



REPUBLIC OF KENYA



**KENYA LAW**  
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**WWK v Republic (Criminal Appeal E020 of 2023)  
[2026] KEHC 1097 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E020 OF 2023  
RN NYAKUNDI, J  
FEBRUARY 5, 2026**

**BETWEEN**

**WWK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the Judgment of Hon. E. Kigen-PM, delivered on 21/02/2023 in Eldoret Chief Magistrate's Court Criminal - Sexual Offences – Case No. E148 of 2023)*

**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 6<sup>th</sup> day of June 2021 at [Particulars Withheld], Turbo Sub-County, within Elgeyo Marakwet County, he unlawfully caused his penis to penetrate the vagina of CC, a girl aged 11 years, reportedly his own step-daughter. 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 11 years.
2. The Appellant pleaded not guilty to the charges, and the case proceeded to full trial, in which the Prosecution called 4 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 then gave a sworn statement and called no witnesses. By the Judgment delivered on 21/02/2023, he was convicted on the main charge, and sentenced to life imprisonment.
3. Dissatisfied with the decision, the Appellant, through filed this Appeal on 07/03/2023 against both conviction and sentence. He listed the following 7 grounds that:



- i. That the Learned trial Magistrate erred in both law and facts by basing its judgment on medical evidence that was inconclusive and unreliable to warrant a conviction.
  - ii. That, the trial court erred in law and facts when failing to note that the identification of the assailant under the prevailing circumstances was not free from possibility of error.
  - iii. That, the trial court erred in law and facts when failing to solve the contradiction and inconsistency in the prosecution evidence.
  - iv. That, the life imprisonment imposed by the court is harsh and excessive in circumstance of the case.
  - v. That, more grounds will be adduced when served with records of appeal.
4. I will now recount the testimonies and/or evidence of the witnesses before the trial Court.
  5. PW1 was GC, the mother to the victim. She stated that the minor was 13 years old and a student in class 6. That she was born on 16/2/2010. She further stated that she knew the accused as he was employed by their neighbour. On 6/6/2021 the minor went to school upto Friday and came home, and on Sunday she disappeared from home. They looked for her upto 9:00pm and came home. She even went to the accused's house and did not find her. However, at 8:30am I found the accused inside the minor's room. She then went to school the following day and called the suspects son who confirmed the minor was at their place. She further testified that the minor narrated that the accused had defiled her and she was ordered to take her to hospital. They then went to Sosiani Hospital after the police station. She stated that the minor told her that she was given 500/- before sex and then he took back the money.
  6. PW2 was Wilson Kosgei who testified that he was the village elder and knew both the complainant and victim. He stated that on 07/06/2021, he received a call from the assistant chief who directed him to arrest the accused which he did. He stated that he then charged the accused and tried to take the statement of the daughter of the accused but she refused to record her statement. They thereafter relocated to an unknown place. He produced the minor's Certificate of birth- Pexh No.1.
  7. PW3 was Dr. Teresa Simiyu attached to Moi Teaching and Referral Hospital. She produced the report on behalf of Taban Lilian. She stated that the child was examined on 8/6/2021 and the doctor observed healing hymeneal tears at 6 am and 11 O'clock, fresh hymeneal tears at 3 O'clock, redness of the labia minora. She had epithelial cells and bacteria seen. She produced the treatment notes and P3 form and stated that the doctor concluded that the minor had been defiled.
  8. PW5 was the minor complainant, CC. She testified that she was 13 years old at the time of the trial. Further, that on 6/6/2021 on Sunday, she was unwell and her mother was unwell, so she went to hospital, came home and rested. When she was lying in bed, the accused approached her and called her. They went to a deserted house and he made her lie on the ground and did bad manners to her. She was with his daughter who he also defiled. She stated that she left the house at 6pm after the appellant told her to leave. When she went home she told her mother that the accused had defiled her and it was not the first time he had defiled her.
  9. As aforesaid, the court found that the appellant had a case to answer and he was placed on his defence.
  10. The appellant denied having committed the offence and further, stated that on the said date he was in his house from morning until evening. His family was at home.
  11. The Appeal was canvassed by way of written Submissions. The Appellant did not file submissions but the state filed submissions dated 15/01/2026.



## Respondent's Submissions

12. On her part, Prosecution Counsel Ms. Kirenge, laid down the background of the same and urged that the prosecution proved its case to the required standard. She submitted that on age, the victim's mother testified that she was born on 16<sup>th</sup> February 2010 and further, furnished a birth certificate as proof thereof; conclusive evidence that the minor was 11 years at the time of the incident.
13. On identification, she urged that the Appellant was known to PW1 as he was their neighbour. PW5, the victim, testified that she recognized her assailant as he was a neighbour and that there was a lot of light when he sexually assaulted her. Further that, the Appellant did not only defile her once but twice.
14. On penetration, she urged that PW 5 gave evidence of how the Appellant lured her to a deserted house, made her lie down and defiled both her and his own daughter, in full view of the Appellant's wife. That when the Appellant's wife and daughter left the house again, the Appellant defiled her a second time. The evidence of the doctor, PW4, as supported by the P3 that was equally furnished shows that there were fresh and healing hymeneal tears on the minor.
15. Counsel submitted that all the essential elements showing that the minor was defiled have been proved beyond reasonable doubt from the facts as stated above, which facts were neither contradicted upon cross examination or at the Defence stage. She cited the provisions of Section 8(2) of the Sexual Offences Act which prescribes the penalty for Defilement and placed reliance on the decision of the Supreme Court in Petition No E018 of 2023 which validated mandatory sentences in the Sexual Offences Act. Further, that the JSP Guidelines emphasizes on the principles underpinning the sentencing process as that of proportionality, accountability, inclusiveness and totality of the sentence. She invited the Court to note from the evidence and the proceedings that the Appellant was/is into the habit of preying on young girls, his daughter included, a victim who he later hid so as to evade justice. Sentiments aside, the Appellant is undeserving of any form of mercy for his acts.
16. Counsel cited the case of Daniel Maina Wambua vs Republic (2018) KEHC (KLR) and Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) and urged the court to dismiss the appeal.

## Determination

17. 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).
18. 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.
19. 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.
20. 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 Certificate of Birth produced in evidence indicates that she was born on 16/02/2010 and PW1, her mother, testified the same. There being no contrary evidence, and the alleged offence



having reportedly been committed on 06/06/2021, it was established that the minor was indeed, at the material time, about 11 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.

21. 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.”

22. In this case, medical evidence was provided by PW3, Dr. Simiyu, who testified that the examination revealed that there were hymeneal tears and as per the P3 form, the conclusion was that the injuries were consistent with defilement. This corroborated the minors’ evidence that she described as ‘bad manners’ to mean the sexual act.

23. Regarding the minor’s use of the term “he did to me bad manners”, the Court of Appeal, in the case of Muganga Chilejo Saha v Republic [2017] eKLR, acknowledged that this is an acceptable description of defilement especially where penetration is established. In accepting that in Kenya, the society has adopted such terms as a euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

“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. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 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”, (Jose Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as 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 V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial Courts should record as nearly as possible what the child says happened to him or her. (emphasis added).”

24. There being no evidence, medical or otherwise, to the contrary, I have no material before me to justify departing from the medical evidence produced by the doctor. I therefore have no reason to interfere with the trial Magistrate’s finding that penetration was proved, and that the minor was defiled.

25. 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”.



26. In this case, there is no dispute that the Appellant is well known to the minor, as he is a neighbour. 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. ....”

27. The Appellant's defence was simply a mere denial of the incident which did not tackle the specific accusations raised against him. The primary testimony against the Appellant in this case was that given by the minor (PW5) who, gave sworn testimony, I find no material to controvert the trial Court's finding that that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses, and also by documentary evidence. No justification has therefore been demonstrated to warrant this appellate Court's interference with the verdict of conviction arrived at by the trial Court.

28. 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”.

29. 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.”

30. 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.

31. However, 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.

32. The upshot of the foregoing is that the appeal against both sentence and conviction fails in its entirety.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 5<sup>th</sup> DAY OF FEBRUARY, 2026**

.....

**R. NYAKUNDI**

**JUDGE**

