



**Githui v Republic (Criminal Appeal E045 of 2023)
[2026] KEHC 3401 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 3401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E045 OF 2023
EM MURIITHI, J
FEBRUARY 20, 2026**

BETWEEN

SAMSON KARIUKI GITHUI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Cheruto C. Kipkorir (PM) in Kerugoya Cr. No. E005 of 2023 delivered on 12/10/2023)

JUDGMENT

1. The appellant herein was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 7/2/2023 at Kerugoya Township within Kirinyaga County, he caused his penis to penetrate the vagina of S.M.M a child aged 5 years old. He faced 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. It was alleged that on the same date and place, he caused his penis to come into contact with the vagina of S.M.M a child aged 5 years old.
2. He denied the charges but upon full trial, he was sentenced to life imprisonment.

The Appeal

3. On appeal, the appellant filed his petition of appeal on 18/10/2023 raising 5 grounds as follows:
 1. The learned trial Magistrate erred in law and in fact in her conclusion that the Appellant committed the offences he was charged with when there was no sufficient evidence to support such a finding.



2. The learned Magistrate failed to take into account the fact that the person who gave evidence in court had not examined the complainant and was referring to notes written by another person who was not called as a witness.
3. The learned trial Magistrate failed to consider, or to adequately do so, the contradictions in the prosecution witnesses' evidence.
4. In all the circumstances the conviction was against the weight of evidence.
5. The Appellant prays that the conviction against him be set aside as well as the consequential sentence.

Duty of Appellant Court

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* (1972) EA 32).

Evidence

5. PW1 AW testified that, "On 8.2.2023, it was at night, my daughter came and told me she will not eat. I did not bother, she slept. When I woke her up, she said she felt pain in her stomach. I wanted to wipe her private parts. I asked her who did sleep with, she asked if I will beat her if she says so. She said baba Jacob - points at the accused, bought them melon and uji. She was with his daughter, I do not know her name, she is younger than her. They went to the living room and he gave them tea. He then took her to bedroom, he told her they will play a game kaungu, she said he removed his susu and put it in her susu. I did not believe her. She said she was afraid of me, I even called her thrice the previous day. She said she did not come as she was afraid. I did tell my neighbour called sarah to ask my daughter and she said as much. I took her to hospital - general. She was examined. The doctors were also shocked. We were taken to the lab. They asked me who the culprit is, I was told not to say anything to him as he will run away. I did go to the station the next day, I gave the police the medical documents. I was tired and I told them as much. P.C. Naomi did follow up on the other things. I did find the accused many times outside my house. I suspected he was up to no good. I was so angry, I even bought a panga and I wanted to kill him. Police did say I don't. My child is now about to be 6 years. Infact, he used to come to my house and pick my child and I allowed him. He said he will go buy her things. Even that day the incident occurred, he did as much, but when I called her she did not come and when I went to pick her. I did clean her and when I gave her food but she slept before she ate. I did not follow up, the next day she told me what happened. My husband died last year. She has never healed, she has sores in her mouth, her private parts and she passes stool that has blood. She also does not eat well. She was not given any medication. She has also lost a lot of weight. All I want the child to be ok. It was been very stressful. Shown P3, treatment notes and PRC and lab tests - it belongs to my child S.M.N. P3-PMFI 1, PRC-PMFI 2, treatment notes - 3 a, lab results - PMFI 3b. The birth notification - it shows she was born in 2018, 1.2.2018. I do not know if the date she was born is correct, as per the notification."
6. On cross examination, she stated that, "I was issued a warrant one time, it was because I was late. I was told as much, but the warrant was lifted. On 7.2.2023, I saw the thing I saw the things I have said. It was at about 7.00 am, when I prepared her to go to school. When she told me, I heard and I took her to hospital. The previous day, is when I had gone to pick her and she slept without eating. The day I saw the child is when I went to hospital. On that day 7.2.2023, I was at home with the child, she had not gone to school, I was preparing her to go to school. The incident occurred on 6.2.2023, he came for her that day, I saw it the next day on 7.2.2023. On 6.2.2023, she came back from school. He usually



comes for the child. He came for the child while I was at home on 6th, He usually smokes bhang. He seats in a stone. He picked his child, she is in municipality. He came back, he sat on the stone again, he said he will go with S. to buy them melon. He does this for a lot of children and children like him. My child did not come back, I even met with him, they left at 3.00 pm and when I looked for her and I went to pick the child from his home. I had sent children to call her she did not come. When I went to pick her, I asked her angrily why I called her and she did not come. She said Jacob's child hit her leg. I carried her home. She slept without eating. On 7.2.2023, she did tell me about the sexual assault. She is the one who told me she was in pain. My statement shows I said her private parts was abnormal. I was wiping her private parts. She said she felt pain, in her private parts. I thought it was because it was dirty. I saw it and I asked her who she did bad manners, which child. When she said it was baba Jacob, I did not believe, I even thought she did it with someone else, and I thought it was abnormal. Her private parts. It was dirty, it was also penetrated, I saw mucus, and I saw it was wide. I took her hospital the same day, I saw the private parts. I took her to hospital at about 10.00 am. I had cleaned her private parts before. Before that day, even when I washed her, she would walk back and say she is in pain. I did not follow up. When I asked, she said the accused used to put his fingers in her private parts. I used to wonder why he would ask for the child. It seems it was not the first time he did that to her. He did it for a while. My daughter did not tell me. He told her that she was told she will not be bought for chicken. She will never go back to being normal. I called my neighbour and she spoke to the child. She is called Sarah I do not know if she is a witness. Incident occurred on 6.2.2023. In my statement, I did not mention how the accused put his fingers in her private parts. She was bought melon and uji. She was given tea and bread when they got to his home. I did not say that in my statement.”

7. PW2 S.M.M. gave unsworn testimony that, “Baba Jacob alinifanyia tabia, he removed my clothes, he was on top of me. I was from school, he told me to remove my uniform he will buy me chicken. He did that every day. He even bought me watermelon. He made me lie on the bed, in his home, he also removed his and my clothes. He lied on my stomach. He also said I do not tell mum, if I did so, he will not buy me chicken. He did not twice. I told mum. He would come pick me up from my house. And take me to his house. We were just the two of us. He used to pick me from the base in town. He would come by himself. He would put his fingers here (points at her private parts). That day he lied on top of me, he put his fingers in my susu and then he oiled my susu. When he finished, he told me to go home. It was on a Friday. That day he went to pick his child from school, he is called Felix Kaungu. He left his child watching TV, he then he said we go do Kaungu. It a game, he said we play with him, we played it on the bed. That is when he undressed me. When I asked him what kaungu is. He removed his susu, he put it in mine. He has come for me at the base, he was not with his child. I know baba Jacob - he is in court - points at the accused.”
8. On cross examination, she stated that, “I have sores in my mouth - shows the advocate. We always go to the hospital and I am given medicine. I have a brother, older than me and my sister N. I was unwell, I did not go to school. I stayed at home. I went to hospital with my mother. I did tell my mother what happened. When I did tell her she told me to tell her. I do not recall what day of the week it was.”
9. PW3 Hezron Macharia Maina, a Clinical officer at Kerugoya County Referral hospital, produced the complainant's P3 and PRC forms, the lab tests and treatment notes as exhibits. He testified that, “On 8.2.2023, Kerugoya police station made a request for the examination of a patient named S.M.M. She was 5 ½ years old. On physical examination of the patient she had changed her clothes. She was in a fair general condition. On examination of the systems, nothing abnormal was seen except in her genitalia. The hymen was broken and it was old, I did not note any other injury, no discharge was seen. On examination of the specimen taken for lab examination it did not see any spermatozoa nor pus cells. This was the case with the HVS. The syphilis and HIV test was negative. Anal swab was



- taken, no spermatozoa was seen. I did accord her psycho-social support and gave her treatment for HIV prevention.”
10. On cross examination, he stated that, “We do not write statements, I just produce the medical documents. I am an expert witness. I saw the patient on 17.2.2023, she was attended to by my colleague 8.2.2023. I did not see her on 8.2.2023. I did not examine her genitalia, I took history. I did physical examination. This means the general appearance of the patient. Old is a relative term. P3 is a secondary document, the initial examination would give the age of the injury. My colleague stated what old means. The hymen is a membrane and even after 24 hrs, if it is broken it would appear old. (Refers to the treatment notes and PRC form). It shows she was examined at 1.00 pm. There was no sign of bleeding nor discharge. There were no spermatozoa noted. The clothes had been changed and the child had been cleaned by the mother. I do not know if she asked for the clothes she had on at the time. I do not know if the accused was examined or not. He was not brought for assessment. The PRC form has been produced in evidence. The sketches on the PRC are pre-drawn, we only fill them in.”
 11. PW4 PC. W. Naomi Chalangat of Kerugoya police station was assigned this case to investigate. She called the complainant’s mother, PW1 on 14/2/2023 to come to the station with the complainant for purposes of recording their statements. She produced the complainant’s birth notification as exhibit 4.
 12. On cross examination, she stated that, “The mother took long to report as she said she was unwell. She went to hospital and was given medication and went back home. She was not able to come. She was sick for 5 days. The clothes she had at the time as she had already washed this included the pantie. The accused was arrested on the 25.2.203. I did look for him from 17.2.2023, after the P3 was filled and after all the medical documents were availed. I got the medical report before 17.2.2023. The treatment notes were filled on 8.2.2023. I got the report from the hospital on 15.2.2023. I did go for them myself to the hospital. The doctor would know what the lab report said. The lab report showed that the hymen was broken and it showed that the defilement had occurred. I did not arrest the accused as I did not have the P3 form I did not record a statement from Sarah the neighbour.”
 13. In his unsworn defence, Samson Kariuki Githue, the appellant herein, testified that, “I live in Kaitheri in Kerugoya. I do casual work. I know the charges that I face. It is not true and nothing like that happened. That is also not true with respect to the 2nd count as well. I pray that I be discharged.”

Submissions

14. The appellant faulted the trial court for failing to critically analyze the evidence by the prosecution witnesses, and thus the appeal ought to be allowed.
15. The respondent maintained that it had proved the ingredients of the offence to the required standard, and cited *DS v Republic* [2022] eKLR, *Edwin Nyambogo Onsongo v Republic* (2016) eKLR, *Williamson Sowa Mbwanga v Republic* (2016) eKLR, *MTG v Republic* (Criminal Appeal E067 of 2021) [2022]KEHC 189 (KLR) (15 March 2022) (Judgment) and *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR. It submitted that the sentence imposed on the appellant by the trial court is properly anchored in law and thus sufficient, and relied on *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR).

Analysis and Determination

16. The singular issue for determination is whether the prosecution proved its case beyond reasonable doubt.



17. The law is clear that in a criminal trial, the prosecution bears the burden of proving its case beyond reasonable doubt. In *Baten v Baten* (1950) All 2 ER at page 459 it was held that: “In criminal cases the charge must be proved beyond reasonable doubt. The requirement to prove means that facts must be established to the satisfaction of the court. Facts do not represent an objective truth but sometimes an accurate, or sometimes a crude estimate truth of the most convincing version of events. Technically evidence is conclusive only where by virtue of a rule of law, it cannot be contradicted.”
18. The essential ingredients of defilement which the prosecution must prove are age, penetration and the perpetrator of the crime.
19. The complainant was born on 1/2/2018, as evinced by the birth notification produced as exhibit 4.
20. On penetration, the complainant testified that, “Baba Jacob alinifanyia tabia, he removed my clothes, he was on top of me. I was from school, he told me to remove my uniform he will buy me chicken. He made me lie on the bed, in his home, he also removed his and my clothes. He lied on my stomach. That day he lied on top of me, he put his fingers in my susu and then he oiled my susu. When he finished, he told me to go home. It was on a Friday. That day he went to pick his child from school, he is called Felix Kaungu. He left his child watching TV, he then he said we go do Kaungu. It a game, he said we play with him, we played it on the bed. That is when he undressed me. When I asked him what kaungu is. He removed his susu, he put it in mine. He has come for me at the base, he was not with his child. I know baba Jacob - he is in court - points at the accused.”
21. Her testimony was corroborated by her mother, PW1, who stated that, “On 8.2.2023, it was at night, my daughter came and told me she will not eat. I did not bother, she slept. When I woke her up, she said she felt pain in her stomach. I wanted to wipe her private parts. I asked her who did sleep with, she asked if I will beat her if she says so. She said baba Jacob - points at the accused, bought them melon and uji. He then took her to bedroom, he told her they will play a game kaungu, she said he removed his susu and put it in her susu. I did find the accused many times outside my house. I suspected he was up to no good. My child is now about to be 6 years. Infact, he used to come to my house and pick my child and I allowed him. Even that day the incident occurred, he did as much, but when I called her she did not come and when I went to pick her. She has never healed, she has sores in her mouth, her private parts and she passes stool that has blood. She also does not eat well. She has also lost a lot of weight.”
22. The complainant was treated on 8/2/2023 as indicated in the treatment notes and the only anomaly noted, was the broken hymen. The absence of spermatozoa and injuries on the complainant’s genitalia does not negate the commission of the offence, because the definition of penetration under section 2 of the *Sexual Offences Act* encompasses either partial or full insertion of the genital organs of a person into the genital organs of another person.
23. Invariably, a conviction can be founded even where there is insufficiency of medical evidence provided that the testimony of the complainant is believed to be the truth in terms of section 124 of the *Evidence Act*.
24. The identity of the perpetrator is not in question. PW1 informed the court that the Appellant would on numerous occasions pick the complainant from her home and take her to his house. The Appellant was therefore no stranger to the complainant.
25. The court finds that the prosecution proved beyond reasonable doubt that the complainant was indeed defiled by the Appellant.



26. On sentence, section 8 (2) of the *Sexual Offences Act*. That section provides that, “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.”
27. The complainant was 5 years old and the appellant was sentenced to life imprisonment, which is the punishment prescribed by section 8 (2) of the *Sexual Offences Act*. That sentence was thus lawful.
28. This court is counseled by Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment), where the Supreme Court ruled that:
- “...We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences...The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court. Consequently, the life imprisonment sentence remained lawful and in line with section 8 of the *Sexual Offences Act*.”
29. The Court has no scope in this matter to consider any other sentence.

Orders

30. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.
- Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2026.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mindo for the Appellant.

Mr. Mwangi for the DPP.

