



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipkurui v Republic (Criminal Appeal E009 of 2022)  
[2026] KEHC 3071 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3071 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E009 OF 2022  
CM KARIUKI, J  
MARCH 6, 2026**

**BETWEEN**

**BENSON LEDAMA KIPKURUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. R.M. Oanda  
(S.P.M) in Kilgoris MCSO NO. 9 OF 2021 delivered on 06.10.2021)*

**JUDGMENT**

**Introduction**

1. This is an appeal against the conviction and sentence of Benson Ledama Kipkurui (“the appellant”) by the Senior Principal Magistrate’s Court at Kilgoris in Sexual Offences Case No. 9 of 2021. The appellant was charged with defilement contrary to Section 8(1) read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that on 28th March 2021, at [Particulars Withheld], within Transmara West Sub-County of Narok County, the appellant intentionally and unlawfully penetrated the vagina of E.K., a girl aged thirteen (13) years.
2. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11(1) of the *Children Act*, by intentionally and unlawfully touching the vagina of the same child. The appellant denied the charges and gave an unsworn statement in defence, calling no witnesses. The prosecution led evidence through five witnesses. The trial court convicted the appellant of defilement and sentenced him to twenty-five (25) years’ imprisonment. Aggrieved by the conviction and sentence, the appellant lodged the present appeal.

**Summary of Evidence Before the Trial Court**

3. The prosecution’s case was led through five witnesses.



4. PW1 – E.K., the complainant: She testified that while fetching water, the appellant intercepted her, carried her away, removed her inner wear, and penetrated her. He attempted to prevent her from screaming by blocking her mouth; however, she managed to cry out. A local chief intervened and rescued her. She was subsequently taken home and then to the hospital by her mother. She identified her blood-stained skirt (Exhibit P2) and inner wear (Exhibit P3) and identified the appellant in court.
5. PW2 – Leboo Ole Kaiseiye, village elder: He testified that on the morning of 29th March 2021, the child arrived at his home in a blood-stained state, visibly shaken, carrying a blood-stained jerrican. He assisted the child and later recorded her statement with the police.
6. PW3 – Diana Naserian Kiserein, Clinical Officer: She examined the child at Transmara West Sub-County Hospital and observed a broken hymen with blood stains, urinalysis showing pus and red blood cells, and the presence of spermatozoa. She concluded that the child had been defiled. She produced a P3 Form (Exhibit P1), PRC Form (Exhibit P4), treatment notes and laboratory results (Exhibit P5), and an age assessment form (Exhibit P6).
7. PW4 – TK, mother of the child: She testified that after failing to locate her daughter at home, she reported the matter to the police. On being informed that the child had been found, she encountered the child in blood-stained clothing on the way to the hospital. The child identified the appellant, who attempted to flee. Members of the public apprehended the appellant. The child also identified him during an identification parade.
8. PW5 – Cpl Jacob Idewa, investigating officer: He confirmed that the child had been left at the scene overnight in the bushes. He investigated the matter, arrested the appellant, and produced the blood-stained jerrican, dress, and inner wear (Exhibits P7, P2, and P3, respectively).
9. Defence: The appellant denied committing the offences, claiming that on 27th March 2021, he was driving a tractor that broke down, was attacked on the road, and taken to the police station. He maintained that the complainant was speaking about him. No witnesses were called in his defence.

The trial court considered the testimony of the child, the village elder, the mother, the clinical officer, and the investigating officer. It was found that the prosecution had established the essential elements of defilement, namely penetration, the age of the victim, and recognition of the perpetrator. The court concluded that the appellant was guilty of defilement and convicted him, accordingly, imposing a custodial sentence of twenty-five (25) years.

### **Grounds of appeal.**

10. The appellant, dissatisfied with the trial court's decision, filed an appeal with this Honourable Court via a memorandum of appeal filed on 22<sup>nd</sup> August 2022. 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.
11. The grounds of appeal assert, inter alia, that:
  - i. The learned trial magistrate erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.
  - ii. The learned trial the learned magistrate erred in law and fact by failing to find that the appellant was not informed of his right to have an advocate assigned to him, considering the gravity of the charges he was facing.



- iii. The learned trial magistrate erred in law and fact by failing to find that the prosecution did not prove the ingredients of the offence beyond reasonable doubt.
- iv. The learned magistrate erred in law and fact by failing to find that the charge sheet was defective.

#### **Directions of the court.**

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

#### **The Appellant's Submissions**

13. The appellant submitted that the prosecution failed to prove all the essential ingredients of the offence. In accordance with the law, to secure a conviction for defilement, the prosecution must prove:
  - (i) penetration,
  - (ii) the age of the complainant, and
  - (iii) identification of the perpetrator (*Charles Wamukoya v. Republic*, Cr. Appeal No. 72 of 2013). While the age of the complainant, E.K., was not disputed and supported by the age assessment form (Exhibit P6) and the P3 medical report (Exhibit P1), the appellant argued that the elements of penetration and identification were inadequately proven.
14. The appellant contended that the complainant, in her testimony and medical records, referred to the perpetrator as “unknown” (PEXHB-4 and PEXHB-5), and that there was no independent or proper identification parade conducted by the police. The appellant argued that reliance on the mother’s testimony regarding identification on the way to the hospital and during an alleged parade was insufficient, vague, and constitutionally defective. The appellant further submitted that the complainant’s recognition of the appellant was made under traumatic circumstances, rendering it prone to error. The appellant emphasized that the prosecution bore the burden of proving guilt beyond reasonable doubt (Section 107(1) and (2) of the *Evidence Act*), and that in this case, the essential proof of identification and penetration was not conclusive.
15. The appellant submitted that the trial court imposed a sentence of twenty-five (25) years’ imprisonment under Section 8(4) of the *Sexual Offences Act*, which prescribes a minimum term of twenty (20) years for defilement of a child aged between twelve and fifteen years. While acknowledging the mandatory minimum, the appellant argued that recent jurisprudence allows courts to exercise discretion where mitigating factors exist. Reference was made to *Regan Otieno Okello v. Republic*, Cr. Appeal No. 189 of 2016 [2022] eKLR, where the court substituted a statutory minimum sentence with a reduced term in light of the circumstances. The appellant also cited *Philip Mueke Maingi & five others v. Director of Public Prosecutions & Attorney General* (Petition No. 97 of 2021, Mombasa High Court), advocating that the sentencing court should have considered proportionality, mitigating circumstances, and the absence of direct physical violence, before imposing a term exceeding the statutory minimum.
16. The appellant submitted that the appellant’s defence of alibi—that he was operating a trailer which broke down and was attacked by people on the road, leading to his arrest—was inadequately evaluated by the trial court. It was argued that the prosecution did not call the arresting officer or any members of the public who apprehended the appellant, resulting in a failure to properly test or rebut his defence. Reference was made to *Victor Mwendwa Mulinge v. Republic* (Court of Appeal, Nakuru) and *Karanja v. Republic* [1983] KLR, emphasizing that the burden of disproving an alibi rests entirely on the



prosecution. The appellant further relied on *Oumas v. Republic* [1986] KLR 619, arguing that the court must evaluate the prosecution's case in light of the accused's defence and give the benefit of any doubt to the accused. The appellant submitted that the trial magistrate erred in failing to weigh the appellant's defence against the prosecution's evidence before arriving at a conviction.

17. In conclusion, the appellant prayed that the court re-evaluate the evidence, find that the prosecution failed to prove the offence beyond reasonable doubt, set aside the conviction, and either quash or reduce the sentence, as may be just and equitable.

### **The Respondent's Submissions**

18. The Respondent opposed the appeal and urged the Court to uphold both conviction and sentence. The prosecution maintained that all the essential ingredients of the offence were proved beyond reasonable doubt.
19. Relying on *Charles Wamukoya Karani v Republic*, as cited with approval in *Simon Oduor Oloo v Republic* [2022] eKLR, the Respondent submitted that the critical elements of the offence of defilement are: proof of the complainant's age, proof of penetration, and positive identification of the assailant. It was argued that each of these elements was satisfactorily established at trial.
20. On the issue of age, the Respondent submitted that the complainant (PW1) was subjected to an age assessment, and the report produced by PW3, the clinical officer, confirmed that she was thirteen (13) years old. The P3 form similarly captured her age as 13 years at the time of examination. In addition, the complainant testified that she was a Class 7 pupil. The Respondent relied on *Francis Omuroni v Uganda*, Court of Appeal criminal No. 2 of 2000, where it was held that age in defilement cases may be proved by medical evidence, documentary evidence, parental testimony, or by observation and common sense. It was therefore submitted that the complainant's age was proved beyond dispute.
21. Regarding penetration, the Respondent submitted that the complainant gave a clear account that the appellant carried her, removed her innerwear, and raped her, covering her mouth when she attempted to scream. Her testimony was corroborated by the medical findings of PW3, who observed blood between the thighs, epithelial cells, and spermatozoa on a high vaginal swab, and a broken hymen. The clinical officer concluded that penetration had occurred. The Respondent cited *Onzare v Republic* (criminal appeal 15 of 2023) (2024) KEHC 494 (KLR) for the proposition that penetration may be proved by the victim's testimony, corroborated by medical evidence. It was contended that the medical evidence and the complainant's testimony were mutually reinforcing and sufficient to establish penetration.
22. On identification, the Respondent argued that the complainant was alone with the appellant during the commission of the offence and that there was sufficient light to enable proper identification. She identified the appellant in court and also at the time of his arrest, as confirmed by PW4. The Respondent emphasized that when the complainant pointed out the appellant, he attempted to flee, prompting members of the public to apprehend him. It was submitted that this was a case of recognition and direct identification, and that the trial court rigorously evaluated and accepted that evidence.
23. With respect to the sentence, the Respondent submitted that the term of twenty-five (25) years' imprisonment was lawful and not excessive. The offence, it was argued, was serious and committed in a cruel manner, leaving the minor injured and exposed. The sentence imposed fell within the statutory framework, as Section 8(3) of the *Sexual Offences Act* prescribes a penalty of not less than twenty years and up to life imprisonment for defilement of a child aged between twelve and fifteen years. The Respondent contended that the trial court exercised proper discretion, considered the



seriousness of the offence and the need for deterrence, and imposed a sentence that was both lawful and proportionate.

24. In conclusion, the Respondent urged the Court to find that the prosecution had proved its case beyond reasonable doubt, that the conviction was sound, and that the sentence was lawful and appropriate in the circumstances, and therefore to dismiss the appeal in its entirety.

### **Issues for Determination**

25. Having considered the record of appeal, the grounds of appeal, and the rival submissions by the parties, and bearing in mind that this Court sits as a first appellate court, the issues that arise for determination are:
- i. Whether the prosecution proved the offence of defilement beyond reasonable doubt, specifically: the age of the complainant; penetration; and the positive identification of the appellant as the perpetrator.
  - ii. Whether the trial court carefully considered the appellant's defense, including the alleged alibi.
  - iii. Whether the sentence of twenty-five (25) years' imprisonment was lawful, proper, and proportionate in the circumstances.

## **ANALYSIS AND DETERMINATION**

### **Duty of a First Appellate Court**

26. This being a first appeal, this Court is under a duty to re-evaluate the evidence afresh and draw its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses testify. This principle was enunciated in *Okeno v Republic*, where the Court of Appeal held that a first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusions.
27. Guided by that principle, I now proceed to analyze the evidence on record.

### **Whether the Ingredients of Defilement Were Proved**

28. The elements of the offence of defilement under Section 8 of the *Sexual Offences Act* are now settled. In *Charles Wamukoya Karani v Republic*, the Court held that the prosecution must prove:
- (i) the age of the complainant,
  - (ii) penetration, and
  - (iii) the identity of the perpetrator.

### **Age of the Complainant**

29. The complainant testified that she was a Class 7 pupil. PW3, the clinical officer produced an age assessment report (Exhibit P6) placing her age at 13 years. The P3 form equally indicated her age as 13 years.
30. The law is that age in sexual offences may be proved by medical evidence, documentary evidence, or the testimony of parents or guardians. In *Francis Omuroni v Uganda*, it was held that medical evidence is paramount in determining age, though other evidence may suffice.



31. In the present case, the age assessment report was produced without objection. The appellant did not contest the complainant's age at trial nor on appeal. I am therefore satisfied that the prosecution proved beyond reasonable doubt that the complainant was aged 13 years at the material time.

### **Proof of Penetration**

32. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another.
33. The complainant (PW1) gave a clear account that the appellant carried her, removed her innerwear, and penetrated her. Her testimony was corroborated by medical evidence. PW3 observed a broken hymen, blood between the thighs, epithelial cells, and the presence of spermatozoa on a high vaginal swab. She formed the opinion that there had been penetration.
34. The Court of Appeal in *Kassim Ali v Republic* [2006] eKLR held that penetration need not be proved by elaborate medical evidence and that even the slightest penetration is sufficient. Further, in *Onzare v Republic*, the High Court reiterated that the victim's testimony, if credible, may prove penetration and that medical evidence serves to lend support to that testimony.
35. In the present appeal, the medical findings were consistent with the complainant's narration. The presence of spermatozoa and a broken hymen strongly corroborated her account. The prosecution proved the element of penetration beyond reasonable doubt.

### **Identification of the Appellant**

36. The appellant challenges the finding on identification, contending that the complainant initially referred to the assailant as "unknown" and that no proper identification parade was conducted.
37. It is trite that where the case against an accused depends wholly or substantially on identification, the court must examine such evidence with the greatest care. In *Wamunga v Republic* [1989] KLR 424, the Court of Appeal warned that evidence of visual identification can bring about an injustice if not carefully tested.
38. In this case, the complainant testified that she was alone with the appellant during the commission of the offence and that there was sufficient light. She identified him in court. PW4 further testified that on their way to the hospital, the complainant pointed out the appellant, who attempted to flee, leading to his arrest by members of the public.
39. Although the record does not demonstrate strict compliance with the rules governing identification parades, the circumstances of arrest and the complainant's direct interaction with the appellant provide strong circumstantial assurance of correct identification.
40. In *Anjononi v Republic* (1980 KLR 59), the Court held that recognition is more reliable than identification of a stranger because it depends on personal knowledge of the assailant. While the complainant may not have known the appellant by name, she had sufficient opportunity to observe him during the attack.
41. Having re-evaluated the totality of the evidence, I am satisfied that the identification of the appellant was free from error and that the prosecution proved beyond reasonable doubt that he was the perpetrator.



### **Whether the Trial Court Properly Considered the Defence**

42. The appellant's defence was that on the material date, he was operating a tractor which developed mechanical problems, and that members of the public attacked him and caused his arrest. This amounts to a defence of alibi.
43. The law is settled that an accused person who raises an alibi assumes no burden of proving it; the burden remains on the prosecution to disprove it. In *Karanja v Republic* [1983] KECA 35 (KLR), the Court of Appeal affirmed that the prosecution must disprove an alibi beyond reasonable doubt.
44. In the present case, the appellant's alibi was raised at the defence stage and was not put to the prosecution witnesses during cross-examination. Nonetheless, even where an alibi is raised late, the court must consider it alongside the prosecution's evidence.
45. The prosecution's evidence placed the appellant at the scene through the complainant's direct testimony and the circumstances of his arrest immediately after being pointed out by the complainant. That evidence effectively displaced the alibi.
46. I am satisfied that the trial court considered the appellant's defence and properly rejected it. The defence did not raise any reasonable doubt in light of the strong prosecution evidence.

### **Whether the Sentence Was Lawful and Proportionate**

47. The appellant was sentenced to twenty-five (25) years' imprisonment. Section 8(3) of the *Sexual Offences Act* prescribes a sentence of not less than twenty (20) years for defilement of a child aged between twelve and fifteen years.
48. The principles governing interference with a sentence by an appellate court were set out in *Wanjema v Republic* (1971) EA 493, where it was held that an appellate court will only interfere if the sentence is illegal, based on wrong principles, or manifestly excessive.
49. The sentence imposed herein was within statutory limits. The trial court considered the seriousness of the offence and the circumstances in which it was committed. There is no indication that the court acted on wrong principles or overlooked relevant factors.
50. In the circumstances, the sentence of twenty-five (25) years imprisonment was lawful and not manifestly excessive.

### **Conclusion**

51. Upon independently re-evaluating the evidence and the applicable law, I find that:
  - i. The prosecution proved beyond reasonable doubt the age of the complainant, penetration, and the positive identification of the appellant as the perpetrator.
  - ii. The appellant's defense was carefully considered and rightly rejected.
  - iii. The sentence imposed was lawful, proper, and proportionate.
52. The appeal against conviction and sentence is hereby dismissed in its entirety.
53. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6<sup>TH</sup> DAY OF MARCH 2026.**Top of Form



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**CHARLES KARIUKI**

**JUDGE**

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**06/03/2026**

