Suleiman v Republic (Criminal Appeal E001 of 2025)
[2026] KEHC 2888 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 2888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E001 OF 2025

DKN MAGARE, J

MARCH 5, 2026

BETWEEN

MOI IDD SULEIMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the trial court, Hon. A. Munyuny (RM) in Migori MCSO No. E019 of 2023)

JUDGMENT

1. This is an appeal from the Judgment of the trial court, Hon. A. Munyuny (RM) in Migori MCSO No. E019 of 2023. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

2. The particulars of the offence were that the appellant, on 25.03.2023 at[Particulars Withheld] Sub Location, in Suna Lower Location, Suna West Sub- County within Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of A.A.R, a child aged 11 years.

3. The appellant was charged with an Alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that the appellant, on 25.03.2023 at[Particulars Withheld] Sub Location, in Suna Lower Location, Suna West Sub- County within Migori County, he intentionally caused his penis to touch the vagina of AAR, a child aged 11 years.

4. The appellant was convicted of the offence of defilement and was sentenced to 30 years' imprisonment. During the hearing of this appeal, a warning was given that the sentence was illegal in view of the provisions of section (2) of the *Sexual Offences Act*.

5. The appellant was aggrieved by the conviction and filed this appeal. He set out the following grounds of appeal:

    a. That I pleaded not guilty to the charge herein.

    b. That the trial court erred in both law and facts by not complying with Article 50(2)(g)(h) of the Kenyan Constitution 2010.

    c. That the trial court erred in both law and facts by not considering that the ingredients of the offence herein were not proved to the required standard in law and facts.

6. The appellant was arraigned in court on 31.03.2023, where he pleaded not guilty. He also opted to defend himself. He chose the English language as the lingua franca. He pleaded not guilty and was supplied with the prosecution bundle, which he acknowledged on record. he prayed that the minor be examined by another doctor. This was declined as the court directed the appellant to cross-examine the court when he came to tender evidence.

7. The matter was slated for hearing on 09.05.2023. Josphat Okinyi, who testified, hailed from[Particulars Withheld] Sub Location and was the assistant chief. He stated that he arrested the appellant herein. He was testifying on what was basically a trial within a trial and of no relevance to the charge before the court.

8. Subsequently, the court carried out voir dire for the minor and found her to be intelligent enough to give sworn testimony and to understand the meaning of an oath. She testified as PW1. She recalled that on 25.03.2023, her aunt told her to go and untether cows at Mama Sila's home at about 10.00 am. He found the appellant, BABANA, picking guavas at Mama Silas's home. She identified the appellant in the dock. The appellant told the witness to take a panga to Mama Mova. She refused, but the appellant pulled her by hand. They went past the guavas and the main road. They did not find anyone. The appellant left her at his house and went for the panga.

9. The appellant did not bring the panga; he came outside and pulled the minor to the house. He carried the witness and placed her on cushions on the floor, pulled the panties and skirt, spoiled the zip. The appellant removed his trousers but did not remove his pants. He slept on her. He pulled the pants to the side, got out his "thing," and inserted the penis into her vagina as the witness was screaming. The appellant held her mouth. Another lady, called Lilian, heard the complainant scream and kicked the door. The appellant stood up, drew a panga, and threatened to cut Lilian into pieces. Lilian ran away, and the appellant gave Ksh 110 to the minor.

10. She was screaming because the appellant was hurting her in the vagina. The appellant gave the minor a panga, and she went her way with Ksh 110, which was tendered in evidence. The minor knew the appellant as someone who cleared people's compounds. She did not tell anyone, as the appellant threatened to kill her if she told anyone. It was Lilian who told her aunt W about the incident. The next day, an aunt, Nyanya, came to school about 4-5 pm and requested permission to go home. They went to the police station and to the ambulance dispensary for treatment.

11. She stated that they went back the next day, as a person who was filling out forms had left. This was done the following day. They went to the Arombe dispensary and the Masara police station, recorded statements, and went to the Migori County Referral Hospital for treatment and to Godkweru Hospital. She identified the Ksh 110 and a panga. She stated that she was born on 22.05.2011. She identified the appellant in the dock as Babana.

12. The appellant refused to cross-examine and just stared at the court. The appellant later requested that the minor be recalled for cross-examination after stating that it was his constitutional right to keep

mum. This was opposed by the state, saying the minor had undergone trauma, and the court had beseeched the appellant to cross-examine. The court upheld the state's position that the appellant had his fair chance and squandered it.

13. PW2, WTR of[Particulars Withheld] area, then testified that the complainant is a niece, being a daughter of her brother. The minor had lived with her since she was 5 months old. She had no child of her own, hence she was given the complaint to help her. She is the one who got the birth certificate. The husband is indicated as JJM, and the mother is indicated as PW2. The witness was a Luo from Tanzania but married in Kenya since 1967 and had a Kenyan identity card.

14. On the material day, 25.03.2023, at around 10.00 am, she left for a journey and came back at 8 pm. Shortly after she arrived, a neighbour, Lilian Akinyi, a neighbour to the appellant, Moi, whom they call Babana, asked if the daughter had told her anything. She told the witness that she found the minor crying inside Babana's house. Lilian told the witness that she pushed the door open and found the appellant lying on the threshold of the minor. The appellant told Lilian, "Nitakukata na panga. , umekuja kufanya nini hapa." Lilian ran away. She asked Lilian to go, and PW2 was to talk to the minor.

15. The PW2 talked to the minor, who recounted that, when the witness asked the minor to tether a cow, the appellant told the minor to take the panga to Mama Moraa, but the minor refused, saying that her mother could beat her. The minor took the minor to his house, pulled her into the house, removed her clothes and his clothes, and penetrated her. The minor cried, and Lilian came and found the minor crying, when the accused saw Lilian, he stopped having sex. They went to report the matter to Arombe Dispensanry and called the assistant chief Josephat Abwai. She also called Saf by the villagers. They went to Masara Police Station and thereafter to Migori District Hospital.

16. She identified the exhibits in the case. The P3 was issued at Masara police station and filled at Godkweru because of the protests in the Migori case. She stated that the charges were not fake. The appellant was known to the witness and was a relative of Mama Moraa. The appellant opted to cross-examine in Kiswahili, a language he indicated he was fluent in. She stated that she was told by them, the minors, about the incident. She took the minor to the hospital. She realized how the minor was walking. She denied that the appellant was buying their land. She stated that the appellant gave the minor money. She stated that she was not aware that the money given was for the examinations.

17. She stated that the panga that the minor was given was the one that the appellant was using. She denied employing the appellant as a casual worker. The appellant then called for PW2 to produce her identity card. She showed the court and the appellant the identity card.

18. PW3 was Josephat ABwao Okinyi, an assistant chief of[Particulars Withheld]. On 26.03.2023, he was called by a villager, Beatrice Buko, who reported a defilement and the perpetrator. He advised the victim to go to the hospital thereafter and reported to Masara. She identified the minor as AAR, and the accused as Babana Moi Idd. He knew the appellant for a long time. They then mounted a search and found him two days later planting maize. He arrested the appellant, took him to his house to drop his tools, and took him to Masara police station. The witness identified the appellant in the dock.

19. On cross-examination by the appellant in English, he stated that the chief arrested the appellant in the company of another village elder. He stated that this was the first incident in the area involving the appellant. He stated that he never ordered that the appellant's house be demolished. He stated that he had heard of a case in which the brothers had demolished the appellant's house. He denied colluding with criminals.

20. PW4 was Okoth Eric Otieno a registered clinical officer at Migori County. He has 8 years' experience. A minor AAR who was 10 years old was examined by Gordon Otieno, who was a clinical officer at the

God Kweru sub-county hospital, with whom the witness had worked for two years. The witness was the medical superintendent of the facility. He stated that on 27.03.2023, the minor was examined and found that the hymen was broken, with bruises on the upper minor, labia minora had signs of a freshly broken hymen. It was inflamed, with swellings and tender to the touch. He produced the treatment notes, P3 form, and PRC. as exhibits 4,5, and 6.

21. On cross-examination, he stated that he was an alumnus of Kenya Medical Training College. he stated that he did not know that the distance from[Particulars Withheld] to Arombe is 8-10 km. He stated that[Particulars Withheld] to Arombe is about 4 km. The minor, as referred by the police, from Arombe to the facility due to the competent clinical officer who could be in the documents. He stated that they do not charge for defilement cases. He stated that the relevant parts of the PRC were fully completed, excluding non-applicable parts such as citizenship. The minor had been examined first at Arombe, then at God Kweru. He stated that they did not collude with their aunt in any way.

22. The court ordered that the doctor who examined the minor, to attend court.

23. PW5 was Gordon Otieno Oromia, a clinical officer at God Kweru sub-county hospital. He graduated in 2015 with a diploma in clinical medicine. He had 7 years of experience. He examined AA, a 10-year-old from[Particulars Withheld] village on 30.03.22023 with a history of defilement by a person known to her. The minor had no physical mark, but on vaginal examination, the outer normal hymen was broken, and there were lacerations on the labia minora. He found blood cells indicated an infection, and antibiotics were administered, and the minor was put on Post-Exposure Prophylaxis. He filled out the P3 and PRC, which he produced as exhibits 4 and 5.

24. On cross-examination, he stated that the facilities have different categories, hence referral for P3. He stated that the minor was 10 years old, but may have later turned 11 years old. He indicated that the minor was Kenyan and he recorded what the minor told him. He stated that he did not indicate that the hymen was freshly broken, but it happened 6 days earlier.

25. PW6 was Rose Achola Otieno, a farmer from[Particulars Withheld] area. She testified that she had a plot and wanted someone to clear it. The appellant was seeking work on 25.03.2023, and they agreed to the work. As he was usually given work by her, the appellant was given a panga, and they agreed that he gave the appellant two fifty shilling notes to grind the panga. When asked about the panga later in the evening, the appellant told her that he had given AAR, daughter to W, his mother-in-law. He did not send AAR to get the panga.

26. In cross-examination, she stated that she remembers that she gave the appellant work in March, said she is known as Mama Moraa, and she knows AAR is about 8-9 years old.

27. On cross-examination, she stated that she found the panga outside her house at 5pm/6pm. she lived near AAR's home.

28. PW7 was PC Emily Nyaboke Ogechi, stationed at Masara crime branch with 8 years of experience. She was allocated a defilement case on 27.03.2023 at 1840 hours. AAR was accompanied by her aunt and said that she had been defiled by Suleiman IDD, alias Babana. They noted the minor is 11 years old. She recorded the minor's statement. She produced the birth certificate as Exhibit 3.

29. PW7 was PC Emily Nyaboke Ogechi. The minor came accompanied with her aunt, Wilkistar. They reported the incident at Masara Police Station. She produced the birth certificate. The minor was 11 years. Upon conclusion of the investigation, she formed the opinion that the Appellant was the perpetrator of the crime and hence his arrest to face the charges before the court.

30. On cross-examination, it was her case that she produced the panga and the 2- fifty-shilling notes and one ten-shilling coin. She stated that Lilian was currently sick at Migori District Hospital and that Lilian and AAR were eyewitnesses. PW7 was elected to produce documents left out. On being further cross-examined she stated that the doctor was to testify on the loss of virginity.

31. PW8 was Lilian. She testified that on 25.3.2023 child was crying from her neighbour's house. She went, and when she kicked the door, she saw the Appellant, who was naked. The minor was holding her pants in her hand. She was also lying down on a mat. She ran to tell other people to come. The Appellant warned that he would kill her. On cross-examination, the house was not locked, hence she just kicked the door open.

32. Upon the closure of the prosecution's case, the court gave a ruling on whether there was a case to answer. Section 211 of the Criminal Procedure Code was complied with. The appellant opted to give sworn testimony and stated that he had an alibi.

33. DW1 was the Appellant. He testified that he was accused of being a land grabber. His house had been demolished. One Wilkistar and Grace falsely accused him. Wilkistar was the aunt of PW1. There were attempts to solve a land dispute between them. He said the minor came to Kenya in 2022 and was not born in Kenya. He states that Rose Atieno is his alibi. She left for work, and he left as well. He was paid 430 and given maize in the evening.

Submissions

34. On the duty of the court, the Appellant relied on case of C M M v Republic [2015] KEHC 4206 (KLR), Bukenya v Uganda (1972) EA 549 and Sawe v Republic [2003] KECA 182 (KLR), though their relevance to the present appeal was not clearly demonstrated. The Appellant submitted that the prosecution evidence was riddled with contradictions and inconsistencies, and that the case was fabricated and fragmented in order to secure a conviction, particularly because the offence carried a life sentence.

35. He further contended that the age of the complainant was not proved, arguing that she was a Tanzanian national and her age could therefore not be established. According to him, even if she were found to be 11 years old, that alone should not attract a life sentence. He maintained that although the prosecution alleged corroboration, the evidence was fabricated.

36. The Appellant also argued that his rights under Article 50(2)(g) and (h) of *the Constitution* were violated by the arresting officer. He submitted that such a violation entitled him to an acquittal, as a nullity cannot be cured by overwhelming evidence. In support, he relied on Amos Karuga Karatu vs Rep (2008) eKLR.

37. The state did not file submissions on the CTS. I was informed that they were filed via email. I leave it at that.

Analysis

38. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence

firsthand. The Court of Appeal for Eastern Africa in Pandya vs Republic [1957] EA 336 held as follows:

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

39. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [supra], the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

40. The legal burden is the burden of proof is on the prosecution and remains constant throughout. According to established principles, burden of proof rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

41. Brennan J, addressed the standard of proof required in Criminal cases the case of Re Winship 397 US 358 {1970}, at page 36164 that:

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because

> of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

42. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

43. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. The section reads as follows:

382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

44. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

45. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. The caution has regard to the nature of criminal offences, whose consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carries a lifelong stigma for the accused. It also leaves indelible scars on the victim. Conviction must thus be justified based on indisputable evidence given to the required standards. This is what the former Chief Justice Mohamed of Namibia had in mind in addressing sexual offences in S v Chapman 1997 (2) SA CR 3 (A) at 55:

'Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of *the constitution* and to any defensible civilization.

46. It is with this background that the court must first analyse the evidence and the proceedings. Then it must address the issues and make findings on each of the issues. The appeal raises only two issues, that is:

    a. Whether the trial court failed to comply with the provision of Article 50(2)(g) and(h) of the Kenyan Constitution 2010.

    b. Whether the offence was proved to the required standards.

47. The court will thus address the appeal on each of the two issues raised. The first issue is that there was a mistrial due to non-compliance with article 50(2) (g) and (h) of *the Constitution*. The said article provides as follows:

    (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

    (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

48. The appellant was duly informed of the two rights at the very onset. He chose to defend himself. The right was thus not breached. Further, when PW1 was testifying, he failed to ask questions. The court beseeched him to ask questions. The court explained to the appellant the ramifications of section 8(2) of the *Sexual Offences Act*. Instead, the appellant chose a part that led to destruction; that is, he raised the question of the witnesses' nationality. There is no right to defile non-Kenyans. Therefore the question of nationality is irrelevant. Indeed they could as well be in the country illegally. However, that is the pain the state will endure as the appellant endures his travails.

49. The Court of Appeal in Manyeso v Republic [2023] KECA 827 (KLR) held thus:

> The appellant did not raise the issue of legal representation either in the trial court and the High Court. The appellant participated in the trial and cross-examined the witnesses, and it was not evident that he suffered any or any substantial injustice. The appellant's rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were not violated.

50. The question of legal representation was not raised at all in the lower court. The appellant dealt with the matter effectively. It is only that the case was overwhelming. There is no demonstration of the appellant suffering any substantial injustice. Looking at cross examination, the appellant was able to effectively raise all questions and there was no evidence that the situation could change. However the most important aspect is that the appellant chose not to exercise his right.

51. Indeed other than the question of representation, the appellant made it impossible for him to continue with PW1 by failing to cross examine the minor. The appellant has a right under article 50(2) to:

> To be present when being tried, unless the conduct of the accused person makes it impossible
>
> For the trial to proceed;

52. Though he was present when the minor testified, he made it impossible to proceed without cross-examining the minor. Consequently, I do not find ground 1 as proved. The court below respected the appellant's right. It is the appellant who failed to exercise the same.

53. The next issue is the question of proof of the offence of defilement. The law under which the appellant was charged is provided under Section 8 of the *Sexual Offences Act* as follows:

8.

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) ...

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

54. On the other hand, the appellant was charged with an alternative count under Section 11 of the *Sexual Offences Act*, which provides as follows:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

(4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (Cap. 141)

(5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

55. In the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013, it was held that the essential elements constituting the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. These key ingredients of the offence of defilement, were similarly elucidated in the case of George Opondo Olunga v Republic [2016] eKLR are;

a. Proof of the age of the complainant,

b. Proof of penetration and

c. Proof that the appellant was the perpetrator of the offence.

d. and {I must add that the penetration is of a sexual organ, [of the vagina or anus] by a sexual organ}.

56. The first element, age, is a bit relaxed, especially for children of tender years. It can be proved, though, by a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent, or by the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. The key element in proof of age is credibility. In more grown-up children, the difference between young adults and children is razor sharp. The court must be vigilant to prevent adults masquerading as children. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016)eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> ... The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

57. While addressing the question of age of the victims in the Sexual Offenses Act, the court in Kaingu Elias Kasomo vs. Republic, Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

> Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.

58. The age of the minor is relevant to the extent that it is to make a distinction between those aged 18 and under 18. If, for any reason, it is proved that a person is a child under the age of 18, but there is a difference in respect of whether the child is 7 or 8, then such a difference is irrelevant. Where the age flows into the next age for purposes of the offence, an acquittal cannot follow. The offence of defilement is complete upon proof that a person is under the age of 18. The actual age is required only when the court is considering, for purposes of sections 8(2), 8(3), and 8(4). The Court of Appeal in the case of Stephen Nguli Mulili v Republic [2014] KECA 408 (KLR), addressed this aspect as follows:

> In the case of Kaingu Elias Kasomo V R, Malindi CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.
>
> However, as the Court clarified in Tumaini Maasai Mwanya V R, MSA CR.A. NO. 364 OF 2010, proof of age for the purpose of establishing the offence of defilement, which is committed when the victim is under the age of 18 years, should not be confused with proof of age for the purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.

59. It is only when there is evidence of doubtful origin that a doctor can determine the age scientifically. In the case of Francis Omuroni Vs Uganda Court of Appeal No. 2/2000, the court held that:

> In defilement cases, medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determine the age of the victim in

the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

60. In this case, the minor testified and gave unshakeable evidence on how the offence occurred. Though the appellant had a golden opportunity to dismantle the minor's evidence, he chose theatrics. The evidence was candid and elaborate. The appellant chose to introduce questions of nationality which have no bearing on the case. PW8 found the appellant in Flagrante delicto, that is red handed.

61. The clinical officer PW5 gave evidence on the injuries the minor suffered. The appellant chose to concentrate in every area except the vagina. The evidence of PW4 and PW5 was corroborated by the evidence of all the prosecution witnesses. PW6 testified how he gave her panga to the appellant. This is the same panga the appellant ended up giving the minor. PW7 recorded the statement and had all the evidence put together. The evidence she gave is consistent with other evidence.

62. PW8 saw the appellant while committing the crime. Instead of defending himself, the appellant chose a party that is not useful by alleging certain differences with the adult woman. There was, however, no difference with the minors.

63. PW1 gave evidence how she was lured by the appellant ho defiled her in his house and gave her Ksh 110/=. She testified how the appellant inserted her thing. This was alter stated to be the penis. The appellant gave a threat to the minor and later gave her the very panga.

64. PW2 demonstrated where she left the minor on 25.03.2023 at 10.00 am. She also testified on the information received from Lilian and how Lilian was threatened. She was given the sum of Ksh 110/=. The treatment records also corroborate the appellant's evidence. The evidence of PW3 was that he knew the appellant and received his reports, and his role in reporting and eventual treatment. PW4 testified on behalf of PW4, who later testified.

65. The minor's age was given as 11 years. However, the minor was born on 22.05.2011. Therefore as at 29.03.2023, was 11 years? The age of the minor was thus proved.

66. The minor testified and identified the appellant as the perpetrator. PW8 also identified the appellant as the assailant. The minor did not just do identification but recognition. On identification, in Anjoroni v Republic 1980 KLR 59 the court thus:

> " Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

67. The court is satisfied that the appellant was recognized by the minor and PW8, who knew him. Consequently it was provided that the appellant was the perpetrator.

68. The last issue is penetration. The medical evidence showed there was penetration. The minor herself testified on what happened to her. Even without medical evidence, it will be safe to convict the appellant. Medical evidence is to be treated like other expert evidence. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

69. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

70. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " While the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

71. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

72. In the case of Mark Oiruri Mose v Republic [2013] KECA 67 (KLR), the Court of Appeal [Onyango Otieno, Azangalala & Kantai JJ.A] held as follows:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

73. It is thus not a defence that the injuries were not serious or the penetration was not complete. The appellant was caught in Flagrante delicto. The penetration was thus proved. The net effect is that the appeal lacks merit and is accordingly dismissed.

74. Before leaving, I note that the court meted out a sentence of 30 years from the date of plea. The sentence imposed on the appellant was 30 years, but it is not in the statute books. The minimum mandatory sentence provided under section 8(2) of the *sexual offences act* is a life sentence. There is no other sentence provided. The court notes that the appellant seriously mitigated that he had a wife who gave birth in 2023, and that he was a first offender.

75. However, the court quoted the wrong section of the law in sentencing, resulting in a miscarriage of justice. The correct section 8(2) provides as follows, at the pain of repetition:

(2) 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.

76. The question of such sentences was addressed in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:

> 11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed
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> 12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in Muruatetu which had to remain binding to all courts below.
>
> 13. The Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

77. Further, the same court delivered its decision in Republic v Manyeso [2025] KESC 16 (KLR), where is stated as follows:

> Paragraph 11 to 14 of the Muruatetu directions are very clear that the decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *Sexual Offences Act* or any other statute. Further, that the Muruatetu case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *the Constitution*. Paragraphs 93 to 97 of the Muruatetu decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:"94.We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.95.We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find

the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.96.We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

78. Life sentence was the only sentence provided. The 30-year imprisonment was not proper. DCP proper. The question is what the court should do. There are two possible routes. If the sentence is legal but lenient, the court has a duty to warn the appellant of the likelihood of enhancement, to enable him to make an informed decision. Where the sentence is illegal, the court has a duty to revert to the correct sentence. However, in this case, the appellant was warned well in advance and chose to proceed with the appeal. The court cannot unsee the illegal sentence.

79. The sentence meted out is less than the mandatory minimum sentence. Therefore, I find that the sentence is illegal. Where a sentence is void, there is no need to warn, as the sentence is deemed to be known. The warning was nevertheless given ex abundanti cautella. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

80. The aspect of warning arises when the sentence is lenient. I warned the appellant of the inevitability of a life sentence if the conviction is affirmed. The time is nigh.

81. The next question is whether the sentence is befitting. The court is under an obligation to increase the sentence, in line with its duty to set aside an illegal sentence. Where a sentence is lawful but lenient, the court has a duty to warn the appellant. However, an illegal sentence must be set aside regardless. In the case of Joseph Muerithi Kanyita v Republic [2017] KECA 387 (KLR), the court of appeal [Waki, Nambuye, & M'inoti, JJ.A.] posited as follows:

> In JJW v. Republic, Cr. App. No 11 of 2011, this Court held that notwithstanding the fact that section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:
>
> It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded

must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

And in Samwel Mbugua Kihwanga v. Republic, Cr. App. No. 239 of 2011, the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

In this appeal, we are satisfied that the appellant was appropriately warned that should his appeal fail the State would seek enhancement of the sentence on the ground that it was too lenient. The warning took the form of a notice of enhancement of sentence that was duly served upon the appellant's advocate. In view of the fact that the filing and service of the notice is not challenged or otherwise contested, we do not see any basis in law for the contention that the appellant, who was represented by a lawyer, had to be personally served with the notice of enhancement of sentence.

The question still remains whether in the circumstances of this appeal the first appellate court was entitled to enhance the sentence. It is common ground that the sentence imposed by the trial court was a lawful sentence, which was within its jurisdiction to impose.

82. I have said enough to demonstrate that the impugned judgment is for upholding the conviction. However, the sentence meted out is unlawful. It cannot stand. In the circumstances, the fidelity to the law is sacrosanct. The 30-year sentence is unlawful. It is consequently set aside and replaced with a sentence of life imprisonment.

Determination

83. In the circumstances, I make the following orders: -

a. The Appeal on conviction lacks merit and is accordingly dismissed.

b. The sentence meted out is unlawful and is therefore set aside and substituted with the only sentence prescribed, that of a life sentence.

c. Right of appeal 14 days.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2026. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Kogos Elizabeth for the State

Appellant in person

Court Assistant – Michael