life imprisonment. Conversely, sexual assault under section 5(2) attracts a minimum penalty of ten (10) years imprisonment, which may be enhanced to life at the court's discretion. Given the lower mandatory statutory floor, sexual assault is undeniably a minor offence relative to aggravated defilement.
54. Offences are cognate if they share the same genus, fundamental legal characteristics, or essential ingredients. Both defilement and sexual assault belong to the same genus of severe sexual violence. Both involve the non-consensual, unlawful violation of a victim's bodily autonomy and integrity through the physical penetration of genital organs. The core difference lies merely in the anatomical instrument utilized by the perpetrator to achieve the penetration. They are inextricably linked in character and purpose.
55. This interpretative approach aligns perfectly with the progressive jurisprudence emanating from the superior courts in Kenya. In numerous cases, appellate courts have utilized section 179 to correct defective convictions under the *Sexual Offences Act* where the specific mode of penetration varied from the charge sheet, or where the age of the victim was unproven.
56. For instance, in *David Mwangi Njoroge v Republic* eKLR (Criminal Appeal No. 193 of 2013), the Court faced a scenario where a man was convicted of defilement, but the evidence revealed the victim was 18 years old. The Court noted that while it could not substitute the defilement conviction with rape because rape requires the complex element of consent which is not a major element in defilement, thereby prejudicing the accused's right to a fair trial on that issue. Substitution to an offence that does not prejudice the defence is permissible.
57. Similarly, in *John Irungu v Republic* (Criminal Appeal No. 20 of 2016), the Court of Appeal upheld the High Court's use of Section 179 to substitute a defilement conviction with a conviction for committing an indecent act where the elements of defilement failed.



58. The evidence of PW1, PW3, PW4, and the corroborative medical findings by PW5 leave no shadow of a doubt that the Appellant inserted his fingers into the genitalia of the 4-year-old minor. This act squarely and exhaustively fulfills all the ingredients of sexual assault contrary to section 5(1)(a)(i) of the *Sexual Offences Act*.
59. Crucially, the Appellant was not prejudiced by this substitution. He was fully aware throughout the trial that the gravamen of the prosecution's case against him was the unlawful sexual violation and penetration of the minor's genitalia. His chosen defence of alibi was a blanket denial of presence at the scene. This means his defence strategy would not have altered one iota had the charge sheet accurately read sexual assault instead of defilement. He was not misled to his detriment.
60. Accordingly, this Court comfortably invokes the provisions of Section 179 of the Criminal Procedure Code. The erroneous conviction for defilement is set aside, and in its place, this Court enters a conviction for the minor and cognate offence of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act*.

Sentencing, Mandatory Minimums, and the Notice of Enhancement

61. The final frontier of this appeal pertains to the legality and proportionality of the sentence. The trial court imposed a sentence of 20 years imprisonment. The State filed a formal Notice of Enhancement, arguing that the trial court acted illegally by imposing a 20-year term when section 8(2) of the Act strictly mandates life imprisonment for the defilement of a child aged 11 years or less.
62. To adequately address sentencing, it is imperative to trace the recent, tectonic shifts in Kenyan sentencing jurisprudence regarding mandatory minimums. Following the Supreme Court's landmark decision in *Francis Karioko Muruatetu & Another v Republic* eKLR, which declared the mandatory death sentence for murder unconstitutional as it stripped judges of their discretion, a ripple effect permeated the subordinate and appellate courts. Numerous courts erroneously extrapolated the Muruatetu case rationale to strike down the mandatory minimum sentences prescribed under the *Sexual Offences Act*, substituting them with lower, discretionary sentences. For instance, in earlier iterations of *Julius Kitsao Manyeso and Evans Nyamari Ayako v Republic*, the Court of Appeal had ruled that indeterminate life imprisonment for defilement was unconstitutional and sought to translate life imprisonment to a definite term of 30 or 40 years.
63. However, the Supreme Court emphatically arrested this trend and restored statutory certainty in a series of defining 2024 judgments. In the landmark decision of *Republic v Joshua Gichuki Mwangi* (Petition No. E018 of 2023), the Supreme Court explicitly clarified that its decision in Muruatetu was restricted exclusively to the offence of murder. The apex Court held that the imposition of mandatory minimum sentences under the *Sexual Offences Act* does not violate the separation of powers and is entirely constitutional. The Court noted that while sentencing involves judicial discretion, it is the absolute prerogative of Parliament to set the parameters and penal floors for grave offences like sexual violence to reflect societal revulsion and protect vulnerable groups.
64. Furthermore, in *Evans Nyamari Ayako v Republic* (SC Petition No. E002 of 2024), the Supreme Court overturned the Court of Appeal's attempt to dilute life imprisonment to a determinate term of 30 years. The Supreme Court firmly reinstated the principle that life imprisonment means exactly that—the remainder of the natural life of the convict—affirming the constitutionality of the maximum statutory sanctions for egregious sexual offences.
65. Returning to the instant appeal, the Respondent's prayer for an enhancement to life imprisonment was entirely and exclusively premised on the mandatory dictates of section 8(2) of the Act. However,



because this Court has quashed the defilement conviction and substituted it with a conviction for sexual assault, the sentencing regime fundamentally shifts.

66. The penal provision for sexual assault is housed under section 5(2) of the *Sexual Offences Act*, which reads: "A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."
67. Under section 5(2), Parliament has established a mandatory statutory floor of 10 years, but unlike section 8(2), it leaves the ceiling open to judicial discretion, extending up to a maximum of life imprisonment. The rigid mandatory life sentence demanded by the Respondent under section 8(2) is legally inapplicable to sexual assault. Consequently, the Respondent's legal basis for demanding an automatic enhancement to life imprisonment dissolves entirely. The Notice of Enhancement fails on this statutory technicality.
68. The task falling upon this Court is to determine the appropriate quantum of punishment within the permissible statutory spectrum of ten years to life imprisonment for the substituted offence. Sentencing is a delicate balancing act that must weigh the gravity of the offence, the circumstances of the offender, and the imperative need for deterrence, retribution, and protection of the public.
69. The aggravating factors in this case are profound, disturbing, and weigh heavily against the Appellant. The Appellant preyed upon a highly vulnerable, 4-year-old child. He utilized his proximity as a neighbour to lure the defenceless child into his dwelling, subjecting her to severe physical trauma. The medical evidence—highlighting an inflamed genital area and a partially broken hymen on a mere infant—underscores the brutality and depravity of the assault. The psychological scars inflicted upon a child of tender years by such a profound violation of trust within a residential community cannot be overstated.
70. The trial Magistrate, operating under the erroneous belief that he was sentencing for defilement under section 8(3) or exercising post-Muruatetu discretion, imposed a 20-year sentence. While the conviction has been altered, the sentence of 20 years rests comfortably and legally within the parameters of section 5(2) of the *Sexual Offences Act*.
71. Accordingly, this Court makes the following orders:
 - i. The Appellant's appeal against conviction for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act is hereby allowed. The conviction for defilement is quashed, and the sentence attached to it is set aside.
 - ii. In exercise of the powers conferred upon this Court by section 179(1) of the Criminal Procedure Code, this Court hereby substitutes the quashed conviction with a conviction for the minor and cognate offence of Sexual Assault contrary to section 5(1)(a)(i) of the *Sexual Offences Act*;
 - iii. The Appellant is hereby sentenced to serve 10 years imprisonment for the substituted offence of sexual assault.
 - iv. The Notice of Enhancement of Sentence is dismissed.
 - v. The sentence shall run from the date of the original conviction by the trial court.

DATED AND DELIVERED AT THIKA THIS 20 DAY OF FEBRUARY 2026.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT



Delivered on virtual platform in the presence of:
For the Appellant: Present at Kamiti Medium Prison
For the Respondent: Ms Torosi
Court Assistant: Lucy Mwangi

