Kangwi v Republic (Criminal Appeal E011 of 2024)
[2026] KEHC 2170 (KLR) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E011 OF 2024

ACA ONG'INJO, J

FEBRUARY 19, 2026

BETWEEN

JOSEPH KANGWI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of Hon. Obiero SPM in the Senior Principal Magistrate's Court at Kehanca SOC No. E031 of 2023 delivered on 20th February, 2024)

JUDGMENT

1 The Appellant J. K. was charged with the offence of defilement contrary to section 8(1) as read with section (2) of the *Sexual Offences Act* No. 3 of 2006.

2 The particulars are that on the 23rd June 2023 at [Particulars Withheld] in Kuria West Sub-County in Migori County the Appellant intentionally caused his penis to penetrate the vagina of D. R. a child aged 7 years.

3 In the Alternative count he was charged with the Offence of Committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4 The particulars are that on the 23rd June 2023 at [Particulars Withheld] in Kuria West Sub-County in Migori County the Appellant touched the vagina of D. R. a child aged 7 years.

5 Based on the evidence of four (4) prosecution witnesses and the Appellant's sworn testimony the Trial Magistrate found the Appellant guilty and convicted for the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* and he was sentenced to serve life imprisonment.

6 The Appellant was aggrieved by the conviction and sentence of the subordinate court and he lodged his Petition of Appeal dated 13th September 2017 on the following ground:-

a. That the Trial Court erred in both law and facts by not complying with Article 50(2)(g) & (h) of *the Constitution* of Kenya 2010

b. That the Trial Court erred in both law and facts by not considering that the ingredients of the offence were not proved to the required standard in law.

Reason Wherefore

1). Conviction quashed and sentence put aside

2). Retrial

3). Any other order the court may deem fit to grant.

7 PW1 – D. R. J. testified that she goes to [Particulars Withheld] Primary School and was a Grade 1 PUPIL. She said she was 7 years old. PW1 said that on 23rd June 2023, she was going home from school at 4.00pm when she met the Appellant whom she knew as baba Sabato. She said Sabato was a boy and they used to go with him to Nyanchabo Primary school before she went to [Particulars Withheld].

8 That when she met the Appellant, he caught her and took her inside trees and removed her clothes and did tabia mbaya. PW1 said she was wearing uniform and the Appellant removed her uniform and put his thing in her thing. That when he finished, he warned her that if she told anybody he would kill her. That when she went back home, she did not tell her parents.

9 PW1 went further to testify that when she went to school the following day her teacher asked why she was not walking well and she told her that baba Sabato did tabia mbaya to her, That the teacher send her elder sister to go and call her father. That when her father went to school, he accompanied madam Doris and another teacher to go and ask baba Sabato. That the following day she was taken to Nyamakongolo Health Centre and the Appellant was arrested.

10 PW1 identified birth certificate showing she is 7 years old. She also identified treatment notes, P3 and PRC forms as exhibits. She also identified the Appellant in court as baba Sabato.

11 In cross examination, she said that the Appellant put cellotape on her mouth and she could not scream. She said that she was also alone when the Appellant caught her and took her to the trees.

12 PW2 Judith Anyango Oloo testified that she was a Clinical Officer at Isebania Sub-County Hospital. She said that the Complainant was taken to the facility by her parents with history of having been defiled by a person known to her who gave her 10/= to buy a pen and also threatened to kill her. That on examination the child's body was hot and she had pain on the vagina but it was however intact and there was no discharge. PW2 said that there was however laceration noted at 5 o'clock.

13 That several tests were conducted but all were negative except that she had malaria. P3 was duly filled on 28.6.2023 and injuries assessed as harm. She produced P3, treatment notes and PRC as exhibits.

14 In cross examination PW2 said that the complainant was taken to hospital by the mother and father. She said that she did not examine the Appellant.

15 PW3 Peter JM testified that he was the father of the complainant who was born on 21.07.2015. He said that on 26th June 2023, the teacher Doris called him and when he went to school, that when he went to school he was told the child was walking with difficulties and had injuries in the genitals. That

when he talked to the complainant, she told him that there was a watchman whom she met when she was from school and who took her to the bush and defiled her and gave her 10/=.

16 PW3 went and called the complainant's mother who examined her and established she had been defiled. That as the complainant was taking them to the scene of defilement, they met a man on a tuktuk and the complainant identified him as the one who defiled her. That they however proceeded to the scene and the next day the complainant was taken to hospital the next day. That as they were going to the police station, they met the Appellant's wife and as they stood to talk to her the Appellant arrived on a motor bike and the complainant again pointed at him as the one who defiled her.

17 That when PW3 asked the Appellant if he knew the complainant, he denied but the complainant identified him as baba Sabato who defiled him. PW3 called the Chief who in turn called the Police and 2 officers came from Masaba and arrested the Appellant and taken to the police post. PW3 said that he knew the Appellant prior to the date of the offence.

18 In cross examination PW3 said that he knew the Appellant's home was in Bomerani but he lived in a rental house in Nyanchabo.

19 PW4 P. C. Magdaline Kibe of Kehancha Police Station investigated the offence. She said she commenced investigations on 28th June 2023 when she found the complainant and her parents at the station having come to report offence of defilement by a person known to the complainant. She established that the child was from school when she met a man she knew as baba Sabato who told her to go with him into the bush and gave her 10/= and defiled her. That the perpetrator then warned the child not to tell anyone or else he would kill her.

20 That the complainant went home but did not tell her parents and the following in day while in school the teacher discovered that the child had difficulties walking and reported to the parents. When taken home PW1 explained to the parents what happened and they took her to hospital and subsequently made a report to the police and the Appellant was arrested. PW4 produced the certificate of birth for the complainant as exhibit 1.

21 At the close of prosecution case that Appellant was placed on his defence and he gave sworn statement and said that on 23rd June 2023 he was in Migori at his place of work and when he was from work, he went home. He said he was arrested at 3.00pm when he was going to work by people on allegations that he defiled a girl. He said that he did not defile the girl. He said he was framed.

22 In cross examination, the Appellant said that at the time of arrest he was at Getonganya center. He said he had a family and 3 children aged 12, 8 and 3 years respectively. He confirmed that the child aged 8 years is called Sabato. He said he did not know if Sabato and the complainant went to the same school and he did not know if the complainant knew him. He said he did not see the Complainant on 23rd June 2023 and he did not defile her. He said he did not take her to the bush and did not give her money.

23 This appeal was canvassed by way of written submissions.

24 The Appellant written submissions are not traced in the file or CTS although the Respondent has referred to them.

25 The Respondent's submissions are dated 22nd October, 2025 and were filed on 27th October 2025. The Respondent submitted that evidence of PW1 was corroborated by PW2 who examined the child and found that she had lacerations at 5 O'clock an indication that she had been defiled. It was therefore submitted that there was proof of penetration of the victim's genital organ.

26 On the element of age, the Respondent submitted that the minor's birth certificate was produced as exhibit by PW3 who confirmed the minor was 7 years old and therefore a child as provided under Section 2 of the *Children Act* 2001 of the Laws of Kenya.

27 On the element of identification, it was submitted that PW1 identified the Appellant as baba Sabato who caught her and took her to the trees where he removed her uniform and did 'tabia mbaya' to her by putting 'his thing into her thing' . That the minor described how she came to know the Appellant when he took money to his son in school.

28 The Respondent submitted that the minor was able to properly identify the Appellant whom she knew prior to the incident and the requirement for proof of identity was met.

29 On the issue that the Appellant was not informed of his right to legal representation, the Respondent submitted that the Appellant was informed of the right as shown at page 3 line 19 of the proceedings in the trial court.

30 The Respondent submitted that all the ingredients of the offence of defilement had been proved and the court was urged to find so.

31 On the submissions that the sentence was manifestly excessive, the Respondent submitted that the Appellant was also convicted for the offence of defilement under Section 8(2) of the *Sexual Offences Act* which provides for sentence of life imprisonment and the same should be upheld.

ANALYSIS AND DETERMINATION

32 This being the first appellate court, my duty is well spelt out namely; reconsider the evidence, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to draw my own independent conclusion while bearing in mind that the trial court saw and heard the witnesses. In the case of Okeno v Republic [1972] EA 32, the East Africa Court of Appeal stated on the duty of the court on first appeal 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."

33 Further, in the case of Mark Oiruri Mose vs R (2013) eKLR, it was reiterated that:

> " ... the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

34 Having considered the grounds of Appeal, and reviewed/revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the appeal turns on four key issues:

1. Whether the Appellant's fair trial rights under Article 50(2)(g)–(h) were violated.
2. Whether the conviction for attempted defilement was supported by the evidence.
3. Whether the sentence of life imprisonment was lawful.
4. Whether a retrial is appropriate.

35 Article 50(2)(g) and (h) guarantee the right to legal representation and State-funded counsel where substantial injustice would otherwise result. In this case the record reveals the Appellant did not request

counsel; there is no indication he was denied representation and he was not charged with a capital offence neither was it demonstrated that the case was complex as to occasion injustice or prejudice to the Appellant.

36 In the case of David Njoroge Macharia v Republic [2011] eKLR), the Court explained that "substantial injustice" is not automatic, but depends on seriousness of the charge; complexity of the trial; ability of the accused to self-represent, and interest of justice. It was held that since the Appellant had competently cross-examined witnesses, participated in the trial, and the evidence against him was strong, the Court found no substantial injustice.

37 Sexual offences, though serious, do not automatically trigger Article 50(2)(h) obligations. It is therefore the finding of this court that there was no violation of the Appellant's rights under Article 50 fair trial rights.

On whether the Conviction Was Supported by Evidence

The age of the Complainant was proved by PW4 who produced the birth certificate confirming the she was 7 years old. This element was proved beyond doubt.

38 On identification of the Appellant, PW1 knew the Appellant as "baba Sabato."

39 PW3 also knew him prior to the incident. The complainant identified him in the tuktuk; she also identified him at the scene of the offence as it was in broad day light; she identified him when he found them talking to his wife at which point he was arrested and escorted to Masaba Police Post. When the Complainant testified in court she also identified the Appellant as the one who did t her 'tabia mbaya'.

40 This was recognition, which is more reliable than identification of a stranger.

41 In Anjononi v R the East African Court of Appeal held:

> Recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant. But even when the evidence is of recognition, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

No evidence of mistaken identity was tendered and none existed.

42 On medical evidence PW2 examined the complainant and observed vaginal pain; Laceration at the 5 o'clock position however the hymen was intact and there was no discharge. These findings are consistent with sexual assault, but not conclusive of penetration

43 On whether the offence of defilement or attempt was proved, PW1 stated that the Appellant "put his thing in my thing," but the medical evidence did not establish penetration as defined under Section 2 of the Act.

44 The trial court convicted the Appellant for attempted defilement and said that 'penetration was not complete or successful as the hymen was intact'.

45 Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs of a person into the genital organs of another, any object or body part into the genital organs, genital organs into the anus or mouth of another.

46 The Appellant's act of dragging the child into bushes, undressing her, lying on her, and the presence of genital laceration went beyond mere preparation to commit an offence. His intentions were clear.

He wanted and attempted to defile the child but he did not penetrate successfully. The conviction for attempted defilement was therefore supported by evidence and remains safe.

47 On whether sentence was manifestly harsh and excessive, Section 9(2) of the *Sexual Offences Act* prescribes minimum sentence for attempted defilement: 10 years,which may be enhanced depending on circumstances. It provides:

9(1) Any person who attempts to cause penetration with a child commits the offence of attempted defilement.

9(2) On conviction, the offender shall be sentenced to a minimum of 10 years imprisonment, with the court having discretion to impose a longer term, up to life.

However, the trial magistrate did not justify the enhancement to life imprisonment. No mitigation analysis was recorded and this violates the sentencing principles in the Sentencing Policy Guidelines 2023 which requiring individualized reasoning.

This court therefore finds that the life sentence was excessive, unreasoned, and unlawful.

The sentence must therefore be set aside.

48 On whether a retrial is appropriate as prayed by the Appellant, the law on retrials states that a retrial is ordered only where the original trial was defective; the interests of justice demand it; new evidence is available and it will not cause injustice. In this case the Appellant did not raise any ground to the effect that trial was defective; the evidence was properly tested; the conviction is safe and a retrial would unfairly allow the prosecution to "fill gaps.". In the circumstances a retrial is neither necessary nor justified.

49 Having re-evaluated the entire record and submissions, the Court makes the following orders:

1. The conviction for attempted defilement is hereby upheld.

2. The life sentence imposed by the trial court is set aside.

3. In its place, the court substitutes a lawful, proportionate sentence of 10 years imprisonment from date he was arraigned in court on 29th June 2023, pursuant to Section 333(2) of the Criminal Procedure Code as he was in remand custody during trial.

4. The prayer for retrial is declined.

50 Right of appeal within 14 days is duly explained.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19th DAY OF FEBRUARY, 2026.

ANNE ONG'INJO

JUDGE HIGH COURT OF KENYA

In the Presence of:

Victor – Court Assistant

Ms. Kogos – Counsel for the Respondent/ State

Appellant -