



REPUBLIC OF KENYA



**Koech v Republic (Criminal Appeal E055 of 2024)  
[2026] KEHC 2962 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 2962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL E055 OF 2024  
E OMINDE, J  
MARCH 5, 2026**

**BETWEEN**

**JOSHUA KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the Judgment of Hon. V. Karanja-PM, delivered on 31/10/2024 in Iten Senior Principal Magistrate's Court Criminal - Sexual Offences – Case No. E056 of 2023)*

**JUDGMENT**

1. The Appellant was charged in the said criminal case with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars were that on the 5<sup>th</sup> day of November 2023 at around 1800 hrs. at [.....] Village in Keiyo South Sub-County, within Elgeyo Marakwet County, he unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of SJ, a girl aged 5 years.
2. The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the same date, time and place, he unlawfully and indecently caused his penis to come into contact with the vagina of the same girl aged 5 years.
3. The Appellant pleaded not guilty to the charges, and the case proceeded to full trial, in which the Prosecution called 5 witnesses. Mr. Tarigo Advocate, came in to represent the Appellant after the first 3 witnesses had already testified, although he successfully applied for recalling of PW1, PW2 and PW3, who then returned for cross-examination.
4. At the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. He then gave a sworn statement and called 3 other witnesses. By the



Judgment delivered on 27<sup>th</sup> September 2024, he was convicted on the main charge, and sentenced to life imprisonment.

5. Dissatisfied with the decision, the Appellant, through Messrs Tarigo Kiptoo & Co. Advocates, filed this Appeal on 18<sup>th</sup> October 2024 against both conviction and sentence. He listed the following 7 grounds that:
  - i. That the learned trial magistrate grossly erred in law and in fact in relying on the suspicious and fictitious evidence of witnesses.
  - ii. That the learned trial magistrate grossly erred and / or misdirected herself in law and facts in holding that the medical evidence tendered as truthful and free from the error and doubt without critically observing that the same was not credible enough to warrant a conviction.
  - iii. That the learned trial magistrate erred in law and fact in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubt without the benefit of properly conducted investigation.
  - iv. That the learned trial magistrate heavily misdirected herself in law in shifting the burden of proof to the appellant and further ignoring the defence of the appellant without proper evaluation, of the same.
  - v. That the learned trial magistrate failed to test the evidence of the prosecution witnesses and caution the circumstances thereby convicting on flimsy, inconsistent and evidence that was not watertight enough;
  - vi. That the learned trial magistrate erred in law and fact without observing that there were no substantive investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication;
  - vii. That the learned trial magistrate erred in law and fact in believing the testimonies of the witnesses on record without considering that they mentioned witnesses who were not called to testify; and
  - viii. That the learned trial magistrate grossly erred in law and facts in convicting the appellant against the weight of the evidence.

### **Prosecution Evidence**

6. PW1 was the minor (victim), SR. Due to her age, she was taken through a voire dire examination upon which the trial Magistrate found that she understood the effect of taking an oath and thus, directed that she gives sworn evidence, which she did.
7. The minor then disclosed the name of her school, and stated that she was a PP1 pupil. She then testified that the accused person removed her dress and underwear, removed his trouser and put his 'miti' into her 'dudu' and pointed at her private parts. When her mother came home, she informed her and she was taken to hospital by her mother. She was then taken home then to the police station. She stated that the appellant was a neighbour and that it happened on a Sunday evening.
8. PW2 was JC, the mother to the complainant. She stated that the complainant was born on 27<sup>th</sup> October 2018 and produced a birth notification. It was her testimony that on 05<sup>th</sup> November 2023 she found the accused person running away from her house as she returned from the shamba. She attempted to greet him and he never responded. She asked the complainant what had happened but she never told her.



9. She stated that in the morning, the complainant told her that her urine had burnt her and when she removed her trouser, she saw blood stains. She washed her and saw that she had been defiled. She stated that the minor was complaining of pains in her private parts as she washed her. She then took her to hospital and reported the matter. In cross examination, she stated that the child had identified the appellant and she had narrated what had happened to her.
10. PW3 was HK, the minor's father. He stated that on 06<sup>th</sup> November 2023 he left the shamba and left the complainant with her one-year-old brother. He was informed that PW1 had been defiled and he took her to hospital.
11. PW4 was Dr. Irene Simiyu who testified that on examination of the minor on 07<sup>th</sup> November 2023, she observed that she had a hymen opening too wide for her age and there was bilateral redness on the labia minora and majora and bruises on the anal region. She made a conclusion of evidence of partial vaginal penetration consistent with a history of defilement.
12. As earlier stated, Counsel for the Appellant successfully applied for witnesses to be recalled. PW1 was then recalled for cross examination and she stated that the appellant came home at 4pm when she was outside playing with her brother. He came and asked her where her mother had gone and when she told him that she had gone to get cows, he removed a 'stick' from his pocket and hit her.
13. PW2 was recalled for cross examination by counsel for the appellant and she stated that her 2 children had been left at home as she had gone to the Shamba and her husband had gone to the center. Further, that she met the appellant coming out of the house and he ran away as he greeted her. She further stated that when she asked the minor about Joshua, she started trembling. She also told her Joshua had called her on 05<sup>th</sup> November 2023 and put his 'stick' in her vagina. Additionally, that he met Joshua at 6pm and it was a bit dark.
14. PW3 was recalled and cross examined by Counsel for the appellant. He stated that the appellant was a neighbour and that he did not have a grudge with him that on the material date, he left the children at home and went to the center at around 3 pm.
15. PW4 was Police Constable Rael Ndiema, from the Kaptagat Police Station, the Investigating Officer. He stated that he interrogated the complainant who told her the name of the accused person. He recorded her statement and her parents' statements as well. He issued them with a P3 form and he was later informed that the appellant had been arrested by members of the public. He then charged him for the offence.
16. As aforesaid, at the close of the Prosecution's case, the trial Court found the Appellant as having a case to answer and put him on his defence. The Appellant then, in his defence, gave a sworn statement, and called 3 other witnesses.
17. The Appellant, testifying as DW1, stated that on 5<sup>th</sup> November 2023 he had gone to check on his cows and had travelled at 2<sup>nd</sup> November 2023 and on 3<sup>rd</sup> November 2023 he took the cows to the dip. On Saturday, he went to graze animals and travelled back on 6<sup>th</sup> November 2023. On 7<sup>th</sup> November 2023, members of the public came to his compound screaming and assaulted him and he was told he had defiled a child. He denied the charges and stated that he never saw the child.
18. DW2 was Ezekiel Marigoch, the father to the appellant who testified that his son had travelled to Ravine and travelled back home on 6<sup>th</sup> November 2023. In cross examination, he stated that they did not travel together and he could not account for his movement on 5<sup>th</sup> November 2023.



19. DW3 was Isaac Cheboi, a neighbour to the appellant. He stated that the appellant was grazing animals over the weekend and returned home on Monday. In cross examination he stated that he did not know the appellants' whereabouts on 5<sup>th</sup> November 2023.
20. DW4 was Edward Korir, a neighbour to the appellant, who stated that the appellant came and took cattle to the cattle dip on 2<sup>nd</sup> November 2023 and travelled back on Sunday. In cross examination, he stated that he could not account for his whereabouts on 5<sup>th</sup> November 2023.
21. The Appellant indicated to the court, on 3<sup>rd</sup> June 2025, that his submissions were on file, however, there are no submissions on record for the Appellant. Similarly, Counsel for the state, Ms. Mwangi, indicated to the court, on the same date, that they were to file submissions by close of business of that date but none were filed.

### **Determination**

22. The duty of the first appellate court is as set out by the Court of Appeal 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 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, see *Peters vs Sunday Post* [1958] EA 424.” This was also set out in the case of *Kiilu & Another vs Republic* [2005] KLR 174.
23. Having considered the pleadings, I am of the view that the issues that arise for determination in this matter are as follows;
  - a. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
  - b. Whether the sentence of life imprisonment imposed against the Appellant was justified.
24. For the offence of defilement to be established, the three ingredients that must be proved in order to obtain a conviction are the age of the victim, penetration and positive identification of the offender see *George Opondo Olunga v Republic* [2016] eKLR, and also *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013.
25. The importance of proving the age of a victim in a case of sexual assault was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR, 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....”



26. In *Peter v Republic* [2024] KECA 1124 [KLR], the Court highlighted the methods of proving age as follows:

“28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians...

“...30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1’s age was proved beyond reasonable doubt.”

27. In the instant case, the record of the trial court indicates that on the element of age of the complainant, PW2 produced her birth notification which indicated that the complainant was born on 27<sup>th</sup> January 2018. PW5 then produced the same as evidence and it was marked as PExh1. The offence was committed on 23<sup>rd</sup> November 2023.

28. This document and its contents were not at all challenged and or rebutted by the defence and nor were its contents denied and/or contradicted. It follows therefore, the element of the age of the complainant was sufficiently proved to the required and the same is that the minor was 5 years and 11 months old at the time of the commission the offence.

29. On the requirement of proof of penetration, the term “penetration” is defined in Section 2(1) of the *Sexual Offences Act* to mean

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

30. From the evidence on record, the court notes the minor’s use of the term “miti” and “dudu” in referring to her genitalia and that of the Appellant as is appropriate from the said record. In regard to this, the Court of Appeal, in the case of *Muganga Chilejo Saha v Republic* [2017] eKLR, acknowledged that this is an acceptable description of defilement especially where penetration is established. In accepting that in Kenya, the society has adopted such terms as a euphemism to mean phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows:

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a Court room. If the trend in the decided cases is anything to go by, Courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (*IE V R, Kapenguria H.C Cr. Case No. 11 of 2016*), “he pricked me with a thorn from the front part of this body.”, (*Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015*), “he used his thing for peeing”, (*David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015*), “he inserted his “dudu” into my “mapaja”, (*Josef Kaburu v R, Meru H.C Cr. Case No. 196 of 2016*), “he used his munyunyu”, (*Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011*), as apt description of acts of defilement. We, however, need to remind trial Courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are



inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial Courts should record as nearly as possible what the child says happened to him or her. (emphasis added).”

31. On the issue of penetration, I have addressed my mind to the evidence on record and I am satisfied that the medical evidence corroborated the evidence of the complainant as to whether there was penetration. This is because the medical report produced by PW4 stated that the Doctor found that that there was a hymen opening that was far too wide for the age of the complainant, that there was bilateral redness on the labia minora and majora, and that there were also bruises on the anal region.
32. The court notes further the evidence of the mother wherein she stated that the next morning after the defilement, the complainant told her that her urine had burnt her and that when she removed the complainant’s trouser, she saw blood stains. Further the mother testified that when she washed the complainant, she saw that she had been defiled and further that the minor was complaining of pains in her private parts as she washed her. This evidence is sufficient proof of penetration to the required degree.
33. On the issue of identification, the admonition of the Court of Appeal on the need to exercise caution on matters of identification is relevant. This is as the court stated in the case of *Cleophas Wamunga v Republic* [1989] eKLR where it 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”.
34. The complainant in her evidence stated that the appellant was a neighbour. In this regard, her evidence on the identification of the Appellant was by way of recognition. Further PW2 also testified that she met the appellant running away from her house as she returned from the shamba and she attempted to greet him but he never responded. PW3 the father of the complainant corroborated the evidence of the complainant when he testified that the Appellant was their neighbour and he had no grudge with him.
35. With this evidence, I am satisfied that the element of identification was well satisfied by way of evidence of recognition. In terms of the reliability of identification by recognition, the Court of Appeal, in the case of *Reuben Tabu Anjononi & 2 Others v Republic* [1980] eKLR, stated that:

“..... This was, however, a case of recognition, not identification, of the assailants; recognition 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. ....”
36. In light of my conclusions as herein, I am satisfied that the conviction by the Learned Trial Magistrate was based on sound, reliable, cogent and coherent evidence presented by the prosecution which evidence I am satisfied proved the case against the Appellant beyond reasonable doubt. In this regard, the conviction is upheld.



37. On the appeal against sentence, the applicable principles in re-considering sentence on appeal, were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

“It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the 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 the wrong material, or acted on the 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 stated is shown to exist”.

38. Section 8(2) of the *Sexual Offences Act* provides as follows:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

39. The Supreme Court decision in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)* held that: -

“Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.....

.....In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The court of Appeal had no jurisdiction to interfere with that sentence.”

40. The trial court imposed the mandatory sentence provided in law. In this regard, the sentence being legal and lawful, the court sees no plausible reason to interfere with the same and it is therefore upheld. The upshot of the above is that it is the court’s finding that the appeal on both conviction and sentence lack merit and the same is accordingly dismissed.

41. Right of Appeal 14 days.

**READ DATED AND SIGNED AT ITEN ON 5<sup>TH</sup> MARCH 2026**

**E. OMINDE**

**JUDGE**

