



REPUBLIC OF KENYA



**Joshua v Republic (Criminal Appeal E017 of 2024)
[2026] KEHC 3072 (KLR) (3 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E017 OF 2024
CM KARIUKI, J
MARCH 3, 2026**

BETWEEN

PETER CHACHA JOSHUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. W. K. Kitur (S.R.M)
in Kilgoris Sexual Offence Case No So 77 Of 2020 delivered on 09.09.2021)*

JUDGMENT

Introduction

1. The appellant, Peter Chacha Joshua, was charged with the principal offence of defilement of a girl contrary to Section 8(1) read together with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge alleged that on the 9th of November 2020, at [Particulars Withheld], Transmara West Sub-county, Narok County, the accused unlawfully and intentionally penetrated the vagina of A.M, a girl aged five years.
2. The appellant was also charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, alleging that on the same day and at the same place, he unlawfully and intentionally touched the private parts of A.M with his penis.
3. The accused first appeared in court on 11th November 2020, stating that he was unwell. He was subsequently taken to the hospital for medical attention. On 13th November 2020, he entered a plea of not guilty to both charges. The accused was remanded in custody as he could not obtain certainty. Trial of the prosecution case commenced on 13th November 2020 and concluded on 19th August 2021.



Summary of Evidence Before the Trial Court

4. The prosecution called four witnesses and tendered exhibits to support its case:
5. A.M (Complainant, PW1) – The complainant, aged five years, testified that she was sent by her family to buy tomatoes from the accused. She was accompanied by her brother, Marwa (PW2). After buying the tomatoes, she remained behind to have tea. She stated that the accused took hold of her, led her to his bed, removed both her pants and his trousers, and penetrated her. She experienced pain and was instructed not to tell anyone. The accused then gave her a soft drink (Coke) before letting her go home. She immediately informed her mother of the incident.
6. EM (PW2) – The elder brother of the complainant testified that he accompanied A.M to buy tomatoes and then returned home with the tomatoes while A.M stayed behind. He did not witness what happened afterward but confirmed their frequent acquaintance with the accused as neighbors.
7. Lilian Sang (PW3), Clinical Officer – Conducted a medical examination of the complainant on 10th November 2020. She observed inflammation of the vagina, presence of pus, and urine containing pus cells and red blood cells. She concluded that the complainant had been defiled. She produced treatment notes, laboratory request forms, and the P3 Form as exhibits. On cross-examination, she confirmed that such symptoms could arise from trauma or sexual intercourse.
8. Snr. Sgt. Salome Mining (PW4), Investigating Officer – Testified that the accused had been subjected to mob justice upon arrival at the police station. She recorded witness statements and escorted the complainant for medical examination. The accused was later charged in court after completion of the investigations.
9. The accused’s defence, presented on 1st September 2021, was a denial of the charges. He alleged that the case arose from a dispute regarding a television set he had lent to the complainant’s father. He denied defiling A.M and stated that he was sober at the time of the alleged incident. No additional witnesses were called in his defence.
10. The trial court found the appellant guilty of committing an offence of defilement of a girl contrary to Section 8(1) as read with Sub-Section 8(2) of the *Sexual Offences Act* No. of 2006. The appellant was convicted of the Principal Charge of Defilement under Section 215 of the Criminal Procedure Code.
11. Subsequently, the appellant was sentenced to serve 30 years’ imprisonment.

Grounds of appeal.

12. The appellant, dissatisfied with the trial court’s decision, filed an appeal with this Honourable Court via a petition of appeal dated 24th July 2024. Pursuant to section 350(2)(v) of the Criminal Procedure Code, the appellant sought leave to amend his earlier lodged grounds of appeal vide amended memorandum of appeal dated 30th June 2025. The appeal is founded on the contention that the trial magistrate erred both in law and fact in the conduct and determination of the trial.
13. The amended grounds of appeal assert, inter alia, that:
 - i. The essential elements of the offence were not proved beyond reasonable doubt, resulting in an injustice.
 - ii. The trial was conducted unfairly, contrary to Articles 25, 27, 28, and 50(2)(c) & (k) of *the Constitution* of Kenya, 2010, thereby denying the appellant the right to a fair trial.



- iii. Crucial witnesses whose testimony was vital to the prosecution's case were not made available, yet the trial magistrate failed to address this omission.
 - iv. The trial magistrate overlooked the existence of a personal grudge between the complainant's family and the appellant, which cast doubt on the credibility of the evidence; and
 - v. The trial court did not account for the period the appellant spent in remand custody, contrary to Article 50(2)(p) of *the Constitution* and section 333(2) of the Criminal Procedure Code.
14. In light of the foregoing, the appellant prays that this Honourable Court:
- i. Quash the conviction.
 - ii. Set aside the sentence and release the appellant; or, in the alternative,
 - iii. Substitute the sentence with a lesser term should the appeal against conviction fail.

Directions of the court.

15. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

16. The appellant's first ground of appeal contends that the essential ingredients of the offence were not proved. While the age of the complainant and the identity of the appellant were not in dispute, the appellant argued that penetration, a critical element under Section 8(1) of the *Sexual Offences Act*, was not established. Section 2 of the Act defines penetration as the partial or complete insertion of a genital organ into the genital organ of another person, including the anus. The appellant submitted that the complainant's testimony did not clearly indicate penetration as legally defined, noting that she described only that the appellant "penetrated her with an organ" without specifying the use of genital organs. Further, the clinical officer called to corroborate penetration evidence testified on behalf of an unavailable examining doctor. This, the appellant contended, violated his right to a fair trial under Article 50(2)(k) of *the Constitution* of Kenya and Section 77 of the *Evidence Act*. The appellant relied on the Court of Appeal decisions in Joseph Mahende v Republic [2019] eKLR and J.A. v Republic [2016] eKLR, which emphasize that evidence purportedly from an expert must be tendered by the expert themselves, and that failure to summon the maker of a document undermines the accused's right to cross-examination.
17. The appellant further argued that the complainant's age, another essential element of defilement, was not properly proved. He submitted that age is a critical determinant of the offence and the sentence, citing Hudson Ali Wachongo v Republic (2016) eKLR, Elias Kasemo v Republic (Criminal Appeal 504/2010, C.A. Malindi), and Francis Omuroni v Uganda (Criminal Appeal No. 2/2000). In this case, PW3 produced an age assessment report without being the maker, while PW1 and PW2 did not testify regarding her age. The appellant contended that the admission of such evidence without proper cross-examination violated his constitutional rights under Article 50(2)(k) and Section 77 of the *Evidence Act*.
18. The second ground of appeal raised concerns about the fairness of the trial. The appellant submitted that the admission of medical treatment notes, age assessment reports, and P3 forms without summoning their authors for cross-examination infringed his rights under Articles 25(c), 27, 28, and 50(2)(c), (k), (p) of *the Constitution*. He argued that, as he was unrepresented, the trial court had a duty to safeguard his ability to challenge evidence, and failure to do so violated his rights to a fair hearing, dignity, and non-discrimination.



19. In the third ground of appeal, the appellant argued that there existed a personal grudge between himself and the complainant's family. He explained that a dispute had arisen over a television set he had given to the complainant's father, who allegedly sought to reclaim it and had previously threatened to level false accusations against him. The trial court had dismissed this defence as an afterthought. However, the appellant submitted, under *S v Sithole* 1999 (1) SACR 585 (W), that if there is a reasonable possibility that an innocent explanation is true, the accused must be acquitted. The prosecution failed to investigate or rebut the appellant's allegations, creating reasonable doubt as to his culpability.
20. The fourth ground challenged the trial court's failure to account for the period the appellant spent in remand custody prior to sentencing. The appellant contended that the eleven months he spent in custody should have been considered under Section 333(2) of the Criminal Procedure Code. He cited *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR, which emphasize that failure to consider remand custody results in disproportionate punishment. The Judiciary Sentencing Policy Guidelines were also invoked to show that custody time must be credited to prevent excessive sentences.
21. In conclusion, the appellant prayed that this Court quash the conviction, set aside the sentence, and release him, or, in the alternative, substitute a lesser sentence and ensure that the period spent in remand custody is credited if the appeal on conviction fails.

The respondent's submissions.

22. The respondent opposed the appellant's appeal, submitting that the conviction and sentence were proper and supported by evidence.
23. The respondent submitted that the prosecution proved the case beyond reasonable doubt. It was contended that to secure a conviction for defilement, the prosecution must establish three essential ingredients: the age of the complainant, proof of penetration, and identification of the assailant. The authorities of *Charles Wamukoya Karani v Republic* and *Simon Oduor Oloo v Republic* (2022) eKLR, where the courts held that these elements are critical to establishing the offence.
24. Regarding age, the respondent submitted that the complainant's age was properly proved. PW4, the investigating officer testified that the complainant underwent an age assessment at the hospital, and the clinical officer (PW3) determined she was approximately five years old. The age assessment report was admitted as prosecution Exhibit 1. PW3 also confirmed the complainant's age, and the complainant herself indicated she was a pupil at Kyengo Academy, although she did not give her exact age. The respondent relied on *Francis Omuroni v Uganda* (Criminal Appeal No. 2 of 2000), where the Court of Appeal held that medical evidence is paramount in determining the age of a victim, supplemented where necessary by birth certificates, parental or guardian testimony, or observation and common sense.
25. On the issue of penetration, the respondent submitted that both the complainant's testimony and medical evidence established the element. The complaint said that the appellant removed her panty and his trousers before penetrating her with his organ, causing her pain. PW3, the clinical officer testified that examination revealed pus discharge and inflammation in both the external and internal genitalia and pus and red blood cells in the urine, which were abnormal for a child of her age. PW3 concluded that these findings were consistent with penetration. In support of the prosecution's case, PW3 introduced several documents, including the complainant's age assessment report, treatment notes, laboratory request forms, and the P3 form. The respondent relied on *Onzare v Republic*



(Criminal Appeal 15 of 2023) [2024] KEHC 494, which holds that penetration can be established through the evidence of the victim, corroborated by medical evidence.

26. Concerning identification, the respondent submitted that the appellant was well-known to the complainant as “Mzee Peter.” The complainant testified that she and her brother were sent to purchase tomatoes from the appellant, and that she remained behind at his request, when the incident occurred. PW2, her brother, corroborated this account. The respondent further cited *Anjononi and Others v Republic (1980) KLR*, as quoted in *Daniel Muthomi Marigu & 4 Others v Republic (2021) eKLR*, noting that recognition of a familiar assailant is more reliable than identification of a stranger, as it is based on prior personal knowledge.
27. On the issue of sentence, the respondent submitted that the trial court imposed a sentence of thirty years, which is in fact lighter than the statutory penalty of life imprisonment provided under Section 8(2) of the *Sexual Offences Act* for defilement of a child under eleven years. Therefore, the sentence could not be considered harsh or excessive.
28. In conclusion, the respondent urged the court to find that the prosecution proved all elements of the offence beyond reasonable doubt, the appellant was afforded a fair hearing, and the trial court’s conviction and sentence were appropriate. The respondent prayed that the appeal be dismissed in its entirety.

Issues For Determination

29. Having considered the charge, evidence, and submissions of both parties, the following issues arise for determination:
 - i. Whether the essential elements of the offence of defilement, namely age, penetration, and identification of the accused, were proved beyond reasonable doubt.
 - ii. Whether the appellant was denied a fair trial in contravention of Articles 25(c), 27, 28, and 50(2)(c) and (k) of *the Constitution* of Kenya, 2010, including the right to cross-examine crucial witnesses.
 - iii. Whether the existence of a personal grudge between the appellant and the complainant’s family undermined the prosecution’s case.
 - iv. Whether the trial court erred in failing to account for the period the appellant spent in remand custody when imposing sentence.

Analysis And Determination

1. Proof of the Essential Elements of Defilement

30. The offence of defilement under Section 8(1) of the *Sexual Offences Act*, No. 3 of 2006, requires the prosecution to prove three elements: (I) the age of the victim, (ii) penetration, and (iii) identification of the perpetrator. This was clearly articulated in *Charles Wamukoya Karani v Republic* and affirmed in *Simon Oduor Oloo v Republic (2022) eKLR*.

Age

31. The complainant, A.M., was alleged to be five years old. Evidence of her age was given by PW3, the clinical officer, and corroborated by PW4, the investigating officer. An age assessment report was tendered as prosecution Exhibit 1. Although the appellant challenged the admission of this report on the basis that PW3 was not the maker, it is well established that in the absence of direct documentary



evidence, medical opinion is admissible to determine age, as held in *Francis Omuroni v Uganda* (Criminal Appeal No. 2 of 2000). Furthermore, age may also be inferred from testimony regarding schooling or parental knowledge (*Hudson Ali Wachongo v Republic* (2016) eKLR). In this case, the complainant's evidence, coupled with the clinical officer's assessment, sufficed to prove her age beyond reasonable doubt.

Penetration

32. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of a genital organ into the genital organ of another person, including the anus. PW1's testimony described that the appellant removed her pants and his trousers and "penetrated her with an organ," causing pain. PW3 corroborated this through clinical observations of inflammation, pus discharge, and abnormal urinalysis findings. In *Onzare v Republic* (Criminal Appeal 15 of 2023) [2024] KEHC 494, it was held that penetration can be established by the evidence of the victim, corroborated by medical evidence. Accordingly, I am satisfied that the prosecution proved penetration.

c) Identification

33. PW1 testified that she knew the appellant as "Mzee Peter" and identified him as the perpetrator. PW2 corroborated the circumstances surrounding the incident. Recognition of a familiar person is more reliable than identification of a stranger (*Anjononi and Others v Republic* (1980) KLR, cited in *Daniel Muthomi Marigu & 4 Others v Republic* (2021) eKLR). There is no evidence of mistaken identity, and I am satisfied that the appellant was positively identified.

Conclusion on Elements

34. Having examined the evidence, all essential elements of defilement were proved beyond reasonable doubt. The appellant's challenge to the penetration evidence and age assessment does not, on the facts, create a reasonable doubt sufficient to acquit.

2. Alleged Unfair Trial

35. The appellant argued that his rights under Articles 25(c), 27, 28, and 50(2)(c), (k), (p) of *the Constitution* were violated, particularly regarding the admission of medical records and age assessment reports without cross-examination of their authors. While the trial court admitted exhibits tendered by PW3, the clinical officer, I find that PW3 testified to the substance of the reports, including examination findings and conclusions. The appellant was able to cross-examine PW3 regarding the findings, and the purpose of cross-examination was fulfilled. The Court of Appeal has held in *Joseph Mahende v Republic* [2019] eKLR and *J.A. v Republic* [2016] eKLR that tendering evidence through a witness familiar with the documents is permissible when the maker is unavailable. Accordingly, I find no infringement of the appellant's constitutional rights to a fair trial.

3. Alleged Grudge Between Appellant and Complainant's Family

36. The appellant claimed that the complainant's parents had a personal dispute with him over a television set and had fabricated the charges. Under *S v Sithole* 1999 (1) SACR 585 (W), an accused may be acquitted if a reasonable possibility exists that an innocent explanation is true. In the present case, however, the appellant's claim was uncorroborated. There is no evidence that the complainant's family had a motive to fabricate the story, and the complainant's evidence was detailed, consistent, and corroborated by medical examination. The Court cannot speculate on unsubstantiated allegations; thus, this ground fails.



4. Remand Custody Period

37. The appellant contended that the trial court failed to account for the eleven months spent in remand custody. Section 333(2) of the Criminal Procedure Code, as interpreted in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR, requires that any period spent in custody before conviction be considered when calculating a sentence. The trial court's sentencing statement did not explicitly address this period. In the circumstances, I find it appropriate to adjust the sentence to reflect the remand period.

5. Sentence

38. The appellant was sentenced to thirty years' imprisonment. Under Section 8(2) of the *Sexual Offences Act*, the statutory sentence for defilement of a child under eleven years is life imprisonment. The sentence imposed was thus lighter than the statutory minimum and cannot be said to be excessive or harsh.

Conclusion And Orders

39. In summary:
- a. The prosecution proved the essential elements of offence, age penetration, and identification—beyond reasonable doubt.
 - b. The appellant's right to a fair trial was not infringed; he had an adequate opportunity to cross-examine witnesses and challenge evidence.
 - c. The alleged grudge between the appellant and the complainant's family was not substantiated and does not create reasonable doubt.
 - d. The sentence of thirty years' imprisonment is appropriate, but the period spent in remand custody shall be credited.

Orders:

40. The appeal against the conviction is dismissed.
41. The sentence is affirmed at thirty years imprisonment, but the period of eleven months spent in remand custody shall be deducted from the sentence. The sentence is to be computed from 11.11.2020.
42. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 3RD DAY OF MARCH 2026.

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CHARLES KARIUKI
JUDGE

