



REPUBLIC OF KENYA



**Kuria v Republic (Criminal Appeal E234 of 2023)
[2026] KEHC 3213 (KLR) (Crim) (9 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E234 OF 2023**

MW MUIGAI, J

MARCH 9, 2026

BETWEEN

JAMES NJUGUNA KURIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of Hon. C.M Njagi (PM) at the Chief Magistrate's Court Milimani S.O No. 046 of 2017 judgment delivered on 8th August 2023)

JUDGMENT

Information

1. In the consolidated charge sheet;

The Appellant herein James Njuguna Kuria was charged in count one with the offence defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.

Particulars being that on diverse dates between December 2014 and 7th January 2015 at [Particulars Withheld] in Kajiado North Sub-county within Kajiado County the accused person unlawfully and intentionally caused his penis to penetrate the anus of PWM a child aged 11 years.

2. In the alternative the accused person was charged with the offence of Committing an Indecent Act with a Child contrary to Section 11(1) of the [Sexual Offences Act](#).

It was alleged that on diverse dates between December 2014 and 7th January 2015 at [Particulars Withheld] in Kajiado North Sub-county within Kajiado County the accused person unlawfully and intentionally touched the anus of MNM a child aged 11 years with his penis.



3. The Appellant herein James Njuguna Kuria was charged in count one with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.

Particulars being that on diverse dates between December 2014 and 7th January 2015 at [Particulars Withheld] in Kajiado North Sub-county within Kajiado County the accused person unlawfully and intentionally caused his penis to penetrate the vagina of MNM a child aged 14 years.

4. In the alternative the accused person was charged with the offence of Committing an Indecent Act with a Child contrary to Section 11(1) of the [Sexual Offences Act](#).

It was alleged that on diverse dates between December 2014 and 7th January 2015 at [Particulars Withheld] in Kajiado North Sub-county within Kajiado County the accused person unlawfully and intentionally touched the vagina of MNM a child aged 14 years with his penis.

Petition Of Appeal

5. The Appellant herein being aggrieved by the entire decision of Hon. C. M. Njagi Principal Magistrate's judgment delivered on 8th August 2023 appealed against the decision on the following grounds:-

1. The Trial Magistrate erred in law and fact in convicting the Appellant despite the fact that essential witnesses were not called by the prosecution
2. The Trial Magistrate erred in law and fact in convicting the Appellant irrespective of the fact that there was no medical evidence linking the Appellant to the offence for which he was convicted.
3. The Trial Magistrate erred in law and fact by convicting the Appellant while relying on the evidence only of the minors' contrary to Section 124 of the [Evidence Act](#).
4. The Trial Magistrate erred in law and fact and grossly misdirected herself by convicting the Appellant for the offence of defilement in the absence of clear evidence as to the age of the complainant.
5. The Trial Magistrate erred in law and fact and misdirected herself by drawing the wrong inferences to the prejudice of the Appellant.
6. That the findings of the fact by the Learned Trial Magistrate regarding the Appellant's mental condition were based on a misapprehension of the evidence and especially the casual approach undertaken by the Learned Trial Magistrate to the medical evidence on record.
7. In the premises the finding and holding of the Learned Trial Magistrate as contained in her judgment is inconsiderate, erroneous, unlawful, biased and untenable in law.
8. The Trial Magistrate erred in law in failing to take into account the Defense put forward by the Appellant and his witness, in shifting the burden of proof to the Appellant and in failing to find for the appellant on parallel evidence.
9. That the Learned Magistrate erred in law and fact by deciding, the case against the weight of evidence and on a balance of probabilities as opposed to beyond reasonable doubt, thus exceeding and misapplying the Courts jurisdiction.
10. That the Learned Trial Magistrate erred in law and fact in finding and holding that the Respondent had proved its case beyond requisite standards, whilst the evidence tendered by the prosecution was replete with pertinent and material contradictions which negated the probative value of the evidence tendered and/or offered.



11. That the Learned Trial Magistrate erred in fact and law when she failed to find and hold that the essential elements of the offences were not proved.
12. That the sentence meted out by the Trial Magistrate is manifestly excessive, harsh or punitive.

Trial Court Evidence

Trial Court Proceedings

The Trial Court started hearing it was by Hon. J. B. Nyagena PM on 22/5/2015 and she heard PW1 & PW2. On 13/8/2019 Hon. C. Muthoni PM read to the Accused person Section 200 CPC proceeded with PW3 to the end of proceedings & delivered Judgment.

1. PW1 PW a minor of 11 years after voire dire examination the Trial Court took sworn statement of the child. PW1 testified that James Njuguna invited him and his friends namely N and K to his house.

On reaching the house they found Pastor Njuguna and his wife who welcomed them. They ate supper and slept in one of the bedrooms. In the morning the wife went to work and the pastor called him to his bedroom and locked the door. He tied his eyes using a piece of cloth and inserted his penis into his mouth. He threatened him not to tell anyone. He told him that the penis was oil from God. He feared and never told his mother. They remained indoors and they used to wash utensils and clean the house.
2. When they were about to open school Pastor called him to his bedroom and asked him to remove all his clothes and he applied oil on his buttocks and inserted his penis into his anus. He did this severally and told him that it was "Agano kutoka kwa Mungu" and he asked him to sit on the bed; when he cried he hit him on the head. After he finished defiling him he asked him to go and a bath and after that he sat in the sitting room. He went and came back later and defiled him.
3. On different days he took K to his bedroom and did the same to him, the next day he took N and defiled him.. He used to cover their eyes using pieces of cloth told them that; that was the blood of Jesus getting into them and cleansing all the diseases they had. When they were about to leave he told them not to tell anyone. His mother knew, they had gone to visit their Pastor. They used to go to church with Njuguna and then back to his home.
4. They used to live with M, M and N. Those were members of their church. He asked M to take them to church and from church everybody went home. He said that those things happened in December 2014. He developed a lot of fear. He went for him again and he defiled him. He asked him to suck his penis at night and rape him during the day. He also said that his sister N was also defiled by Pastor Njuguna when she took church drums to church. When he used to suck his penis, he used to tell him to swallow the sperms but he did not. His sister N alerted their mother what had happened the mother questioned him and then she took them to Karen Hospital and later Nairobi Women Hospital.
5. In cross examination he stated that the Accused used to defile them during the day when the wife was away at work or at night when the wife delayed to come home. The 1st day he went to his house he inserted his penis to his mouth and asked him to swallow the things he released into his mouth. He was walking with a lot of difficulties due to pain. He feared to tell his wife. He said that they went to Karen Hospital once and blood sample was taken from his sister. They were referred to Nairobi Women Hospital.



6. PW2 CNW stated that she resided in Ngong doing casual jobs and also sold vegetables. She stated that PW1 was her 3rd born child and he was 11 years old and attended school at [Name Withheld] school. MNM, was her child of 14 years old. She attended school at Ngong Township PriM school in class 8. She produced their birth certificates PMF1 I and PMF1 2. She was told by MNM that where it had reached she wanted to take 'rat rat' poison which is normally used to kill rats. She asked her why and she said they had made a covenant with Pastor. It had happened when they were in company with other children. She explained further that oil was applied in their private parts.
7. After Church Pastor [accused] asked them to carry drum and Bibles to his house. She took her to Karen Hospital and then referred to Nairobi Women Hospital where she was found to be pregnant. She produced the treatment notes from Nairobi Women Hospital. PMFI 3(a) and Ultra sound form PMFI 3(b) and post rape case form PMFI 4. She reported to the Police in Ngong and Pastor was arrested. She was also treated at Karen Health Centre PMFI 5. M told her to interrogate M and M told her what the pastor used to do to him. He inserted the "agano" to PW1's anus. This 'agano' was his penis. He also said that he would ask him to suck his penis claiming that that it was oil from God.
8. She took him Karen Hospital and then to Nairobi Women Hospital where he was treated he had a wound on his anus. She produced treatment noted from Karen PMF16. This is post care form from Nairobi Women Hospital PMF17. She takes him monthly for checkups.
9. On cross examination she stated that she suspected M was pregnant. In March she took her to Ololua Health she was examined by the Doctor and when she was interrogated she mentioned Pastor James Njuguna sent them to take drums and bible the store and then he came and applied oil on her vagina then inserted his penis. M got a baby boy.
10. PW3 - Dr. Joseph Maundu from Nairobi Police Surgery testified that on 16/3/2015 he examined MNM a 14 years old referred from Ngong Police Station on allegation that she was defiled on July 2014 by a person known to her. After examination she was found to be about 32 weeks pregnant. She had been examined earlier in Nairobi Women's Hospital. He signed the P3 Form on 16/3/15 and he produced it as an exhibit.
11. He was also presented with PW M 11 years old alleged to have been defiled in December 2014 by a person known to him. When he examined him he found several scratch marks around the anal opening. He had been treated at Nairobi Women Hospital and Karen. He signed the documents on 16/3/15 and it in evidence MF1 8.
12. On cross examination he stated that M was 32 weeks pregnant clinically. The offence took place in July 2014 and he examined her on 1/3/15. She was almost due to delivery.
13. PW4 MNM said that she was 19 years old. In the year 2014 she was 14 years old and she recalled in July 2014 she was invited by her friend Ciku to their church called First Born of the Holy Spirit Church. Then Pastor was James Njuguna Kuria. After the service ended the Pastor said the youth to remain behind for dance she remained with C, N and three boys M, M and K
14. The pastor told them to take the drums to the store which was a distance from the church. The store had a division using a curtain and there was a bed and stools. In the divided room we were six of us and the pastor. He told the girls to go to one room. They said the prayer on the bed, Castor, N and her then he asked them to remove their clothes. He said he wanted to build a covenant in them. He took the oil and applied it on his penis. He said he "anataka kupanga



agano ndani yetu” (He wanted to build a promise in us.). He had sex with all the three girls C, N and M.

15. He threatened them not to tell anyone at home as they should respect their elders. They respected him as a pastor.
16. She said that Pastor sodomized the boys and defiled the girls. He also instructed M to have sex with them. She also said that pastor defiled her at their home when he went there and found her alone.

She stated that she started feeling unwell and her mother suspected her to be pregnant and when pregnant test was done the results were positive. She delivered in May 2015. A DNA test was done twice as the pastor had denied being responsible but both tests showed that pastor was the father of the child.

17. On cross examination she stated that pastor could put loud music when he was defiling her so that no one could hear even if she raised an alarm. She also stated that Pastor defiled them inside the church for the second time.
18. PW 5 Henry Kiptoo Sang of Government Chemist dealing with DNA analysis to determine genetic relationships testified that on 15/9/2015 he received/obtained buccal swab analysis samples from the following
 - i. M N who was said to be complainant in this case.
 - ii. Christian Nduo who was said to be a child.
 - iii. James Njuguna Kuria the accused person.

19. Accompanying them was an exhibit memo Form requesting them to determine the paternity of the child Christian Nduo.

Based on the DNA profiles he was able to find out that half of the DNA elements that were found on the child Christian Nduo came from the complainant M N while the other half originated from James Njuguna Kuria the accused person. He did a probability of paternity and it showed there are 99.99% chances that James Njuguna was the biological father to Christian Nduo, M N’s child. He produced the Analysis Report as exhibit in Court.

20. PW6 - John Njuguna a clinician from Nairobi Women Hospital stated that MNM was attended by her colleague Jeff Njoroge a Clinician who no longer works at the hospital but they worked together in the department for more than three years. He said that MNM was attended in the facility on 5/3/2015. She reported to have been defiled in June and December 2014. The patient was diagnosed with UTI and she was pregnant. She produced a PRC Form filed on 5/3/2015 and treatments notes from Karen Health Centre where she was treated and given referral to their facility.
21. On cross examination he said that the victim was pregnant and the offence occurred twice in June and December 2014. She gave reports of going to the Pastors house and the pastor defiled her.
22. PW7 No. 44173 Cpl Francis Kandie testified that the matter was handed over to him by PC Namusasi who resigned from the service. He stated that the accused person was charged with the offence of defiling two minors but he denied after a DNA report was done. The DNA were for the suspect, the victim and the child.. The Court ordered another DNA to be done after application by the accused. He witnessed the DNA sampling of 2nd test. The outcome



of the 2nd DNA analysis was the same as the 1st one which was positive that it belonged to the complainant, the accused and the child.

23. DW1 on his defense he said that he was a Pastor in First Born of the Holy Spirit Ministry and he was also employed in Fruit of Zion Sacco Society Limited. He knew the Complainant M.N.M PW1 as an employee of Fruit Zion Saccos as a tea girl.
24. In his statement he stated that he knew the mother to PW1 whom he claimed to be his lover. He stated that he was mentally ill and had been receiving treatment which kept him from being violent. No medical documents were produced to support the issue of being mentally ill.
25. On cross examination he said that he understood the charges he was facing, charges of defilement. He claimed that mother to PW1 employed her to be cooking tea for the Pastors. He confirmed to have defiled M N and the child she sired was his. PW1 was 15 years old.
26. DW2 Grace Wanjiru testified that the accused person was her last born. She could not say much about his behavior apart from him being a church person. She said that the accused was a bad child in class and when he was seven years old he was expelled from school because of beating children and teachers. In the year 2005 she received a call from the police station that her son was detained in the station because of defiling someone's child. He locked himself in his house and lit his house on fire. He wanted to kill himself in the house. People rescued him. She took him to Mathare Hospital where he was admitted for 2 months. I took him if he did not take medication he was violent.

Appellants Written Submissions.

1. The Appellant relies on the case of Irene Atieno Ochieng v Republic [2017] eKLR where the court stated that:

“As this is the Appellant’s first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of Okeno vs. R (1977) EALR 32 and further in the Court of Appeal case of Mark Oiruri Mose vs. R (2013)eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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 give allowance for that”
2. The Appellant submits that the prosecution did not prove its case beyond reasonable doubt to warrant a conviction in this case. The three ingredients of the offence of defilement were not proved, these are; whether there was penetration, secondly, whether the appellant was the perpetrator and thirdly whether the age of the 2nd complainant was proved.
3. The Appellate Court at Meru in Dominic Mwilaria V Republic (2018) KLR. stated that

“It is now beyond peradventure that, in cases of defilement, the prosecution must prove

 1. The age of the child
 2. The fact of penetration in accordance with section 2(1) of the *Sexual Offences Act*, and
 3. That the perpetrator is the appellant”



4. Proving one ingredient is not enough as all are critically important and that they must be proved beyond reasonable doubt and that the benefit of doubt, if any, ought to be given to the appellant so that the less severe sentence is imposed. The appellant submits that no evidence was provided to link him as the perpetrator of the offences
5. It was a well settled law that the offence of defilement with which the Appellant was charged and subsequently convicted has three main ingredients, to wit, identification and recognition, penetration and the age of the victim.
6. In Criminal appeal 96 of 2017; Michael Mumo Nzioka v Republic [2019] eKLR, the court had this to say:

“It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia, the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

7. In evaluating the appeal, they formulated main issues from the grounds of appeal filed on herein with a view to proving to the court that the Prosecution did not prove the main ingredients of the charge to the requisite standard of beyond reasonable doubt

Corroboration.

8. Under the provision to the Section the Court is allowed to solely rely on the evidence of the victim provided the Court satisfied itself on reasons to be recorded that the child is being truthful Criminal Appeal No. 44 of 2016-Sahali Omar vs Repl,
9. The only evidence the Magistrate considered to corroborate PW1 was the Doctor’s evidence. The doctor’s evidence was on “16/4/15 he was also presented with PW M 11 years of Ngong Police Station alleged to have been defiled by a person known to him” (page 62 line 15-17 of the record). The doctor found that there were no injuries on genitals and anal region. He said he found several scratch marks around the anal opening but did not state whether they could have been caused by introduction of a penis into the anus. When PW3 indicates in relation to PW1 (1 complainant) that he found several scratch marks around the anal opening, the prosecution was obliged to go beyond the evidence offered to show that there was actual penetration by a male sexual organ and that the perpetrator was the appellant. Showing that a male was involved is not enough. Nothing should be left for the court to assume. The court must be certain that the evidence discloses the offence the suspect is charged with and that the offender is the person charged before the court.

Defence Case

10. The Magistrate failed to take into account the defence raised by the Appellant. The Appellant’s testimony was at page 120 to 122 of the record. His witnesses’ evidence (DW 2) was from page 123 to 125 of the record. Both the Appellant and his witness stated that the Appellant had had a mental illness since 2005. He stated that he was on monthly treatment and his mother stated she took him to Mathare Mental Hospital for treatment. In her judgement the Magistrate did not acknowledge this very pertinent fact. She said “He had been on treatment since 2015.” [Page 5 of the judgement] [under the heading Defence Case”] This was not the case since both he and his mother testified that he had



been on treatment since 2005. This led her to conclude in her judgment that he was aware of everything he was doing. She failed to take into account the fact that the case had to be adjourned at various stages to allow the Appellant to be hospitalized Mathare Mental Hospital for treatment. Indeed, the Court failed to take into account the very pertinent evidence of the mother that his mental condition made him do some of the following things, beating other children and teachers, assaulting his own father, attempting to commit suicide by locking himself in his house and setting it on fire, causing all other members of his family to run away from home.

11. These symptoms would normally disappear if he took his medication. The conclusion and finding that He was of sound mind when he repeatedly defiled the complainants together with other children." is therefore not grounded on any testimony given and proven.

Respondents Written Submissions

Issues Arising For Determination

1. Under Section 107 of the *Evidence Act*, the prosecution bears the burden of proof on every element in a criminal charge. The prosecution must discharge this burden beyond reasonable doubt.

Proof Of Penetration

2. Penetration is defined under section 2 (1) of the Sexual Offences Act No.3 of 2006 as follows:-

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

Under the same section, Genital Organs are defined as follows:

“Includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.

3. The above finding as was found in the case of John Onzere Kambi v Republic [2013] eKLR where the court noted;

“I find that there was at least partial penetration of the complainant's anal orifice. The said penetration was by way of the appellant's penis. Therefore, I find that the ingredients of the offence of defilement were proved beyond reasonable doubt.”

Whether The Age Of The Child Was Proved

4. They submitted that there was also no doubt as to the age of the minors. PW3 who was the doctor that examined the minors recorded the age of PW1 as 11 years old and the age of PW4 as 14 years corroborating the minors' testimony as to their age. PW7 produced the birth certificates of PW1 and PW4 proving their age as of the time of the incident.

Positive Identification Of The Assailant

5. The minors easily identified the appellant as their pastor as they had attended his church over a substantial period of time. They were also able to identify the appellant on the dock as they testified.



Whether The Sentence Was Illegal

6. Section 8(2) of the Act provides for a sentence of life imprisonment. The Appellant was sentenced to serve a term of 50 years imprisonment
7. Section 354 (3) (ii) and (iii) of the Criminal Procedure Code provides as follows:
 - (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-
 - (a) In an appeal from a conviction-
 - (i) Reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - (ii). Alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - (iii) With or without reduction or increase and with or without altering the finding, alter the nature of the sentence;
7. They further submitted that the court is bound by the doctrine of judicial precedent/stare decisis and in the case of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) the Supreme Court held that the mandatory sentence of life imprisonment as provided under Section 8 of the [Sexual Offences Act](#) is lawful and that the court has no jurisdiction to impose a sentence lower than what is prescribed.

Analysis & Determination

1. The Court considered the Criminal Trial Court record, proceedings, defense, submissions Rulings Order and Judgment. The Petition of Appeal filed and Record of Appeal, this Court finds for determination the following condensed issues;
 - a. The essential witnesses were not called by Prosecution; no medical evidence linking the Appellant to the matter;
 - b. The Trial Court erroneously relied only on evidence of minors C/S Section 124 [Evidence Act](#).
 - c. The Age of the minor (s) was not established and drew wrong inferences to the prejudice of the Appellant.
 - d. The findings by the Trial Court of the Appellant's Mental Condition were based on misapprehension of evidence and undertook casual approach. The finding and holding of Trial Court contained in the Judgment is inconsiderate, erroneous, unlawful, biased and untenable in law by failing to take into account the defense put forward and shifting burden of proof on the Appellant and failed to find for the Appellant on parallel evidence.
 - e. The Trial Court decided the case against the weight of evidence and on a balance of probabilities as opposed to beyond reasonable doubt, thus exceeding and misapplying the Courts jurisdiction.
 - f. The evidence tendered by the prosecution was replete with pertinent and material contradictions which negated the probative value of the evidence tendered and/or offered. The essential elements of the offences were not proved.



- g. The sentence meted out by the Trial Magistrate is manifestly excessive, harsh or punitive.
2. This Court being the 1st Appellate Court, its duty is as set out in the case of Okeno vs. Republic [1972] EA 32 as follows:-

“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 vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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.”

The Burden & Standard Of Proof

- 3. According to Phipson on the Law of Evidence; the term Burden of Proof has 2 distinct meanings;
 - a. The obligation of a party to convince the Tribunal on a fact; the obligation of a party to persuade the Tribunal to come to one’s way of thinking. The persuasion would be to get the Tribunal to believe whatever proposition the party is making. The proposition of fact has to be a fact in issue.
 - b. The obligation to adduce sufficient evidence of a particular fact The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof.
- 4. Burden of Proof is the obligation to adduce evidence & also convince the Tribunal or Court on facts that prove commission of offence in Criminal Law. The general rule burden proof is by the Prosecution Section 107-110 *Evidence Act*; and on occasion the burden of proof is shifted on the Accused person as provided by Section 111 (1) *Evidence Act*.

111. Burden on accused in certain cases

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him
- (2) Nothing in this section shall
 - (a)
 - (b)
 - (c) affect the burden placed upon an accused person to prove a defense of intoxication or insanity.

Lord Denning stated what amounts to proof beyond reasonable doubt in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 that:-



“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 a 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 favor 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.”

5. Applying the burden and standard of proof to Criminal Law principles; that to find and determine criminal liability, there must be evidence that discloses the criminal act (actus reus) and the act caused through a guilty mind (mens rea) and both caused by the culpable person(s) The criminal culpability is proved by either Direct evidence or and circumstantial evidence.

The Appellant raised issues to show that the burden and standard of proof were not met in this case, he alleged;

- a) The essential witnesses were not called by Prosecution; no medical evidence linking the Appellant to the matter;
- b) The Trial Court erroneously relied only on evidence of minors C/S Section 124 [Evidence Act](#).
- c) The Age of the minor (s) was not established and drew wrong inferences to the prejudice of the Appellant.
- e) The Trial Court decided the case against the weight of evidence and on a balance of probabilities as opposed to beyond reasonable doubt, thus exceeding and misapplying the Courts jurisdiction.
- f) The evidence tendered by the prosecution was replete with pertinent and material contradictions which negated the probative value of the evidence tendered and/or offered. The essential elements of the offences were not proved.

Evaluation Of Evidence On Trial Court Record

6. The evidence adduced during trial was as follows;

PW1 PW a minor of 11 years after voire dire examination the Trial Court took sworn statement of the child. PW1 testified that James Njuguna invited him and his friends namely N and K to his house. They found Pastor Njuguna and his wife; they ate supper and slept in one of the bedrooms. In the morning the wife went to work and the pastor called him to his bedroom and locked the door. He tied his eyes using a piece of cloth and inserted his penis into his mouth. He threatened him not to tell anyone. He told him that the penis was oil from God. He feared and never told his mother.

7. The 2nd time was when they were about to open school, Pastor called him to his bedroom and asked him to remove all his clothes and he applied oil on his buttocks and inserted his penis into his anus. He did this severally and told him that it was "Agano kutoka kwa Mungu" and he asked him to sit on the bed; when he cried he hit him on the head. He went and came back later and defiled him.
8. The 3rd incident, he went for him again and he defiled him. He asked him to suck his penis at night and rape him during the day.
9. PW4 MNM said that she was 19 years old. In the year 2014 she was 14 years old and she recalled in July 2014 she was invited by her friend Ciku to their church called First Born of the Holy Spirit Church.



Then Pastor was James Njuguna Kuria. After the service ended the Pastor said the youth to remain behind for dance she remained with C, N and three boys M, M and K

10. The pastor told them to take the drums to the store which was a distance from the church. The store had a division using a curtain and there was a bed and stools. In the divided room they were six of them and the Pastor. He told the girls to go to one room. They said the prayer on the bed, Castor, N and her then he asked them to remove their clothes. He said he wanted to build a covenant in them. He took the oil and applied it on his penis. He said he “anataka kupanga agano ndani yetu” (He wanted to build a promise in us.). He had sex with all the three girls C, N and M.
11. The 2nd time, the pastor defiled her at their home when he went there and found her alone.
12. The evidence by PW1 & PW4 sworn statements testified in detail with graphic circumstances that disclosed that the Appellant/accused person/Pastor sodomized PW1 and defiled PW4 by penetrating his penis in PW1’s anus and PW4’s vagina and in terms described by Section 2 of *Sexual Offences Act* that provides; ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person.’

The Trial Court in the judgment delivered on 28/7/2023 found that ‘the 2 minors were truthful witnesses and their evidence was corroborated by medical evidence.’ This Court cannot legally take issue and/or change the observation by Trial Court as this Court did not see/hear the evidence directly from the witnesses and cannot assess demeanor of the witnesses. See *Okeno vs. Republic* [1972] EA 32 supra on this point.

13. The Defense took issue with compliance of Section 124 of

Evidence Act;

Section 124 of the *Evidence Act*, provides:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

14. The Trial court record shows on 22/5/2015, the Trial Court administered voire dire examination and concluded PW1 would proceed on sworn statement. The evidence of PW1 was sworn statement and was subjected to cross examination to test the veracity of the evidence and credibility of the witness. The evidence of PW4 was sworn statement and also subjected to cross examination.
15. Secondly, the evidence of PW1 & PW4 was corroborated by medical evidence as follows;
16. PW3 - Dr. Joseph Maundu from Nairobi Police Surgery testified that on 16/3/2015 he examined MNM a 14 years old and found her to be about 32 weeks pregnant. She had been examined earlier in Nairobi Women’s Hospital. He signed the P3 Form on 16/3/15 and he produced it as an exhibit. He was also presented with PW M 11 years old he examined him he found several scratch marks around the anal opening. He had been treated at Nairobi Women Hospital and Karen. He signed the documents on 16/3/15 and produced P3 Form MF1 8.



17. PW 5 Henry Kiptoo Sang of Government Chemist dealing with DNA analysis to determine genetic relationships testified that on 15/9/2015 he received/obtained buccal swab analysis samples from the following
 - (i) M N who was said to be complainant in this case.
 - (ii) Christian Nduo who was said to be a child.
 - (iii) James Njuguna Kuria the accused person.
18. Accompanying them was an exhibit memo Form requesting them to determine the paternity of the child Christian Nduo. Based on the DNA profiles he was able to find out that half of the DNA elements that were found on the child Christian Nduo came from the complainant M N while the other half originated from James Njuguna Kuria the accused person. He did a probability of paternity and it showed there are 99.99% chances that James Njuguna was the biological father to Christian Nduo, M N's child. He produced the Analysis Report as exhibit in Court.
19. PW6 - John Njuguna a clinician from Nairobi Women Hospital stated that MNM was attended by his colleague Jeff Njoroge a Clinician who no longer works at the hospital but they worked together in the department for more than three years. He said that MNM was attended in the facility on 5/3/2015. She reported to have been defiled in June and December 2014. The patient was diagnosed with UTI and she was pregnant. She produced a PRC Form filed on 5/3/2015 and treatments notes from Karen Health Centre where she was treated and given referral to their facility.
20. The medical evidence disclosed penetration to PW1 who had scratch marks around the anal opening and PW4 whose hymen was broken and defilement resulted in pregnancy and child was born whose DNA by Government Analyst on samples from Accused person, PW4 and child established the paternity of the child , the Appellant as the father.
21. The Defense /Appellant raised issue with regard to the Complainants age and proof of their age. The Trial Court discloses through evidence of PW2 CNW mother to PW1& PW4. She stated that PW1 was her 3rd born child and he was 11 years old and PW4 MNM, was her child of 14 years old. She produced their birth certificates PMF1 I and PMF1 2 and they were listed in Trial Court's List of exhibits. It worth noting that the procedural facts of the case the Trial Court discloses that trial commenced 17/3/2015 in Milimani Court as per the Charge Sheet and culminated with judgment of the Court on 28/7/2023; a span of 8-9 years within which PW1 aged 11 years at the time of the offence and PW4 at the age of 14 years old at the time of the offence grew and during testifying in Court their ages were different.
22. The issue of age of PW4 was taken up during trial by the Defense on 14/1/2020 who demanded that PW4 would be taken for age assessment and a Ruling of 21/2/2020, the Trial Court relied on the Birth Certificate as the priM and official document produced as exhibit, PW4 was born in 2000 and at the time of offence was aged 14 years old. PW3 the doctor affirmed the same when filling the P3 Form. The application for age assessment of PW4 was not granted.
23. This Court notes that the Defense did not take issue with contents of Birth Certificates official documents produced in Court but took issue with medical documents and the witnesses testimonies during Trial as to their age which realistically time had passed.
24. In the absence of any evidence that Birth Certificates were not genuine and/or altered or forged, I find the issue of age of PW1 at 11years at the time of the incident and PW4 14 years at the time of the incident sufficient. The issue of age is settled none of the victims/Complaints were adults at the time of commission of offence.



25. As to the witnesses that were not called; the Prosecution is to call witnesses to prove their case beyond reasonable doubt in a criminal case.

Section 143 of the *Evidence Act* provides; No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact

26. The issue at hand is whether the evidence on record disclosed commission of known criminal offence(s) by the Accused person/Appellant. Evaluating evidence on Trial Court record and the direct evidence by PW1 & PW4 that is corroborated by medical evidence by PW3 PW5 PW6 and the contents of these medical reports were also subjected to cross examination by the Defense; the Prosecution proved their case beyond reasonable doubt.

27. The Defense took issue with production of medical report by doctor other than the doctor who filled the report after examination of the subject without asking the Defense if they objected to such production.

Section 77 of *Evidence Act* provides;

Reports by Government analysts and geologists

- (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence

28. The Prosecution witness PW6 informed the Trial Court that Dr Jeff Njoroge Clinician whom he had worked with for 3 years left the establishment and produced the Report he filled. This explanation was not challenged by the Defense as being untrue and S 77 provides for such production of an expert report as evidence which is also subject to cross examination by the Appellant's Counsel. The Trial Court in the absence of any evidence to the contrary that the author of the report could be found to testify within reasonable time, was on firm legal ground to accept the Report from PW6 under S77 of *Evidence Act*.

29. The identification of the Appellant was evidenced by the detailed testimonies of PW1 & PW4, they both attended the Church the Appellant worked as Pastor they interacted with him in Church, in his house, at their home and at the store near the Church. The incidents complained of sodomy of PW1 and defilement of PW4 was not a one-off incident but various times, and as such they were in close proximity, talking, seeing each other and were touched intimately during the unlawful acts.

30. Identification by recognition of the suspect/Accused person is described in the case of Anjononi and others vs Republic [1989] KLR, the Court of Appeal held that

“Recognition on 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”.

Appellant's Mental Condition

The Appellant submitted that;

31. That the findings of the fact by the Learned Trial Magistrate regarding the Appellant's mental condition were based on a misapprehension of the evidence and especially the casual approach undertaken by the Learned Trial Magistrate to the medical evidence on record.



32. The Trial Court on 20/9/2021 & 6/10/2021 sought mental assessment based on the application from Defense Counsel for the Accused person/Appellant after receiving disturbing news from the appellant and stated that his behavior was not in tandem with a person of sound mind. The Trial Court that had released the Accused person on bond granted him to attend medical examination and treatment.
33. On 10/5/2022, Counsel for Accused person informed the Trial Court that medical evaluation was conducted at Mbagathi Hospital and he was diagnosed with schizophrenia and was under medication and he needed time to recover. The Prosecution sought a second opinion medical report to the one of 24/2/2022. The Trial Court granted that a 2nd Mental assessment report to be obtained. The 2nd Report dated 17/5/2022 was produced in Court on 7/6/2022 that the Accused person was not fit for trial.
34. The Prosecution applied for cancellation of bond and admission of Accused person in Mathare Hospital for treatment and inpatient care. The Defense Counsel sought the Accused person to obtain medical care while out on bond at the family's care and cost. The Trial Court by Ruling delivered on 14/6/2022 found that the Accused was to be admitted at a mental facility of his choice until he is able to stand trial and mention after 60 days. The Prosecution prayed the Trial Court commit the Accused to Mathare Mental Hospital for treatment as proposed in the Report, the Court granted the request on 28/6/2022.
35. On 19/9/2022 by Report dated 24/8/2022 the Accused person was declared capable of making his defense and the Trial proceeded to its logical conclusion.
36. The Appellant submitted as follows;

“Both the Appellant and his witness stated that the Appellant had had a mental illness since 2005. He stated that he was on monthly treatment and his mother stated she took him to Mathare Mental Hospital for treatment. In her judgement the Magistrate did not acknowledge this very pertinent fact. She said “He had been on treatment since 2015.” [Page 5 of the judgement] [under the heading Defence Case”
37. The Trial Court record in the Judgment also confirms, the Trial Court also noted DW2 took the Accused person to Mathare Hospital in the year 2005 where he was admitted...was recorded by the Trial Court, it is not true that the Court did not attend to the Accused person's medical condition when the application was made the Court granted medical attention, admission of the Accused person for inpatient treatment and stopped proceedings until he was declared fit to give his defense.
38. In the case of Leonard Mwangemi Munyasia –Vs- Republic [2015] eKLR: the Court of Appeal held that :

“It is the duty of trial courts, to inquire specifically into the question of insanity, not only in situations where such defense is raised but also where, as here, it becomes apparent to the court from the accused person's history or antecedent that insanity may be an issue.”
39. The Trial Court inquired on the Appellant's mental capacity allowed application by Defense for Accused person's examination and treatment and 2nd Opinion was also sought. The trial was adjourned. The Accused person was admitted treated and later medical report indicated he was fit to give defense and trial proceeded.
40. In the case of Kelvin Lewa Akide C.A.39 of 2021 where the Trial Court upon evaluation of evidence was satisfied the Appellant at material time was suffering from mental illness and incapable of forming intention to kill declared the Appellant guilty but insane.



The conduct exhibited by Appellant in the above mentioned case consisted of harassing threatening and beating up inmates in Police custody that he was moved from the cell with inmates to his own cell, he was violent and smeared himself with faecal matter and was escorted to psychiatrist for examination and was treated.

The Court of Appeal found that the Appellant could not form intent or knowledge as prescribed in Section 12 Penal Code. Therefore a finding of not guilty by reasons of insanity as opposed to guilty but insane was entered by Court of Appeal.

In this case, the Appellant was not violent and infact he conducted trial proceedings at some point himself before Counsel came on record and it is later midstream the court proceedings, the issue of mental illness cropped up. He was attended to and the medical reports presented to Trial Court, proceedings halted with.

The medical report of 24/8/2022 from Mathari Hospital by Dr. Olando that declared the Accused person capable of making his defence unlike the cited case above.

Sentencing

41. The Appellant submitted that the sentence meted out by the Trial Magistrate is manifestly excessive, harsh or punitive. The prosecution filed submissions on conviction and sentence and filed notice to enhance sentence.
42. Sentencing is part of judicial process and hearing and determination of the matter by the Trial Court. Sentencing is discretion of the Trial Court that will look at the facts and circumstances of the offence in entirety so as to arrive at appropriate sentence.
43. The Appellant submitted that the Appellant was sentenced to 50 years imprisonment in Count 1 and 20 years imprisonment in Count 2 and both sentences to run concurrently. The appellant relied on Republic vs Evans Nyamari Ayacko SC Petition E002 of 2024 and the Appellant should not have been imprisoned but released on mental illness grounds.
44. The Prosecution relied on Section 354 (3) ii & iii CPC and Supreme Court case of Republic vs Manyeso SCE013 of 2024-2025 on enhancement of sentence to life imprisonment.
45. This Court recognizes that the Court of Appeal & Supreme Court are binding precedent setting Courts to the High Court and Magistrates' Courts respectively. After the landmark case of Muruatetu 1 [2017] that sentencing was part of Trial Courts proceedings to consider appropriate sentence to specific even where mandatory sentence [in this case death penalty] was prescribed. Although; Muruatetu 2 [2021] clarified that the reasoning of Muruatetu 1 applied only to murder cases; a number of cases had already been processed through the reasoning of Muruatetu 1, that sentencing is discretion of Trial Court.
46. Emerging jurisprudence between 2022-2023 ;with regard to Sexual Offences was to the effect that life imprisonment was not mandatory and Courts interpreted the life imprisonment to definite terms of imprisonment & recognized the Trial Court's discretion in sentencing and High Court re-sentencing discretion where there were mandatory minimum or maximum sentences. Cases on point are;
 - a) Phillip Mueke Maingi & 5 others Petition E017 of 2021 MKS HCT; allowed trial Court to exercise discretion in sentencing and those strictly applied sentences to apply for resentencing in the High Court.
 - b) Evans Nyamari Ayacko vs Republic CA KSM; reduced life imprisonment to 30 years; Julius Kitsao Manyeso vs Republic CA Malindi; life imprisonment was reduced to 40



years; Chigongo Dzuye vs Republic CA Malindi Life imprisonment was reduced to 30 years

47. In 2025; Supreme Court case Joshua Gichuki Mwangi vs Republic Petition No E018 of 2023 held that the mandatory minimum sentences prescribed under the *Sexual Offences Act* are lawful and/or Constitutional and therefore courts have no jurisdiction to impose lesser sentences.

48. With the above background, the Trial Court bound by precedent at the time; life imprisonment as mandatory sentence was reduced to definite term and that is what the Trial Court did with regard to 2 offences a total of 50 years imprisonment. I find conduct of Appellant abhorrent and ghastly that he used the pulpit instead of inspiring faith and trust and hope inflicted on unsuspecting innocent children unbecoming sexual misconduct.

I find no legal principle ignored not applied and therefore will not disturb the sentence. I will not enhance the sentence to life imprisonment as the reigning jurisprudence then was to give definite terms of imprisonment.

Disposition

1. The Appeal on conviction and sentence is not upheld or granted.
2. The Trial Court judgment is upheld on conviction and sentence.
3. The Appeal is dismissed.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT CRIMINAL DIVISION HIGH COURT ON 9TH MARCH 2026.

M.W. MUIGAI

JUDGE

