



**LIA alias J v Republic (Criminal Appeal E042 of 2025)
[2026] KEHC 2622 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E042 OF 2025
JN NJAGI, J
FEBRUARY 20, 2026**

BETWEEN

LIA ALIAS J APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.P.W. Wasike, Principal Magistrate, in Lamu Principal Magistrate’s Court Sexual Offence Case No. E021 of 2024 delivered on 23/7/2025)

JUDGMENT

1. The Appellant herein was convicted for 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 offence were that on diverse dates and time between 14th and 24th November 2024 at (name withheld) in Lamu county he intentionally and unlawfully caused his penis to penetrate the anus of A.S. (herein referred to as the complainant), a child aged 14 years.
2. The Appellant was sentenced to serve 30 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:
 1. That the learned trial magistrate erred in law and facts by failing to find that PW1 and PW2’s evidence on the identification of the appellant was not watertight Act.
 2. That the learned trial magistrate erred in law and fact by failing to find that the contradictions in the evidence of the prosecution witnesses made the conviction of the appellant unsafe.
 3. That, the learned trial magistrate erred in law and facts by failing to find that the prosecution did not prove their case to the required legal standard threshold and the conviction of the appellant was unsafe.



4. That, the learned trial magistrate erred in law and facts by failing to consider the appellant's defence thus the sentence imposed is harsh, unjust and unconstitutional.

Prosecution case

3. The case for the prosecution is that the complainant was at the material time a grade 9 pupil. He was living with his mother PW3. The Appellant was a son to the sister of the complainant's father. He had come visiting them during the Lamu cultural week and was sleeping on a bed placed at the veranda of the complainant's family house. The house has two bedrooms. The complainant was sleeping in one of the bedrooms with his younger brother while his parents were sleeping in the other bedroom.
4. It was the evidence of the complainant who was PW1 in the case that on the 14th November 2024 he was sleeping in his bedroom when he woke up suddenly and found that he did not have clothes on and was naked. He saw the Appellant behind him on his buttocks. He tried to push him away but he resisted and pulled out a knife. He warned him not to scream. He applied saliva on his penis and inserted it into the complainant's anus. He did so for about 10 minutes and he then left.
5. Later on another day, the Appellant went to his room and removed a knife. He ordered him not to say anything. He did the same thing to him. While he was coming out of the room he was seen by his mother. In the morning his mother asked him what the Appellant was doing in the room. He was hesitant to tell her due to fear of threats from the Appellant. He opened up and told her. They went to the Appellant. He was questioned but he denied. His mother took him to hospital. He was examined.
6. The complainant's mother PW2 testified that on 24/11/2024 at about 1.10 am she left her room to go to the toilet when she noticed that the Appellant was not on his bed at the verandah. She thought he was in the toilet and waited for him to come out. She then saw him come out of the children room. She got suspicious. He had not seen her. He rushed to the toilet. When he come out, she asked him what he was doing in the children room. He said that he had gone to sleep there as there were mosquitoes where he was sleeping. She went to the children room and found the complainant sleeping on his belly. That in the morning at 5.30 am she called the complainant and asked him what was going on between him and the Appellant. He was hesitant to say. She slapped him and threatened to take him to the police station. He told her that the Appellant had sodomized him and had warned him not to report to anybody. She checked his anus and found it open. He woke up the Appellant and told him what the complainant had told her. He denied doing it. She took the complainant to King Fahad Hospital where he was examined and found to have been defiled.
7. The complainant was examined at King Fahad Hospital on 24/11/2024 and his P3 form and Post Rape Car form completed by Dr. Khalifa Swaleh. He was found with anal pains and tears and laceration at the 9 o'clock anal region.
8. The Appellant was arrested by members of the public including PW4. He was taken to the police station.
9. The case was investigated by PC Koskei PW5 of Lamu police station. He recorded statements of witnesses and issued a P3 form to the complainant. He charged the Appellant with the offence. During the hearing of the case in court, a doctor from King Fahad Hospital, Dr. Aswim PW3, produced the P3 form and the Post Rape Care form on behalf of Dr. Khalifa as exhibits, P.Exh.1(a) and (b) respectively. The mother to the complainant produced the complainant's birth certificate as exhibit, P.xh.2.



Defence case

10. The Appellant stated in his defence that he was on 20/11/2024 attacked by 2 people who started to beat him. The village headman went there and he was taken to the police station. He was locked up and taken to court on the following day. He said that the charges were fabricated due to differences between the mother to the complainant and her husband. He said the complainant was beaten to lie against him.
11. The appellant called one witness, DW2 who testified that he was with the appellant on 23/11/2024 from 5pm. That they slept at Kandari Village. That on the following day at 7.15 am, the father of Rahma and his brother went and attacked the appellant and beat him up. He was taken to the police station

Submissions

12. The Appellant submitted that while the complainant said that he saw the Appellant with aid of light coming from the veranda he did not state the distance the light was from where they were when he purported to identify him. More so that the complainant did not tell the court the intensity of the light. Further that the complainant's mother did not mention any source of light when she claimed to have seen him come from the complainant's bedroom.
13. The Appellant submitted that there was insufficient medical evidence to support the charge as the doctor who testified in court, PW3 is not the one who attended to the complainant.
14. It was submitted that the mother to the complainant beat him up to implicate the appellant with the offence. That the case was full of inconsistencies and contradictions and as such the conviction of the appellant was not safe.
15. The Respondent on the other hand submitted that the charge was proved beyond reasonable doubt. That the age of the complainant was proved by the birth certificate. That the complainant's evidence proved that the Appellant penetrated him with his penis into his anus. That this evidence was corroborated by the evidence of the doctor, PW5 as the complainant was found with injuries in his anus. That the identification of the Appellant was proved as he was a cousin to the complainant and was sleeping at the veranda of the complainant's house. That the complainant's mother saw the Appellant come out of the complainant's house when the Appellant defiled the complainant on the second occasion.

Analysis and determination

16. This court being the first appellate court in this matter is alive to and is cognizant of the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own 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.”



17. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No3 of 2006. The section provides as follows:
 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2.
 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.
18. In the case of *Dominic Kibet Mwareng v Republic* (2013) eKLR, it was held that the ingredients for the offence of defilement are: proof of the age of the victim, proof of penetration on the victim and positive identification of the assailant. The appellant submitted that the offence was not proved to the required standard of beyond reasonable doubt.
19. As regards the age of the complainant, the complainant said that he was at the material time aged 14 years. The complainant's mother gave the same age and produced the complainant's birth certificate that indicated that he was born on 18/11/2010. That placed his age in November 2024 at 14 years. The age of the complainant was therefore proved.
20. The complainant testified that the Appellant inserted his penis into his anus on two occasions. That the first one took place on 14/11/2024 at 10 pm whereas the second one took place 3 days later after his father left the home for fishing. The complainant said that the Appellant threatened him with a knife on both occasions. The mother to the complainant said that she saw the Appellant coming out of the complainant's bedroom on the second occasion alluded to the complainant.
21. The trial magistrate in his judgment stated that the complainant managed to identify the Appellant with the aid of light coming from the verandah. The Appellant however submitted that the identification was not safe as the complainant did not state how far the light was when he purported to have identified him.
22. The offence in this case was said to have been committed at night. A question then arises as to how the complainant managed to identify the Appellant at night.
23. The law on identification is that the court before basing a conviction on identification taking place at night must examine such evidence with care so as to satisfy itself that the evidence on identification is free from the possibility of error. In *Francis Karuiki and 7 others vs. Republic* Cr. Appeal No 6 of 2001 [200] eKLR it was held that;

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error.”
24. In *Kimea v Republic* (Criminal Appeal 010 of 2020) [2022] KEHC 104 (KLR) (18 February 2022) (Judgment), the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.
25. Apart from saying that there was light from the verandah when the Appellant defiled him in his bedroom, the complainant did not give details of how the light from the verandah was entering into the



- bedroom yet he at the same time said that the bedroom has a door. Had he left the door to the bedroom open or it was closed? If the bedroom had a door, how was the light from the verandah entering into the room? These were not explained to the court.
26. However, Any doubt that the Appellant entered into the bedroom of the complainant on the night of 24/11/2024 is erased by the evidence of the complainant's mother PW2 that she on that night at around 1am saw the Appellant coming out of the complainant's bedroom. There is no reason to doubt the evidence of the complainant's mother that she saw the Appellant coming out of the complainant's bedroom. It was the evidence of the witness that the Appellant's bed at the veranda was empty when the witness came out of her bedroom to go to the toilet. She in fact thought that the Appellant was in the toilet and waited for him to come out only for him to come out of the children bedroom. The complainant's mother confronted him immediately he came out of the toilet and talked to him. The Appellant went to sleep at his bed at the verandah and he was still sleeping there when the complainant's mother interrogated the complainant in the morning. She confronted the Appellant with what the complainant had told her about the defilement but he denied committing the offence.
 27. The fact that the complainant's mother saw the Appellant coming out of the complainant's bedroom at 1 am corroborates the evidence of the complainant that the Appellant defiled him on the night of 24/11/2024. The complainant said that on the first day she saw the appellant pulling out a knife and threatened him. That he also had a phone torch. That he saw him applying saliva on his penis. That on the second occasion he saw him with a knife and threatened him with it. For the complainant to have seen all this means that there was some light in the room. There was no doubt that the complainant was telling the truth.
 28. The Appellant was a cousin to the complainant. He knew him very well as they were staying in the same house. Consequently, I find that the identification of the Appellant by the complainant and the complainant's mother was free from the possibility of error. There was positive identification of the Appellant by the two witnesses.
 29. The complainant was examined at King Fahad Hospital by Dr. Aswim Sultan but the medical documents were produced in court by a colleague doctor PW3 who explained that Dr. Aswim was away on leave and was not readily available. That he had worked with him at the same hospital for 2 years and was conversant with his handwriting and signature.
 30. The law permits the production of medical documents by another medical officer where sufficient basis is laid showing that the maker cannot be found or there will be delay in procuring the attendance of the witness. The witness producing the document must show that he is familiar with the maker's handwriting and signature. In this case the doctor PW3 explained the unavailability of the maker of the documents. He was working at the same hospital with the doctor who completed the documents and was familiar with his handwriting and signature. The Appellant was not prejudiced by the production of the documents by PW3. I find that proper basis was laid for production of the documents by PW3.
 31. The complainant upon examination at King Fahad Hospital was found with a tear on the 9 o'clock position of the anus. This corroborated the evidence of the complainant that the Appellant defiled him on the night of 24/11/2024.



32. Even then the court could convict in this case without medical evidence as defilement can be proved by way of oral or circumstantial evidence. In the case of *Kassim Ali v Republic Criminal, Appeal No. 84 of 2005*, the Court of Appeal held that: -

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.

33. The oral evidence of the complainant was in this case sufficient to prove the charge on the basis of section 124 the *Evidence Act* that allows a court in sexual offence case involving children to convict on the sole evidence of the child if the court is satisfied that the child is telling the truth. It was clear that the complainant was in this case telling the truth that the Appellant defiled him on the two occasions. The defilement on the last occasion on the night of 24/11/2024 at 1am was corroborated by the evidence of his mother who saw the Appellant coming out of the complainant's bedroom.

34. The Appellant raised a defence that the case was fabricated due to marital differences between the complainant's mother and her husband. However, the Appellant never showed how those differences, if at all there were such, were connected with the defilement on the complainant.

35. The Appellant called a witness DW2 who said that he had spent the night of the 24/11/2024 with the Appellant until he was arrested on the following day. Whereas the complainant and his mother testified that the Appellant spent the night of 24/11/2024 in their house and that the complainant questioned him in the morning at 5.30 am after the complainant implicated him with the defilement, he never raised any issue when cross-examining the witnesses that he had spent the night away from their house on that night. The Appellant himself in his defence in court never told the court that he spent the night away from the house of the complaint. He only talked of the time he was arrested during the day. The defence that the Appellant was not at the complainant's house on 24/11/2024 at 1 am was an afterthought and a lie. The Appellant was convicted on solid grounds and the conviction is thus upheld.

36. The Appellant argued that he was a first offender and that the trial court ought to have been lenient with him when sentencing him. The court is alive to the fact that sentencing lies at the discretion of the trial court. The offence the Appellant was charged with attracts a minimum sentence of 20 years. I find the sentence of 30 years imposed on the Appellant was excessive. In my view the minimum of 20 years was sufficient in the circumstances of this case.

The upshot is that the conviction of the appellant by the trial court is upheld but the sentence of 30 years imprisonment is substituted with a sentence of 20 years imprisonment.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 20TH DAY OF FEBRUARY, 2026

J.N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant – present virtually at G.K.Prison Malindi

Court Assistant - Rahma

