Akoyo v Republic (Criminal Appeal E014 of 2025)
[2026] KEHC 3387 (KLR) (3 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E014 OF 2025

JN KAMAU, J

MARCH 3, 2026

BETWEEN

ESITOKO BABU AKOYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon R.M. Ndombi (PM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No E008 of 2023 on 12th September 2023)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The Learned Trial Magistrate, Hon R. M. Ndombi (PM) convicted him of the main charge and sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 20th May 2025, he lodged an appeal herein. His Petition of Appeal was dated 16th May 2025. He set out six (6) grounds of appeal. On 1st August 2025, he filed Supplementary Grounds of Appeal dated 14th July 2025. He listed five (5) Supplementary Grounds of Appeal.

4. His Written Submissions were dated 14th July 2025 and filed on 1st August 2025 while those of the Respondent were dated and filed on 11th September 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Trial Court failed to comply with Section 214(i) and (ii) of the Criminal Procedure Code, Cap 75 (Laws of Kenya);

    b. Whether or not the Appellant's right to legal representation was infringed upon; c. Whether or not the Prosecution proved its case beyond reasonable doubt; and d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Compliance With Section 214 (i) And (ii) Of The Criminal Procedure Code

9. Supplementary Ground of Appeal No (2) was dealt with under this head.

10. The Appellant faulted the Trial court for failing to comply with Section 214 of the Criminal Procedure Code by not informing him of his right to recall the witnesses to be reheard or cross-examined after the amendment of the Charge Sheet, hence being subjected to an unfair trial.

11. He placed reliance on the case of Yongo vs Republic (1983) KLR 319 where it was held that although the magistrate recorded that he had complied with Section 214 and that the amended charge was read to the appellant, he did not record that the requirement under the second proviso, the appellant's right to recall the witnesses was complied with.

12. He also cited the cases of Harrison Mirungu Njuguna vs Republic Criminal Appeal No 90 of 2004 (eKLR citation not given) where it was held that the right for witnesses to give the evidence afresh on amended charge sheet or to cross-examine the witness further was a basic right going to the root of fair trial and could not be cured under Section 382 of the Criminal Procedure Code. He also relied on the case of Peter Maina Macharia vs Republic (eKLR citation not given) where the trial court was found to have erred for not recalling a witness who had testified after the Charge Sheet was amended.

13. On its part, the Respondent submitted that the Charge Sheet was amended on the date of the offence and age of PW 1 and the same was read out to the Appellant where he pleaded, "Not true" to both the main and alternative charge. It added that the amendment was to ensure that the date and age on the Charge Sheet were as stated by the witnesses in their testimonies, and thus, no prejudice was occasioned on the part of the Appellant.

14. Notably, Section 214 (1)(i) and (i) of Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates that:-

> " Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> > Provided that where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

15. A perusal of the record herein showed that on 26th July 2023, the Prosecution applied to amend the date of the offence and age on the Charge Sheet. The Trial Court allowed the said application and the Charge Sheet was amended. The charges were then read afresh to the Appellant who responded, "Not true" to both the main and alternative charge.

16. PW 1 testified that she was fifteen (15) years old at the material time. The Age Assessment Report indicated that she was sixteen (16) years of age. On its part, the Respondent submitted that PW 1 was a minor and that the Appellant did not suffer any prejudice after the Charge was amended.

17. Notably, at no point did the Appellant inform the Trial Court that he wished to recall the witnesses who had already testified. If he suffered any prejudice, then he did not demonstrate the same. If, however, the Charge Sheet would have been amended to reflect a younger age than that of PW 1, this court would have been persuaded to find and hold that the Appellant would have suffered prejudice if PW 1 was not recalled for cross-examination. This was because the sentence for defilement of a child who would have been younger than her would have attracted a longer sentence. However, as the latter scenario was purely hypothetical, this court found and held that the Appellant's assertions that witnesses were not re-called for cross-examination, therefore, fell by the wayside.

18. Indeed, the purpose of recalling witnesses was not to give an accused person a second bite at the cherry but it was to ensure that his line of cross-examination was aligned to the facts that had been introduced in the amended charge. Indeed, all the evidence that was adduced during cross-examination of witnesses was to help him or her prepare for his or her defence in the event he or she was found to have had a case to answer.

19. As a charge sheet could be amended at any time before the close of the prosecution's case and the charge read to the accused person to plead again pursuant to Section 214(1)(i) of the Criminal Procedure Code, this court was not persuaded that the Trial Court's duty under Section 214 of the Criminal Procedure Code had been misapplied.

20. In the premises foregoing, Supplementary Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

Ii. Right To Legal Representation

21. Supplementary Ground of Appeal No (4) was dealt with under this head.

22. The Appellant submitted that he was not informed of his right and/or accorded legal representation on the State's expense.

23. On its part, the Respondent submitted that the right to legal representation was not absolute and that there were situations where it could be limited. It argued that it had to be established that the accused would suffer substantial injustice if he was not accorded legal representation. It added that for an appellant to benefit from the omission by the trial court to accord him state legal representation, he had to demonstrate that from the commencement of the trial he raised concern about his inability to afford legal representation and that substantial injustice could occur as a result as was held in the case of Charles Maina Gitonga vs Republic[2020]eKLR.

24. It was its contention that the Appellant did not raise the issue of legal representation during trial. It pointed out that he followed the proceedings keenly, participated in the trial by cross-examining the Prosecution witnesses on very salient points related to the charges, he gave a detailed defence and understood the charges that he was facing and the evidence that was presented. It was emphatic that there was no evidence that he was incapacitated during the trial due to a lack of legal representation and for which reason, the ground had to fail.

25. The proceedings showed that the Appellant did not at any given time request the court to give him time to instruct a counsel to represent him during trial. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of *the Constitution* of Kenya, 2010.

26. Notably, Article 50(2)(g) of *the Constitution* of Kenya provides as follows:

> " Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

27. Failure by the Trial Court to have informed the Appellant of this right was a great omission. Having said so, it was not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had completely been prejudiced.

28. In this particular case, the Appellant proceeded with the trial without ever having asked the Trial Court to give him time to instruct counsel to represent him during trial. Provision of legal representation at the State expense was a progressive right which was currently accorded to persons who had been charged with capital offences only.

29. This court thus came to the firm conclusion that the Appellant's constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform him of his right to legal representation under Article 50(2)(g) of *the Constitution* of Kenya.

30. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) of *the Constitution* of Kenya and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of *the Constitution* of Kenya, trial courts were called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice besides being mandated by the law.

31. In the premises foregoing, this court found and held that Supplementary Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

Iii. Proof Of Prosecution's Case_____

32. Ground of Appeal No (1), (2), (3) and (6) of the Petition of Appeal and Supplementary Grounds of Appeal No (1) and (3) were dealt with under this head as they were all related.

33. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

34. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

35. The Appellant placed reliance on the cases of Kaingu Alias Kasomo vs Republic [2010]eKLR where it was held that the clinical doctor failed to explain in court on how he assessed the complainant's age and hence that fact was not proved and Nyongesa vs Republic Criminal Appeal No 123 of 2009 (eKLR citation not given) where it was held that age was a critical aspect in sexual offences and had to be conclusively proved. He also relied on the case of Eliud Ouma Agwara vs Republic [2015]eKLR where it was held that age could be proved by production of other relevant documents such as baptism cards, school leaving certificates, the school admission letters, child health clinic cards and notification of birth cards.

36. He argued that the Charge Sheet recorded that the Complainant, FN (hereinafter referred to as "PW 1") was six (6) years old while PW 1 stated that she was fifteen (15) years old. He argued that the officers did not indicate that they examined the age of PW 1 at the time of recording her age on the Charge Sheet, P3 Form and PRC Form. He asserted that the Clinical doctor who recorded the Age Assessment Report did not explain how he assessed her age. He added that the said Age Assessment Report was also not produced by its maker, hence, age was not proved beyond reasonable doubt. He submitted that any sentence meted on him would be a matter of conjecture.

37. On its part, the Respondent submitted that the Charge Sheet indicated that PW 1 was fourteen (14) years of age at the time of the commission of the offence. It relied on the case of Musyoki Mwakavi vs Republic[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.

38. It pointed out that PW 1 testified that she was fifteen (15) years old and that No 107358 PC Desima Odilo (hereinafter referred to as "PW 3") also testified and produced her Age Assessment Report dated 14th July 2023 which indicated that she was approximately sixteen (16) years old, hence a minor.

39. Notably, PW 3 produced the said Age Assessment Report as evidence in this case. A perusal of the same showed PW 1 was approximately sixteen (16) years old. Ordinarily, as the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut the said evidence by adducing evidence to the contrary, this court would have been satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

40. However, it was evident whereas the Respondent had argued that PW 1 was a child, the age of a child at the time of defilement was critical and could not be dismissed casually as the punishment of the perpetrator under Section 8 of *Sexual Offences Act* Cap 64A (Laws of Kenya) depended on the age of

that child. Indeed, the sentences for defiling a fifteen (15) year old and a sixteen (16) year old child were twenty (20) years and fifteen (15) years respectively.

41. In this particular case, the Trial Court took the upper limit of sixteen (16) years as the Age Assessment Report had indicated that PW 1 was sixteen (16) years of age at the material time. Be that as it may, the said Age Assessment Report was silent on what scientific evidence that Dr Keya Brian, the Dental Specialist, used to come to the conclusion that PW 1 was sixteen (16) years. There was need to have indicated what dental investigation he conducted to reach the finding that he did so as to make his opinion cogent and water tight. Left as it is, it was difficult to interrogate his findings as they were not properly and/or scientifically explained.

42. It is trite law that any person who asserts must prove, which assertion had to be proven by facts as was stated in Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya) that provides as follows:-

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

43. Further, Section 109 of the *Evidence Act* states that:-

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

44. The legal burden remained with the Prosecution to have provided the proof of how Dr Keya Brian reached his conclusion and if it failed to produce the same, it lent to the failure of that case. Indeed, Section 108 of the *Evidence Act* stipulates that:-

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

45. While the Appellant's assertions that PW 1's age was not proven because the report was not produced by the maker were rendered moot as he did not raise the issue in the Trial Court, this court instead found his submissions that PW 1's age was not proven as the said Dr Keya Brian did not explain how he arrived at that conclusion to have been valid.

46. Notably, if one (1) ingredient in a defilement case was not proven, the entire Prosecution case would collapse. Having said so, this court was aware that it could be found to have erred on this point at the Court of Appeal. It was, therefore, on that basis that it analysed the remaining ingredients of The Judiciary of Kenya Doc identification and penetration to establish if indeed the same had been proven.

B. Identification

47. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 testified that she knew him and referred to him by his name. It pointed out that she stated that she had met the Appellant several times and he had asked her to be his girlfriend.

48. It contended that there was proper identification as there was prior knowledge of the Appellant. It asserted that he was someone who was well known to her and she could not, therefore, have been mistaken as to his identity.

49. It submitted that the evidence in this case was that of recognition which courts had held to have been more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568.

50. According to PW 1, on the evening of 12th March 2023, she went to the river to fetch water. She met the Appellant at the hill and he asked her to be his friend. She told him "Sitaki hiyo ujinga" (I do not want that stupidity). It started raining and she stood at his veranda. The Appellant took her hand and pulled her into his bedroom and he removed her skirt and his trouser. He then removed his thing for urinating and inserted into her thing for urinating. She wanted to run but he told her not to scream. When he was done, he gave her Kshs 20/= and she went home. She added that a neighbour who used to go to Church with her mother told her mother that she saw her entering the Appellant's house and her mother told her that she did not want that stupidity.

51. Her further evidence was that after Christmas, she took her shoes to the Appellant for mending and she found him cooking "Nduma." Another boy called Doni who had also taken his shoes to the Appellant's house asked her where she had been. He (sic) told her to put the shoes in the basket in the sitting room and she took them to the bedroom. The Appellant followed her to the bedroom and removed her skirt. He then removed his thing for urinating and inserted into her thing for urinating.

52. The said Doni had remained outside. He knocked on the door, pushed it open and began calling people. Both she and the Appellant dressed up and the Appellant ran away. A crowd gathered and called her father, Peter Okhubi (hereinafter referred to as "PW 2"). Her father came and took her to the Police Station and later to the hospital at Emuhaya.

53. On cross-examination by the Trial Court, she said that the Appellant was not her immediate neighbour but that they used to take shoes to him for mending. She identified him at the dock. She said that three (3) women did not hear the commotion. She stated that he had defiled her four (4) times as at the end of 2022 (emphasis court).

54. She said that the first time she went to shelter at his verandah. The second time, she went to the posho mill where he was working and he defiled her on the floor after she raised her skirt and he removed his trouser. She averred that she was with her niece. Three (3) weeks later, she again went with her niece to the posho mill. He did not defile her but he gave her Kshs 20/=. She said that the fourth time was when he was arrested at his house.

55. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

56. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

57. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other

corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

58. PW 1 positively identified the Appellant. Whether he defiled her was a different matter altogether. More questions than answers came to the mind of this court. As PW 1 was said to have been sixteen (16) years of age, her evidence was expected to have been cogent, consistent, with no gaps and without contradictions.

59. The first time the Appellant allegedly defiled her, she told him that she did not want his stupidity. However, her actions were not consistent with a person who wanted nothing to do with the Appellant. It was not clear how she ended up at his veranda to shield herself from the rain if they met at the hill. It was even more puzzling how she entered into his bedroom because her demeanour was of someone who was no-nonsense.

60. No evidence was led to demonstrate the distance between the hill and his house to explain how she ended up at the said veranda. It was also not clear why after Christmas, she did not put the shoes in the sitting room as the Appellant had told her to but she instead took them to his bedroom where he was said to have followed her. That action was not consistent with the image of a tough girl who rebuffed the Appellant herein during the first encounter. There appeared to have been a disconnect between her demeanour of toughness on the one hand and the vulnerability or innocence that was insinuated from her evidence on the other hand. This caused a lot of uneasiness to this court when considered against the backdrop of other missing gaps.

61. Notably, the Prosecution did not call the said Doni to explain what led him to knock on the door, push it open and call people. What he saw leading to him to call others remained unclear. Further, none of the people who gathered at the Appellant's house were called to testify. The girl who went to tell PW 2 that PW 1 had been locked in the Appellant's house was also not called as a witness. The three (3) women PW 2 who were at the scene were crucial witnesses but they were also not called to testify during trial.

62. Section 143 of the *Evidence Act* states as follows:-

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

63. Although it was the prerogative of the Prosecution to decide the number of witnesses it would call to prove a fact, failure to have called the said Doni , the three (3) women, the neighbour who went to tell PW 1's mother that she had seen PW 1 enter in the Appellant's house, and PW 1's niece to corroborate PW 1's and PW 2's dealt a fatal blow to the Prosecution's case. There was a gap in the chain of events as the people PW 1 and PW 2 referred to in their testimonies. They were crucial witnesses who would have joined and/or connected the missing dots.

64. Going further, if there were no known mental challenges, a sixteen (16) year old was not expected to contradict herself while testifying to the extent of raising doubt in the mind of this court. Notably, when the Trial Court cross-examined PW 1, she stated that she had been defiled four (4) times but the Appellant did not defile her the third time. Whereas she stated in her evidence in- chief that the Appellant ran away when the crowd gathered, when she was cross-examined by the Trial Court, she stated that the Appellant was arrested at his house. PW 3 also stated that the Appellant was arrested in his house. If he indeed ran away, the day when he was arrested was important so as to have connected him to the injuries PW 1 was said to have sustained.

65. Further, PW 1's evidence also contradicted that of PW 2. Whereas PW 2 stated that she had been locked inside the house, PW 1 said that people took her outside after people entered the Appellant's house. PW 3 who was the Investigating Officer did not also fare any better. She did not explain who and how the Appellant was arrested.

66. The lack of cogency, inconsistencies, gaps and contradictions in the evidence that was adduced by the Prosecution witnesses could not be said to have been minor. Instead, there were glaring omissions that created great doubts in the mind of this court as to what really transpired. The doubts were enough for this court to find and hold the Prosecution not to have proved its case beyond reasonable doubt.

67. The sentences that were imposed in defilement cases were long. Courts were, therefore, called upon to be cautious not to deprive accused or convicted persons their liberty when doubt arose. Indeed, courts were only asked to find persons culpable of offences when the evidence was overwhelming. If there was an iota of doubt, courts were enjoined to release such accused or convicted persons so as not to contravene Article 27 (a) of *the Constitution* of Kenya, 2010 that provides as follows:-

> " Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause."

68. It was more prudent to acquit a guilty person if a court was uncertain of what transpired as opposed to convicting and/or upholding a conviction of an accused and/or appellant who may very well have been innocent. Whereas, the Prosecution proved the ingredient of identification which was by recognition as both the Appellant and PW 1 knew each other, this court was not persuaded to find that the Appellant defiled PW 1 as was further buttressed by the findings that this court made on the ingredient of penetration hereinbelow.

C. Penetration

69. The court considered the submissions that were tendered in respect of the ingredient of penetration and found that the same were rendered moot by the court's finding on identification. It did not see the value to reproducing them in this decision.

70. Suffice it to state that even after considering the same, it did not find PW 4's evidence to have connected PW 1 to the Appellant herein. The fact that PW 1 had a whitish discharge and that the hymen was broken with fresh edges like bruises or lacerations on walls did not necessarily link the Appellant to the defilement. This was because PW 1 was already sexually active and was not expected to have had a broken hymen with fresh edges as at 12th March 2023 when she was first taken to the hospital. It was indeed her evidence that the Appellant had defiled her four (4) times, the first time having been in 2022.

71. In addition, PW 4's evidence on the age of injuries was contradictory. Whereas in his examination-in-chief he stated that the injuries were fourteen (14) days, when cross-examined by the court, he stated that PW 1 was availed a few hours after the incident. After considering the P3 Form, Post Rape Care (PRC) Form and treatment notes that were produced as exhibits during trial and PW 4's testimony, this court found that the Prosecution did not prove the ingredient of penetration as the evidence was not consistent.

72. In the premises foregoing, Ground of Appeal No (1), (2), (3) and (6) of the Petition of Appeal and Supplementary Grounds of Appeal No (1) and (3) were, therefore, merited and the same be and are hereby upheld.

Iv. Sentence

73. Ground of Appeal No (4) and (5) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were dealt with under this head as they were all related.

74. The Appellant submitted that in the event his appeal on conviction failed, this court should order that his sentence run from the date of his arrest on 26th March 2023.

75. On its part, the Respondent cited Section 8(3) of the *Sexual Offences Act* and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that it was Parliament and not the Judiciary that set the parameters of sentencing for each crime.

76. It argued that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at appropriate sentence. It added that the Appellant's sentence was lawful.

77. It made reference to Section 333(2) of the Criminal Procedure Code and relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that courts must take into account the period which the accused spent in custody during trial while sentencing them. It submitted that during sentencing, the Trial Court directed that the Appellant's sentence run from the date that he was remanded, being 28th March 2023.

78. The Appellant herein was charged under Section 8(3) of the *Sexual Offences Act* . The same provides as follows:-

> " 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."

79. The Trial Court established that PW 1 was sixteen (16) years of age and hence sentenced the Appellant under Section 8(3) of the *Sexual Offences Act*. The same provides as follows:- "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."

80. In the event this court could have found that the Prosecution had proved its case, it could not have faulted the Trial Court for having sentenced him to fifteen (15) years imprisonment as jurisprudence at the time allowed courts to reduce sentences under the *Sexual Offences Act*.

81. However, without belabouring the point in view of its findings on the ingredients of age, identification and penetration, this court found and held that Ground of Appeal No (4) and (5) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were merited and the same be and are hereby upheld.

Disposition

82. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 16th May 2025 and filed on 20th May 2025 and Supplementary Grounds of Appeal dated 14th July 2025 and filed on 1st August 2025 were merited and the same be and are hereby upheld. His conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

83. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

84. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 3RD DAY OF MARCH 2026

J. KAMAU

JUDGE