



**Koech v Republic (Criminal Appeal E008 of 2022)  
[2026] KEHC 3100 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E008 OF 2022  
CM KARIUKI, J  
MARCH 6, 2026**

**BETWEEN**

**JOHANA KIPRONO KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. R.M. Oanda  
(S.P.M) in Kilgoris MCSO No. 48 of 2020 delivered on 08.10.2021)*

**JUDGMENT**

**Introduction**

1. The Appellant, Johana Kiprono Koech, was charged before the Principal Magistrate’s Court at Kilgoris, charged 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. The particulars of the charge were that on diverse dates between March 2019 and February 2020 at Kona Centre, Oldonyorok Location, Transmural West Sub-County within Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of V.C., a child aged 15 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that on diverse dates within the same period and locality, he intentionally and unlawfully touched the vagina of S.C., a child aged 15 years.
3. The Appellant pleaded not guilty, and the case proceeded to full trial. Upon consideration of the evidence adduced, the learned Senior Principal Magistrate convicted him of the main charge of defilement and sentenced him to twenty-five (25) years’ imprisonment. Being dissatisfied with both conviction and sentence, he preferred the present appeal.



## Summary of the Evidence Before the Trial Court

4. The prosecution called six (6) witnesses in support of its case.
5. PW1, the complainant, a minor aged 16 years, and a Class 6 pupil at Oldonyorok Primary School, testified that the accused used to stay at their home. In 2019, they began a relationship and engaged in sexual intercourse on several occasions. As a result, she became pregnant and delivered a baby boy, Ezra Kiprotich, in April 2020. She stated that the accused was the father of the child. She identified the P3 form, PRC form, and DNA report produced in evidence.
6. PW2, Mercy Chebet, a sister of the complainant, testified that the accused resided in their home as a father figure. In February 2020, the complainant fell ill and was taken to the hospital, where it was discovered, she was pregnant. She later delivered a baby boy who subsequently died. PW2 stated that the complainant informed her that the accused was responsible. The matter was reported to the police, leading to the accused's arrest.
7. PW3, Janet Koech, the complainant's mother, testified that she had cohabited with the accused for about five years. She confirmed that the complainant delivered a baby at Nyayo Hospital, Lolgorian. She stated that she was informed by her other daughter that the accused, who was her husband, was responsible for the pregnancy. She identified the clinic booklet and the burial permit for the child.
8. PW4 testified that on 9th July 2020, he received information from a nurse at Lolgorian Hospital that the complainant was pregnant and had implicated the accused. He facilitated the accused's arrest.
9. PW5, CPL Isaack Mwanja, the investigating officer, testified that he re-arrested the accused on 9th July 2020. He issued a P3 form, facilitated age assessment, and arranged for DNA sampling. DNA analysis conducted at the Government Chemist in Kisumu showed a 99.994% probability that the accused was the biological father of the child born to the complainant. He produced the DNA report dated 10th August 2020.
10. PW6, a clinical officer from Lolgorian Sub-County Hospital, testified on behalf of a colleague. He confirmed that the complainant attended the antenatal clinic in February 2020 and delivered it on 3rd April 2020. Medical records confirmed pregnancy and childbirth. He produced the P3 form, PRC form, and clinic booklet.
11. Defense Case
12. The accused gave sworn testimony. He stated that he is a casual laborer from Oldonyorok and was arrested on 9th July 2020. He acknowledged that DNA testing was conducted and showed a 99.994% probability result but denied committing the offence. He claimed that the charges were fabricated by his in-laws and prayed to be acquitted.
13. The trial court 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.

14. The appellant, dissatisfied with the trial court's decision, filed an appeal with this Honorable Court via a petition of appeal filed on 19th August 2022. Pursuant to Section 350(2)(v) of the Criminal Procedure Code. 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.



15. The amended grounds of appeal assert, inter alia, that:
- i. The learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the appellant was not informed of his right to legal representation pursuant to Article 50(2) (g) and (h) of *the Constitution*.
  - ii. The learned trial magistrate erred in both law and fact by convicting the appellant yet failed to find that the penetration of the complainant’s genitalia was not proved as required in law.
  - iii. The learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the complainant’s age was not proved as required in law.
  - iv. The learned trial magistrate erred in both law and fact by convicting the appellant yet failed to find that the D.N.A evidence presented as Exp 3 was never produced by the maker, neither was he summoned for cross-examination.
  - v. The sentence imposed is both harsh and excessive and did not take into consideration the appellant’s mitigation and the unique circumstances of the case.

**Directions of the court.**

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

**The Appellant’s Submissions**

17. The appellant, Johana Kiprono Koech, filed written submissions challenging both conviction and sentence following his conviction for defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and the imposition of a twenty-five (25) year custodial sentence. The submissions are structured around five principal grounds.
18. On the first ground, the appellant contends that his constitutional right to legal representation was violated. He submits that from the time of plea taking on 13 July 2020 until the commencement of the hearing on 1 February 2021—during which period there were twelve mention dates—the trial court failed to inform him of his right to legal representation as guaranteed under Article 50(2)(g) and (h) of *the Constitution* of Kenya, 2010. He argues that *the Constitution* imposes a mandatory duty upon courts to promptly inform an accused person of the right to choose and be represented by an advocate and, where substantial injustice would result, the right to have counsel assigned at state expense. Reliance is also placed on Section 43 of the *Legal Aid Act*, 2016, which obligates a court before which an unrepresented accused promptly informs him of his right to legal representation and, where necessary, notify the Legal Aid Service.
19. The appellant submits that the words “to be informed promptly” in Article 50(2)(g) and (h) are peremptory and require compliance at the earliest opportunity, preferably at plea taking or commencement of trial. He argues that the trial court failed to conduct a preliminary inquiry as to whether substantial injustice would result if he proceeded unrepresented, particularly given that the offence charged carried a severe sentence. He relies on the decision in *Pett v Greyhound Racing Association* (1968) 2 All ER 545, where Lord Denning emphasized the importance of legal representation in ensuring justice is done and seen to be done. It is therefore submitted that the omission occasioned substantial injustice and vitiated the trial.
20. On the second ground, the appellant challenges proof of penetration. He argues that although PW1 testified that she became pregnant and delivered a child, pregnancy alone does not conclusively establish penetration. He relies on *Kariuki v R* (1965) EA 555 for the proposition that pregnancy



by itself is insufficient proof of penetration and that the prosecution must establish the act beyond reasonable doubt. He further invokes Article 50(2)(a) of *the Constitution* on the presumption of innocence and submits that in the absence of credible and direct evidence of penetration, the conviction cannot stand.

21. The appellant also cites the Court of Appeal decision in *Williamson Sowa Mbwanga v Republic* [2016] eKLR, where the Court observed that paternity evidence does not necessarily prove defilement and that DNA testing merely determines biological relationship, not the act of penetration itself. Reference is made to *Twehangane Alfred v Uganda*, Cr. App. No. 139 of 2001 (Uganda Court of Appeal), for the principle that even the slightest penetration suffices to constitute the offence, but that it must nonetheless be proved. The appellant argues that reliance on DNA evidence alone to prove penetration was legally flawed.
22. On the third ground, the appellant submits that the complainant's age was not proved beyond reasonable doubt, yet age is a critical ingredient of the offence of defilement. He argues that no birth certificate, baptismal certificate, vaccination card, school records, or properly produced age assessment report was tendered in evidence. He contends that the trial court erroneously referred to an age assessment form and a clinic card that were either not produced or did not relate to the complainant. The mother and child health booklet allegedly produced did not bear the complainant's name and was therefore unreliable.
23. He relies on *Peter Maina Njeri v Republic* [2016] KEHC 2800 (KLR), where the High Court held that age is a fact in issue in sexual offences and must be proved by concrete and tangible evidence, and that a mere assertion by the complainant is insufficient. He further cites *HKK v Republic* [2024] KEHC 5039 (KLR), where the court held that a birth certificate marked for identification but not formally produced cannot be relied upon to establish age. The appellant submits that the failure to properly prove age is fatal to the prosecution's case and renders the conviction unsafe.
24. On the fourth ground, the appellant challenges the admissibility and evidential weight of the DNA report. He submits that the report was produced by the investigating officer (PW5) and not by the Government Chemist who conducted the analysis. It is argued that under the law governing expert evidence, the maker of an expert report ought to testify and be subjected to cross-examination to enable the court to assess the methodology and reliability of the findings. The production of the DNA report without calling the expert is said to have contravened evidentiary principles and undermined the integrity of the evidence. The appellant reiterates that even if properly admitted, DNA evidence establishing paternity does not by itself prove penetration.
25. On the fifth ground, the appellant challenges the sentence as harsh, excessive, and unconstitutional. He submits that although he was treated as a first offender, the trial court imposed a twenty-five-year sentence primarily on grounds of deterrence without considering mitigation or the specific circumstances of the case. He argues that sentencing must be individualized and proportionate in line with Articles 25(c), 50(1), and 50(2)(p) of *the Constitution*. He further invokes Article 160 on judicial independence, arguing that rigid or mandatory sentencing undermines judicial discretion.
26. Reliance is placed on *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR), where the Supreme Court discussed the proper procedural pathway for constitutional challenges relating to sentencing provisions. The appellant submits that the twenty-five-year sentence was disproportionate, particularly in light of the alleged failure to prove age and should therefore be reduced or set aside.
27. In conclusion, the appellant prays that the appeal be allowed in its entirety, the conviction quashed, the sentence set aside, and that he be set at liberty.



## The Respondent's Submissions

28. The respondent, representing the Republic, filed comprehensive submissions opposing the appellant's appeal, asserting that the conviction and sentence were properly grounded in law and supported by credible evidence.
29. In support of the prosecution's case, the respondent cited *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, which established that the essential elements of defilement are: the complainant's age, proof of penetration, and positive identification of the assailant.
30. Regarding the age of the complainant, the respondent submitted that PW1, the complainant, testified on voir dire that she was 16 years old and a class six pupil at Oldonyorok Primary School. The trial court had the benefit of observing her demeanor, and the appellant did not challenge her age. This, according to the respondent, satisfied the legal requirement that the victim be a minor at the time of the offence.
31. On the issue of penetration, the respondent emphasized that PW1 testified she engaged in sexual intercourse with the appellant on several occasions during 2019 while alone at home, resulting in conception and the birth of a baby boy in April 2020. PW6, a clinical officer, conducted an antenatal examination and concluded that the complainant had been defiled and impregnated. He tendered supporting documents, including the P3 form (Exp. P1), PRC form (Exp. P3), and the complainant's clinic book (Exp. P4). PW2 and PW3, family members, corroborated that the complainant became pregnant as a result of sexual intercourse with the appellant. This evidence, the respondent argued, conclusively established penetration.
32. Regarding identification, the appellant was well-known to the complainant as her stepfather, and the offences occurred when only they were present at home, leaving no possibility of mistaken identity. The respondent further emphasized that DNA testing involving the complainant, the appellant, and the infant corroborated her testimony and positively identified the appellant as the father, strengthening the case against him.
33. On sentence, the respondent submitted that the trial court lawfully imposed a term of twenty-five (25) years' imprisonment under Section 8(3) of the *Sexual Offences Act*, which mandates a minimum sentence of twenty years for defilement of a child aged 12–15 years. The court considered the appellant's lack of remorse and the need for deterrence. The respondent maintained that the sentence was within statutory limits, proportionate to the offence, and properly informed by sentencing principles, leaving no basis for interference.
34. Finally, the respondent conceded that under Section 333(2) of the Criminal Procedure Code, the appellant is entitled to have his pre-trial custody time counted toward the sentence, which would thus run from 13th July 2020.
35. In conclusion, the respondent contended that all elements of the offence—age, penetration, and identification—were proven beyond reasonable doubt, and that the sentence imposed was both lawful and appropriate. Consequently, they urged the court to dismiss the appeal in its entirety.

## Issues for Determination

36. From the record and submissions by both parties, the following issues arise for determination in this appeal:
  - i. Whether the appellant's constitutional right to legal representation under Article 50(2)(g) and (h) of *the Constitution* was violated, and if so, whether such violation vitiated the trial.



- ii. Whether the prosecution proved beyond reasonable doubt that the appellant penetrated the complainant, as required for a conviction of defilement under Section 8(1) read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006.
- iii. Whether the prosecution proved beyond reasonable doubt that the complainant was under the age of 18 years at the time of the offence, which is an essential element of the offence of defilement.
- iv. Whether the DNA evidence presented was properly admitted and whether it sufficed to prove the act of defilement.
- v. Whether the sentence of twenty-five (25) years imposed on the appellant was excessive, harsh, or contrary to the principles of proportionate and individualized sentencing.

## **Analysis and Determination**

### **1. Right to Legal Representation**

- 37. The appellant contended that he was not informed of his right to legal representation from plea-taking until trial, relying on Article 50(2)(g) and (h) of *the Constitution* and Section 43 of the *Legal Aid Act*, 2016. The law is settled that courts have a mandatory duty to inform an unrepresented accused promptly of the right to choose and be represented by an advocate, and where necessary, to ensure access to state-funded counsel to prevent substantial injustice (*Pett v Greyhound Racing Association* (1968) 2 All ER 545).
- 38. In this case, the record shows the appellant was present in court for mentions from 13th July 2020 to 1st February 2021. However, the trial court's record does not indicate any failure to inform the appellant of his rights. The trial magistrate afforded the appellant an opportunity to cross-examine witnesses and give his defense. There is no evidence that the appellant was prejudiced in presenting his defense, nor is there a showing of substantial injustice. I therefore find that there was no breach of the constitutional right that would warrant quashing the conviction.

### **2. Proof of Penetration**

- 39. Penetration is a fundamental ingredient in the offence of defilement (*Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013). The appellant argued that pregnancy alone does not prove penetration, citing *Kariuki v R* (1965) EA 555 and *Williamson Sowa Mbwanga v Republic* [2016] eKLR, and that DNA evidence only establishes paternity.
- 40. The record, however, shows that PW1 testified that the appellant engaged in repeated sexual intercourse with her, leading to the conception and birth of a child. PW6, a clinical officer, corroborated that the complainant had been defiled and pregnant, producing medical documents including the P3 and PRC forms and clinic booklet (Exhibits P1, P3, and P4). PW2 and PW3 corroborated the complainant's account. Furthermore, in *Twehangane Alfred v Uganda*, Cr. App. No. 139 of 2001, it was held that even the slightest penetration suffices to constitute the offence if proved.
- 41. Given the cumulative testimony of the complainant and corroborating witnesses, and consistent clinical records, I find that penetration was proven beyond reasonable doubt.

### **3. Proof of the Complainant's Age**

- 42. Age is an essential element in defilement (*Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013). The appellant contended that the complainant's age was not properly proven, citing Peter



Maina Njeri v Republic [2016] KEHC 2800 and HKK v Republic [2024] KEHC 5039, noting that reliable documentary evidence, such as birth certificate or school record, was not produced.

43. The record shows that PW1 testified to her age as 16 years and her schooling, and PW6 produced the clinic booklet indicating her age. The appellant did not cross-examine the complainant on her age in a manner that challenged its credibility. The trial court observed the complainant and found her age to be consistent with the evidence. Given that the complainant's age was not contradicted and that the law permits corroborative evidence in the absence of a formal birth certificate, the prosecution sufficiently proved that the complainant was under 18 years.

#### 4. DNA Evidence

44. The appellant challenged the admissibility of the DNA report, noting that the Government Chemist who conducted the test did not testify. It is settled that expert evidence should, ideally, be presented by the maker of the report, but courts may admit reports under Section 68 of the *Evidence Act* when proper notice and opportunity for cross-examination is accorded. In this case, the DNA report showed a 99.994% probability that the appellant was the biological father of the child. This corroborates PW1's evidence on identification and supports the fact of repeated sexual intercourse.
45. I find that while the DNA evidence alone does not prove penetration, it corroborates the complainant's testimony on identification and the sequence of events. Its admission was therefore proper and did not prejudice the appellant.

#### 5. Sentence

46. The appellant argued that the sentence of twenty-five years was harsh and excessive. Section 8(3) of the *Sexual Offences Act* provides a minimum sentence of twenty years for defilement of a child aged 12–15 years. The trial court considered the appellant's lack of remorse, the gravity of the offence, and the need for deterrence. Sentencing must be individualized, proportionate, and guided by Articles 25(c), 50(1), and 50(2)(p) of *the Constitution* (Republic v Mwangi; ISLA & 3 Others [2024] KESC 34).
47. Given the appellant's failure to show mitigating factors sufficient to reduce the sentence, and in light of the statutory minimum, the sentence was lawful, proportionate, and within judicial discretion.

#### Determination

48. Having considered the evidence, arguments, and authorities:
- a. The appellant's right to legal representation was not violated in a manner that prejudiced his defense.
  - b. The prosecution proved penetration beyond reasonable doubt.
  - c. The complainant's age was sufficiently established.
  - d. DNA evidence was properly admitted and corroborates.
  - e. The sentence imposed is lawful, proportionate, and falls within the statutory limits.
49. Conclusion:
- I. The appeal is devoid of merit and is accordingly dismissed in its entirety. The conviction and sentence of twenty-five (25) years' imprisonment imposed by the trial court are upheld, with the appellant entitled to credit for time spent in custody from 13th July 2020 under Section 333(2) of the Criminal Procedure Code.



It is so ordered.

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

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**CHARLES KARIUKI**

**JUDGE**

