Kipkemoi v Republic (Criminal Appeal E025 of 2024)
[2026] KEHC 3012 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E025 OF 2024

E OMINDE, J

MARCH 5, 2026

BETWEEN

CORNELIUS KIPTANUI KIPKEMOI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the conviction and sentence in Iten Senior Principal Magistrates' Court – Sexual Offences Case No. E059 of 2023 delivered by Hon E. Kigen on 06/06/2024)

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Sexual Offences Case No. E059 of 2023 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. It was alleged that the Appellant, on diverse dates between 27th and 29th October 2023, at [Particulars withheld] in Keiyo North Sub County, within Elgeyo Marakwet County intentionally and unlawfully caused his penis to penetrate the vagina of AJR, a girl aged 14 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.The Appellant pleaded not guilty to all the charges and the case then went to full trial in which the prosecution called 4 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the Criminal Procedure Code. The Appellant gave an unsworn statement and elected to call no witnesses. By the Judgment delivered on 0th June 2024, he was convicted on the main charge and sentenced on the same date, to serve 20 years' imprisonment.
3. Dissatisfied with the said decision of the trial Court, the Appellant instituted this appeal on 22/07/2024, against the conviction and sentence on 15 grounds reproduced verbatim as follows:

i. That the learned trial magistrate erred in law and fact when she failed to properly consider the defence the Appellant offered for his case to reach at a proper decision.

ii. That the trial magistrate erred in law and fact by convicting and sentencing him to 20 years when the penetration was not proved according to the law and the same was never corroborated by the medical examination done on the complainant as she was found to have been sexually active.

iii. That the trial magistrate erred in law and fact by convicting and sentencing Appellant while the age of the complainant was not conclusively determined since the guardian to the complainant was very unsure of the same when she was informing the court hence the age was not established.

iv. That the trial magistrate erred in law and fact by convicting and sentencing him when he was not positively identified a good indicator was the alibi name "JUSTINE" 'which she used to identify him which is unfamiliar and does not identify with.

v. That the trial' magistrate erred in law and fact by convicting and sentencing; him while she failed to ensure that he was supplied with exhibits the prosecution was relying in his case such as the medical/treatment notes were not supplied to him offending his constitutional right.

vi. That the trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering the conduct of the complainant which is very relevant to this case such as she was found to have been sexually active among other improper conduct.

vii. That the trial magistrate erred in law and fact by not making a finding that there was poor investigation in this case as he was charged on the pretext that he was responsible for harassing the complainant using SMS messaging.

viii. That the trial magistrate erred, in law and: fact when she failed to order the period spent in pre-trial custody of 7 months to be part of his sentence of 20 years.

ix. That the prosecution did not provide enough evidence to prove the Appellant committed the crime of Defilement and was only implicated when there were SMS found in the phone of the complainant's mother which were not exhibited in court to confirm the same.

x. That, the trial magistrate erred in law and fact when she enforced a mandatory sentence of 20 years denying him the benefit of article 50(2) (p) of *the Constitution*. The mandatory sentence was rendered to be unconstitutional for denying the court its judicial discretion to impose a fit or a lesser sentence and urged the court to consider his case for a sentence reduction.

xi. That the trial magistrate erred in law and fact by not considering his mitigation on record and imposed the automatic sentence, of 20 years. The mitigation which is an important element in a trial was irregularly omitted making his trial to be unfair offending article 25 (c). I urge the court incompliance with the sentencing policy guideline to consider his mitigation by reducing his sentence, by 50 percent as stipulated in the guideline.

xii. That the trial magistrate erred in law and fact when she did not give a concrete reason why she believed the complainant testimony hence not complying with provisions of section 124 of the *evidence act*.

xiii. That the trial magistrate erred in law and fact when she failed to realize the inconsistencies in the case are very major and consequential and touched the root of the prosecution case and occasioned an injustice to Appellant.

xiv. That the trial magistrate erred, in. law-and fact by not making a finding that the complainant ought to have been treated as a hostile witness, on the reason she was compelled to testify under threats and coercion and whatever she stated was what she was couched to state.

xv. That the trial magistrate erred in law and fact by not ensuring the resulting sentence did respect the fundamental principle of proportionality as the sentence is harsh and excessive in the circumstances.

Prosecution Evidence

4. Before the trial Court, the prosecution called 4 witnesses. PW1 was AGR, the minor complainant. She testified that she was born on 03/06/2009 and she was 14 years old. She produced her birth certificate as P-Exhibit 1. She stated that on 27th October 2023 at 10.00am, she was at Kipsoen center in the shop when the Appellant Cornelius came and told her that he wanted her and she asked him why. He then went to his kinyozi and at about 5.00pm he came back to their shop and told her that he was coming to sleep in their shop.

5. That he asked where her mother was and she told him that she had gone to Iten. He went and came back to the shop at around 7.00pm and asked if her mother was present. He told her that he was not leaving the shop and she then locked him inside the shop from outside and went through the back door and entered the shop where he called her. He asked her where she usually sleeps and she told him that she sleeps in the shop. He then carried her to the bed and removed all her clothes.

6. That he told her to open her legs or he would break them and he inserted his penis into her vagina and they had sex using a condom -Kiss brand-. Further, she testified that they had sex on that day and also on the 29th, they had sex twice in the shop. She testified that he used to skip one day and would come while she slept and they would have sex. She further testified that her mother slept in a different plot and, that she never told anybody what happened because she feared as he had threatened to kill her parents.

7. It was her testimony that her mother found a message in her phone from the said Cornelius for reasons that they used to communicate and took the phone to the Police Station and she was called to record statements. She was thereafter taken to Iten Referral Hospital and examined. She was found not to be pregnant. She further stated that she had known the accused for about 4 days before they had sex and she pointed him out in court, stating that she used to see him around the kinyozi where he works.

8. PW2 was MJK, the minors' adoptive guardian. She testified that on 20th November 2023 at 5:00 pm she had gone to the farm and came back and found the said minor chatting with one Justine on phpone. That the said Justine was calling her his wife. She asked her how long they had known each other and she told her that they had been chatting for 2 months. She told her that they had had sex with him thrice and that in the 1st time he had forced her and given her a lollipop. She reported the matter to the police and thereafter she went to the hospital where the doctor examined PW1 and confirmed that she had been defiled. She stated that she knew the accused as Justine and that he shaves at a kinyozi at the centre. That he had been in that area for about 2 months, and she pointed him out in court.

9. PW3 was Philemon Kirui, a Clinical Officer from Iten County Referral Hospital. He produced the P3 form for the complainant who was 14 years old during that time of examination. He testified that she was seen on 21st November 2023 with chief complaint of being that she had been defiled. On examination, he found that she had an inflamed vagina, the cervix was open at 2 cms, she had an active

discharge and had a few pus cells and the vagina was open and torn. He had a Post Rape Care form which he produced as P-exhibit 2. He concluded in his report that the injuries to the PW1 were caused as a result of penal penetration as supported by the torn hymen and inflammation of the vestibule and he classified the same as harm.

10. PW4 was the Investigating Officer Police Corporal Mary Goretti who testified that she was attached to Iten Police Station. She stated that on 15th November 2023 at 3:00 pm, she was at the station when the complainant came with her mother and reported that the minor had been defiled. The minors' mother stated that she had left the minor with the phone and on returning she found love text messages on asking the minor she said that the accused had made sexual advances at her and defiled her inside their house. She then took the minor to Iten County Referral Hospital for treatment, visited the scene and later arrested the suspect. She stated that the minor was born on 03rd June 2009 and was 15 years at the time of the offence. She produced a copy of birth certificate as P-Exhibit 1.

11. As aforestated, the court found that the Appellant had a case to answer and he was placed on his defence. He opted to give a sworn statement.

12. DW1 was the Appellant who stated that On 27/11/2023 he was suspected to have defiled a minor, which offence he denied. He stated that he was at his work place when he was arrested. That the mother forced the minor to tell lies, stating that he chatted with the minor and later defiled her but the said phone was not produced in court. He stated that the mother did not find the minor in his house. He stated further that the doctor who filled a P3 Form testified that the minor was sexually active and also brought in other documents besides the P3Form which had not been stated earlier on.

13. He stated that he was not found with the minor and the messages were not produced in court as exhibits. That he was not the one who defiled her and that the PW2 later chased away the minor.

14. After analysing the evidence, the trial Court in its judgement delivered on 06th June 2024 found the Appellant guilty and convicted him. The Appellant was then given an opportunity to mitigate which he did on the same date. The trial Court then sentenced the Appellant to serve 20 years' imprisonment.

Hearing of the Appeal

15. The Appeal was canvassed by of written Submissions. The Appellant filed his handwritten submissions on 25th June 2025 while the State filed on 25th September 2025 through Prosecution Counsel, Ms. Racheal Mwangi.

Appellant's Submissions

16. The Appellant submitted that mistakes can be made during identification by recognition and urged that where identification by recognition is to be relied upon, it must be established that the circumstances that would prove the suspect is not a stranger by the witness. Further, that none of the prosecution witnesses other than PW1 testified about witnessing the Appellant engaging in sexual intercourse with the complainant. He maintained that the evidence of identification was uncorroborated.

17. The Appellant cited the case of S vs Rabie (1975) (4) SA 855 AD at 862 and urged that PW2's evidence could not be taken seriously by the prosecution. He urged that the prosecution violated Section 94 of the *Evidence Act* by neglecting Section 106(1) of the same act. Further, that PW2 alleged that the information she relied upon for fixing the Appellant was obtained through the phone but the prosecution never bothered to make any physical recording which was a violation of the Evidence (Out of court confession) Act Rules 2009.

18. The Appellant submitted that PW3 failed to display his career credentials as he was a groundsman and further, that the trial court violated the provisions of Section 36 of the *Sexual Offences Act* by not ordering a DNA test. He additionally cited the case of State v Banda & Others 1997(2) SA 352(2)B at 355 and reiterated that there was no prima facie evidence to warrant him being dragged into the case. He prayed that the court allows the appeal.

Respondent's Submissions

19. On her part, the Prosecution Counsel submitted that the offence of defilement was proved beyond reasonable doubt. Counsel urged that Section 8 of the *Sexual Offences Act* outlines that a person who commits an act that causes penetration with a child is guilty of the offence of defilement. That Section 8(3) of the same Act stipulates that the penalty for defilement of children between the ages of 12 and 15 years is 20 years' imprisonment.

20. That Section 8(4) of the Act stipulates that the penalty for defilement of children between the ages of 16 and 17 years is 15 years' imprisonment. In the current case, however, the complainant was 14 years old at the time the offence occurred. The correct charge should therefore have been Section 8(3) of the *Sexual Offences Act*. She urged that although the Appellant herein was charged under Section 8(1) as read with Section (4) of the *Sexual Offences Act*, he did not suffer any prejudice since all the ingredients of Defilement were proved beyond reasonable doubt.

21. Counsel cited the case of Tot v Republic (Criminal Anneal 339 of 2018) (2025) KECA 1376 (KLR) where although the charge sheet cited Section 8(3) of the Act, while evidence showed the complainant was 16, failing under Section 8(4) of the Act, the Court of Appeal upheld the conviction since the age was clear and the defence was not prejudiced. Counsel urged that although the age of the victim is central to proving defilement cases, what matters is whether the age of the victim was demonstrated to the required standard. Once age is proved, the appropriate subsection applies. That Section 134 of the Criminal Procedure Code requires that charges contain sufficient particulars to enable an accused to know the offence alleged.

22. Counsel submitted that in this case, the charges as read out to the Appellant during plea taking, were clear. The particulars on the charge sheet were very clear that the Appellant defiled a child who was aged 14 years old. The charges and particulars of the offence were read out to the Appellant, who pleaded not guilty to the offence. That having understood the offence as charged, he participated in the hearing of the case and was able to cross-examine all the witnesses in the case.

23. He did not, therefore, suffer any prejudice. She placed reliance on the Court of Appeal decision in Benard Kimani Gacheru v Republic (2002) eKLR, which held that a wrong citation of the law is not fatal if the particulars are clear and the accused understood the case. Further, that similarly, in Peter Ochieng v Republic [1985] eKLR. the Court stressed that a charge defect is curable unless it misled or prejudiced the accused.

24. Counsel while restating the evidence as already herein summarised, urged that the prosecution proved its case beyond any reasonable doubt. On penetration, counsel urged that the complainant testified as PW 1 and she stated that on 27th October 2023, she met the Appellant who told her that he wanted her. The Appellant later went to her parents' shop where he found her and informed her that he was going to sleep at that shop.

25. At around 7.00 pm. he went to the said shop, carried PW 1 to the bed, removed all her clothes and then had sex with her by inserting his penis into her vagina, and it was her testimony that they had sex on the 27th and on the 29th October 2023. She urged that her evidence was corroborated by the evidence of

PW3, a medic who examined the complainant and testified that she had an inflamed vaginal cervix and that her vagina was open and torn. He concluded that there was penetration, as supported by the torn hymen and inflammation of the vestibule. Counsel submitted that the prosecution proved beyond any reasonable doubt that there was penetration.

26. With regards to the age of the complainant, she submitted that Section 2 of the *Children Act* 2022 defines a child as an individual who has not attained the age of 18 years. Further, that a person under the age of 18 years cannot legally consent to any sexual activity. PW2, the complainant's guardian, testified that she was 14 years old. She identified the complainant's birth certificate which was marked as PMFI-1 and her evidence was supported by the evidence of PW4, who is the investigating officer and who stated that the complainant was born on 3rd June 2009 and produced the birth certificate as PExh1.

27. On identification, she urged that the complainant positively identified the Appellant as the person who defiled her. The Appellant was not a stranger to the complainant and from the evidence on record, the complainant testified that she had had sex with the Appellant on the 27th and 29th of October 2023. That this clearly demonstrates that the complainant was familiar with the Appellant and was able to recognize him. Furthermore, the complainant successfully identified the Appellant in court.

28. That this confirms that PW1 positively identified the Appellant. She placed reliance on the decision of the Court of Appeal in Wanjohi and another v Republic (1989) KLR 436 where the court affirmed that "the evidence of recognition is of higher quality and more reliable than identification of a stranger." She additionally cited Anjononi and others vs Republic (1989) KLR and reiterated that the prosecution proved the case beyond any reasonable doubt as required by the law.

29. Counsel urged that there were no material contradictions in the prosecution's case that would create doubt as to whether the Appellant committed the offence. She placed reliance on Francis Mugo v Republic [2022] eKLR and the case of Richard Munene v Republic (2018) eKLR in this regard. Counsel further submitted that from the evidence on record, all the ingredients of the offence of defilement were proved beyond any reasonable doubt by all the prosecution witnesses who gave a detailed account of the events leading to the defilement of the complainant and maintained that there were no contradictions in the prosecution's case that would create a doubt as to the guilt of the Appellant. She reiterated that the prosecution discharged the burden of proof beyond any reasonable doubt that the Appellant committed the offence.

30. Counsel urged that the sentence as meted out was not harsh nor was it excessive. She cited Section 8 (4) of the *Sexual Offences Act* and further submitted that the learned trial magistrate observed a typographical error on the charge sheet and proceeded to apply the correct punitive provision under the *Sexual Offences Act*. This followed the prosecution's successful proof that the victim was 14 years old as indicated in the particulars of the offence. And that consequently the magistrate sentenced the Appellant to 20 years' imprisonment, being the minimum sentence prescribed under Section 8 (3) of the *Sexual Offences Act*.

31. Counsel cited the decision of the court in Bernard Kimani Gacheru v Republic (2002) eKLR and the case of Republic v Joshua Gichuki Mwangi and urged that the Appellant's sentence was not excessive and further that the trial court neither ignored any relevant factors nor considered irrelevant ones, nor did it apply any incorrect legal principles. He urged the court to dismiss the appeal against conviction and sentence and to uphold the judgment of the trial court.

32. Counsel acknowledged that the trial court erred in failing to consider the Appellant's pre-sentence custodial period, and conceded the appeal to that extent Section 333(2) of the Criminal Procedure Code mandates that any time spent in custody prior to sentencing shall be taken into account when

imposing a sentence. She did not oppose the inclusion of the Appellant's time in pre-trial custody in the computation of the sentence.

Determination

33. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32). Having addressed my mind to the Grounds of Appeal, the evidence adduced before the Trial Court and the submissions filed, it is my considered opinion that he following issues arise for determination.

    a. Whether the Defilement charge against the Appellant was proved beyond reasonable doubt.

    b. Whether the defect in the charge sheet on the provision of the law under which the Appellant was charge is fatal to the prosecution case on account of the disparity on the age of the complainant.

    c. Whether the sentence of 20 years' imprisonment imposed against the Appellant was justified.

34. On the issue of whether the charge was proved case beyond reasonable doubt, it is trite law that for the offence of defilement to be established, three ingredients that must be proved are the age of the victim, penetration and positive identification of the offender and the court will handle then one after another in determining whether the prosecution reached the required degree of proof beyond reasonable by way of the evidence adduced.

35. On the issue of the age of a complainant, Section 8(1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed Defilement.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years

36. The Court of Appeal in the case of Hadson Ali Mwachongo v Republic [2016] eKLR underscored the importance of proving the age of a victim in a case of defilement as follows;

> " The importance of proving the age of the victim of Defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of Defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.

37. The Appellant in his 3rd ground of appeal has asserted that the age of the complainant was not conclusively determined since the guardian to the complainant was very unsure of the same when she was informing the court hence the age was not established. However, this assertion is not correct.

38. This is because the age of the complainant was ascertained by way of a Birth Certificate which was produced and marked as PExh1 and the Appellant did not at all make issue with the said document in any way and did not even cross examine the witness on the document and its contents. From the said exhibit 1, the court is satisfied that the complainant was a minor aged 14 years old at the time of the defilement. This ground therefore lacks merit.

39. On the issue of penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

40. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated thus:

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

41. In his 2nd ground of appeal, the Appellant asserts that penetration was not proved according to the law and the same was never corroborated by the medical examination done on the complainant as she was found to have been sexually active. On this issue, the 1st thing the court needs to point out is that having perused the record of proceedings as well as the P3 filed together with the Post Rape Care form and treatment notes, I have not come across any evidence to the effect the complainant had been sexually active and so this aspect of the ground of appeal is misleading.

42. Related thereto, the Appellant also faulted his conviction by the trial court on the ground that the court failed to consider the conduct of the complainant which is very relevant to this case such as she was found to have been sexually active among other improper conduct. Now, even assuming that were to be the case, that the complainant at the time of the alleged defilement was sexually active, and according to the Appellant, of improper conduct, it should be noted that her previous sexual activity, if at all, and/or her morals were not up for judgement in this case and further, that the same in any event would not be a licence to any person to sexually predate, harass, assault and/or defile the complainant on a whim.

43. But even more importantly, what the prosecution was required to demonstrate and prove beyond any reasonable doubt in this case, through the evidence adduced in support of the charge before the court, is that at that particular moment in time when it is alleged that the complainant was defiled, it is the Appellant and nobody else who defiled the complainant as alleged on the material date, time and place relevant to the charge.

44. In this regard, I have considered the evidence of the prosecution witnesses with respect to proof of penetration and I am satisfied that the evidence of the complainant on this issue was very well corroborated by the entirety of the prosecution evidence and more particularly by that of the Doctor's with respect to his findings as entered in the P3 Form that was produced in court as exhibit. and the other attendant medical documents produced by the said Doctor.

45. The Appellant has also stated that he is protesting to the evidence of the Doctor for reasons that the said Doctor brought in new documents which had not been stated earlier on. He stated in ground five (5) of his grounds of appeal that the Learned Trial magistrate failed to ensure that he was supplied with exhibits the prosecution was relying in his case such as the medical/treatment notes were not supplied to him offending his constitutional right.

46. I have considered the record of proceedings and I note firstly, that there is no indication therein, either during the cross examination of the Doctor who testified as PW3, or at any point in time during the presentation of the prosecution evidence, that the Appellant complained to court that he had not been served with the documents that the prosecution sought to rely on, or with any new documents that the prosecution sought to produce midstream in the course of the trial.

47. The court notes that in his defence, the Appellant only stated that the Doctor brought other documents besides the P3 form which had not been stated earlier on, but he did not elaborate and/or pursue the issue further. This statement in his defence shows that even at the point of the doctor testifying, he was aware that there were documents sought to be produced that he had not been served with, if at all. The record does not at all show that he raised the matter with the court and protested to the production of these two documents for reasons that they had not been supplied to him.

48. That said, I have considered the nature of the documents complained of. They are in actual fact the Post Rape Care Form (PRC) and the treatment notes. The court in examining all these documents together has noted that it is indeed the contents of the PRC form and the treatment notes that form the greater part of the P3 Form. They are in effect a sub-set of the P3 so to speak. Their contents are therefore not apart from the information contained in the P3 Form but inform every aspect of the said information relevant to proving the charge.

49. In this regard, it is my very well considered opinion that their production alongside the P3 Form did not prejudice the Appellant in any way since the contents of all the three documents are basically the same with regard to their import and purport. In light of my above conclusions, I am satisfied that the element of penetration of the complainant by the Appellant was proved to the required standard.

50. On the issue of the identification of the Appellant, the Appellant's ground of appeal on the issued is that the trial magistrate erred in law and fact by convicting and sentencing him when he was not positively identified. That a good indicator was the use of the alibi name "JUSTINE" 'which the complainant used to identify him which is he is unfamiliar with and does not identify with.

51. The Court of Appeal in the case of Cleophas Wamunga v Republic [1989] eKLR expressed itself as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

52. On this issue, the record of the proceedings of the trial court shows that the complainant positively identified the Appellant in court as the person who defiled her. From the evidence on record, the complainant stated that it is the Appellant who told her that his name was Justine and that she had had sex with the Appellant on the 27th and 29th of October 2023.

53. She stated that he had a "kinyozi" shop in the vicinity, which evidence that was corroborated by PW2 and also the Appellant himself in his statement of defence when he testified that he works as a barber and also a bongo musician. PW2 also corroborated the evidence of PW1 on the name and in fact she too referred to the Appellant as Justine in her testimony.

54. Further, the Appellant placed himself at the scene of crime in his defence when he stated that he resides at Kipsoen and that that too is the place where he works as a barber. With this evidence, the Appellant corroborated and confirmed the evidence of the prosecution witnesses. The cumulative effect of this evidence then is that the Appellant was not a stranger to the complainant and it clearly demonstrates that the complainant was familiar with the Appellant whom she told her mother she had been in touch with for two months when she discovered their text communication.

55. Her evidence on the identification of the Appellant is therefore one of recognition of a person that she has interacted with over time. This kind of evidence has been held by the courts to be more reliable – see - Wanjohi and another v Republic (1989) KLR 436 where the court affirmed that "the evidence of recognition is of higher quality and more reliable than identification of a stranger."

56. Further to the above, the court as guided by the court of Appeal in the above cited case of Cleophas Wamunga v Republic [1989] has carefully analysed this aspect of the evidence as herein above and satisfied itself as to its credibility and therefore finds that it is sufficiently safe to sustain a conviction. In the circumstances, it is my finding that this aspect of the appeal too lacks merit.

57. On the issue that the complainant was couched by the PW2 to give false evidence against the Appellant, and particularly because the phone that PW2 testified that PW1 was using to communicate with the Appellant, together with the attendant text messages were not produced in court by the prosecution, I have addressed my mind to this aspect of the appeal and it my considered opinion that this evidence was not primary to the prosecution proving the material particulars of its case.

58. This is particularly so in light of the fact that the evidence of PW2 very well corroborated that of PW1 on the issues that could be said to be related to the text messages that were in the phone which are relevant to the proof of the prosecution case which are the fact of the existence of a relationship between the Appellant and the complainant, the identity of the Appellant, how they met, for what duration of time they had related and what transpired in the course of that relationship.

59. Further, I am also well satisfied that the evidence on record has proved the case against the Appellant. All in all, on the first issue that the court raised for determination, in light of my conclusions as above, I am satisfied that the prosecution proved its case against the Appellant to the required standard of beyond reasonable doubt.

60. On the second issue for determination which is whether the defect in the charge sheet on the provision of the law under which the Appellant was charge is fatal to the prosecution case on account of the disparity on the age of the complainant, the record of the trial court indicates that the Appellant was charged under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. Because the Birth Certificate produced placed the complainant's age at 14 years, the Appellant indeed ought to have been charged under Section 8(1) as read with Section 8(3) of the Act.

61. The court notes that the trial court in its judgement made the correction and sentenced the Appellant under Section 8(3) of the Act as is prescribed under the law. The question is therefore whether this act by the Learned Trial Magistrate prejudicial to the Appellant.

62. Section 382 of the Criminal Procedure Code provides that unless an error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed. The Section provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,

proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

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

63. The Court of Appeal in Peter Ngure Mwangi v Republic [2014] eKLR held thus: -

> " On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not."

64. The Court of Appeal gave guidance on determining whether a defect in a charge is fatal in Benard Ombuna v Republic [2019] eKLR as follows: -

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the Appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

65. Further, in the case of Bernard Kimani Gacheru v Republic [2002] eKLR emphasised that:

> " It is now settled Law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already states is shown to exist."

66. I have considered the proceedings before the trial court. I note that even though the charge itself was framed as brought under Section 8(1) as read with Section 8(3) of the Act, the particulars of the offence on the charge sheet were very clear on the age which was placed at14 years. The charge and all particulars of the offence were read out to the Appellant and he pleaded not guilty to the charge.

67. Having understood the offence as charged, he participated fully in the hearing of the case and the record shows that he did cross-examine all the witnesses and testified in his defence. In considering this defect, it is my considered opinion that it is a defect of form rather than substance and that the said defect did not prejudice the Appellant in any way. In this regard, I am in agreement with the submission by the Counsel for the State that although the age of the victim is central to proving defilement cases, what matters is whether the age of the victim was demonstrated to the required standard and that once age is proved, the appropriate Section applies in sentencing.

    1. The court as has already herein above stated that it is satisfied that all the ingredients of the charge of defilement were proved beyond reasonable doubt by the prosecution, and having also found that the defect was one of form that did not affect the substance of the charge, as

already established, the proper interpretation of the law indicates that she was 14 years old at the time of the defilement. In the circumstances, the proper sentence was that provided for under Section 8(3) of the *Sexual Offences Act* and which the trial court duly passed. I am therefore satisfied that the Learned Trial Magistrate did not err in sentencing the Appellant under the correct provision of the *Sexual Offences Act*.

2. On the last issue for determination which is whether the sentence of 20 Years' imprisonment imposed was justified. Without belabouring the issue, the position is that the sentences prescribed under the *Sexual Offences Act* are mandatory. The provisions of Section 8(3) of the Act under which the Appellant was sentenced by dint of the age of the complainant provides for a minimum sentence of 20 years. The learned Trial Magistrate sentenced the Appellant to the minimum aspect of that sentence and in this regard, it is my finding that the said sentence is legal and therefore justified.

3. The above said, the court notes from the sentence meted out that as provided under Section 333(2) of the Criminal Procedure Code, the trial court did not take into consideration the period that the Appellant spent in remand custody in the said sentence. This being a mandatory provision of the law, the court notes that the plea was taken on 30th November 2023 and the Appellant was sentenced on 6th June 2024 and he was in remand throughout the trial. This is a aggregate period of 6 months and 6 days. The court now hereby directs that this period be computed in the Appellants sentence of 20 years 'imprisonment and it is so ordered.

4. The upshot then is that save for the court's finding on the provisions of Section 333(2) of the Criminal Procedure Code, the Appellant's appeal against conviction and sentence is devoid of merit and the same is therefore dismissed in its entirety and the trial court's conviction and sentence are accordingly upheld.

READ DATED AND SIGNED AT ITEN ON 5TH MARCH 2026

E. OMINDE

JUDGE