REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. E040 OF 2025

KALICHO GALGALLO……

APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(BEING AN APPEAL ARISING FROM THE ORIGINAL CONVICTION AND SENTENCE IN MARSABIT SPMCR MCSO CASE NO. E005 OF 2024 DELIVERED BY HON S.K AROME (PM) ON 7th OCTOBER 2025)

ARISING FROM

REPUBLIC……
PROSECUTOR

VERSUS

KALICHA GALGALO…… ……ACCUSED

JUDGMENT

A. BACKGROUND.

1. The Appellant herein **KALICHA GALGALLO** was on 24th June 2024 charged for the offence of **DEFILEMENT** contrary to ***section 8(1)*** **as read together with section 8(3)** of the **Sexual Offences**

Act No 3 of 2006. The particulars were that on 6th day of January 2024 at Marsabit township, in Marsabit central Sub County within Marsabit County; intentionally used his penis to penetrate the vagina of G.A. a child aged 16 years.

2. The Appellant was further in the alternative charged with the offence of ***indecent assault with a child*** contrary to **section 11(1) of the Sexual Offence Act No.3 of 2006.** The particulars were that on that on-6th day of January 2024 at Marsabit township, in Marsabit central Sub County within Marsabit County; intentionally touched the vagina of G.A. a child aged 16 years.

3. The appellant denied the charges levelled against him before the trial court. The prosecution called five witnesses who testified against the appellant and after considering the said evidence, the appellant was placed on his defence and opted to give sworn evidence. At the conclusion of the trial, the appellant was found guilty of the offence of defilement and was sentenced to serve fifteen (15) years imprisonment. Being dissatisfied with the lower court's judgment, the appellant filed his petition of Appeal raising the following grounds of Appeal;

a) THAT the learned trial magistrate erred in law and fact by failing to note that the charges were framed up due to vendetta, which had erupted during the arrest of the complainant's brother.

b) <u>THAT</u> the learned trial Magistrate erred in law and fact by failing to note that there was no evidence adduced before the court by the clinical officer to support the penetration as alleged by the complainant in this case. The evidence of hymen being absent is not proof of penetration.

c) <u>THAT</u> the learned trial Magistrate erred in law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts according to the law.

d) <u>THAT</u> the learned trial Magistrate erred in both matters of law and facts by failing to consider the appellants defence.

e) <u>THAT</u> the learned trial Magistrate erred in both fact and law by not considering the evidence given/sworn in defence.

f) <u>THAT</u> the trial court erred in law for failing to observe that it was a defence to a charge against the Appellant, for him to believe that the complainant was over 18 years old in line with Section 8(5)(a)(b) of the Sexual offences Act No 3 OF 2006.

g) <u>THAT</u> the trial court erred in law by failing to observe the penalty clause as provided under Section 8(1)(4) of the sexual offences Act, which provided for a minimum of fifteen years

4. The Appellant thus prayed that his Appeal be allowed, the conviction and sentence be quashed and he be set free.

B. FACTS AT TRIAL

5. PW1, G.A.A stated that she was 16 years old and was a form 2 student at Marsabit Mixed Secondary School. In September 2023, the appellant had called her mother and requested her to send her (PW1) to clean his house. She did go to the appellant's house and met him, and while in the process of cleaning his house the appellant turned on her held her by force, removed her cloths and proceeded to insert his penis into her vagina and once done gave her Kshs 200/=, which he had agreed with her mother to be her pay for the cleaning services rendered. After the incident, she did go back home, but did not inform anybody of what had transpired.

6. After 4/5 days, the appellant once again called her mother and requested that she goes back to clean his house. She went and on reaching the appellants house, he once again accosted her and asked her to bend over after removing her cloths and once again he proceeded to insert his penis into her vagina and later gave her 200/=. On this occasion too, she did not tell anyone about this incident because she was afraid that the appellant would harm her.

7. On the third occasion, the appellant requested that they go to town so that he could buy for her shoes. Enroute to town, they passed by Marsabit Boys Secondary school gate and he proposed that they get inside the said school. The went to one of the dormitories near the school gate, where they proceeded to have sex. On another occasion the appellant went to their house and found her alone in the Kitchen washing utensils and again they had sex and on the final occasion they had met in town during the last day of Ramadhan and the appellant requested her to meet him at Marsabit Boys high school, but she did not heed to his request and opted not to go.

8. A few days after Ramadhan, while asleep, her late dad spirits appeared to her in her dreams and urged her to open up about what the appellant had been doing to her and when she woke up, she decided to open up to her Aunty whom she was staying with. He aunty informed her mum, who confronted the appellant but he denied any wrong doing. They reported the matter to the police, recorded their statements and she was taken for medical assessment at Marsabit referral hospital.

9. Under cross examination she did reiterate her evidence and confirmed that the appellant did use a condom during the said incidences. (It was also noted by the trial Magistrate that PW1 broke down and cried but was later able to recompose herself and proceed with her evidence.) she further denied framing

the appellant because her brother had broken into and stolen from the school. She insisted that her evidence was truthful and that the appellant had rape her on several occasions at his house near the shrine.

10. **PW2 Diba Dika Hallo** stated that she was a registered clinical officer based at Marsabit referral hospital and confirmed that PW1 had been brought to the hospital on 01.07.2024 for check up by the police with a history of having been defiled. She examined her and found her genitalia to be normal and the hymen was absent. The laboratory results too were normal and she filled in the P3 form and PRC form, which she produced into evidence

11. **PW3 Halima Abdulla**, confirmed that on several instances, the appellant had called her and requested her to allow her daughter (PW1) to go clean his house and in turn he would pay ***Kshs 200/=*** for the service rendered. Later her daughter had confessed to her that the appellant had defiled her on three occasions and upon getting the said information, she proceeded to report the incident to the police and had the accused arrested. She also produced PW1's birth certificate, which confirmed that she was born on 20.06.2008. Under cross examination she reiterated the same evidence.

12. ***PW4 Hauli Makaa*** confirmed that PW1 was her niece, who resided with her. On 19.04.2024 she had confessed to her that the appellant had raped her on several occasion, when she had gone to wash his house and threatened to kill her if she told anybody about the said incident. She confirmed that on two occasions PW3 had called her and requested her to release PW1 to go wash the appellants house and it in on the said occasions that the incidents are alleged to have occurred. During IDD Fitr the appellant had also requested PW1 to go visit him but she had refused to do so. It is after this last incident that PW1 had gathered courage and informed her of what had transpired.

13. ***PW5 PC Jane Refa*** confirmed that on 19.04.2024 she was at gender desk at Marsabit police station, when PW3 came with her daughter and reported the defilement case. she spoke with PW1 who narrated to her the several incidences that had occurred and proceeded to recorded their statements and took PW1 to hospital for assessment. She also confirmed that she did visit the locus in quo and did not pick any exhibit therefrom.

14. The prosecution closed their case at this point and the appellant was placed on his defence. DW1 (the appellant) confirmed that he resided at shrine and was a security officer at Marsabit Boys secondary school. On 05.04.2024 he had been called by the school principal at about 11,00pm and was informed that

burglars had broken into the school. He rushed to school and confirmed the incident. He was told that they were three burglars, two had managed to run away but one, known as Hassan Afatu was arrested and escorted to the police station.

15. On 19.04.2024 the school board did visit the school and the principal asked him to go to the police station and get the OB extract of the said incident. Upon arrival at the police station, he was shocked to met PW3, who told the police that he was the culprit and was immediately arrested and placed in the police cells for defiling PW1.He denied having PW3 phone number nor had he been the caretaker of the house behind Hass petrol station. Under cross examination, the appellant confirmed that he had known PW1 since she was a child, but denied ever raping her. He further insisted that he had framed because he had arrested PW1 brother on 05.04.2024 over the burglary that occurred in school.

16. The trial court did consider all the evidence present and found that the prosecution had proved their case beyond reasonable doubt and proceeded to sentence the appellant to serve fifteen (15) years imprisonment.

C. THE APPEAL

16. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and

to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by **Okeno Vs. Republic (1927) E.A 32 & Pandya Vs. Republic (1975) EA 366.**

17. Also in **Peter's vrs Sunday Post(1958) E.A. 424** it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

18. Having gone through the grounds of Appeal, trial court proceedings, submissions filed and the Authorities relied upon, I do find that this Appeal turns of two issues namely;

a) Whether the prosecution sufficiently proved their case beyond reasonable doubt.

b) ***Whether the trial Magistrate failed to consider the appellants alibi defence that he was not at the scene of the crime.***

19. ***Section 8(1) of the Sexual Offences Act*** provides as follows**:**

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> *(2)* ***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.***
>
> *(3)* ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> *(4)* ***A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

20. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

21. The first element is age. The Court of Appeal in **Edwin Nyambogo Onsongo vs. Republic (2016) eKLR** stated as follows in respect of proving the age of a victim in cases of defilement:

> ***"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."*** **(emphasis added).**

22. PW1's age was confirmed by the production of her birth certificate No 1908247 (Exhibit 5) by PW3. She was born on 20th June 2008 and confirms that by April 2024, PW1 was sixteen (16) years old.

23. The second ingredient is penetration. Penetration is defined under ***Section 2 of the Sexual Offences Act*** as follows:

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

24. On whether there was penetration of the victim's genital organ, it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in ***Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995*** which was quoted with approval in ***Sammy Charo Kirao v Republic [2020] KLR*** where the court stated;

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.''***

25. Unlike other crimes where invariably eye witness evidence is available, it is seldom that eye witness accounts would be available in a sexual offence as the act will always be

perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence.

26. Also ***Section 124 of the Evidence Act, Cap 80*** provides as follows:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."***

27. PW1 confirmed that the appellant had sex with her on different occasions and vividly explained each of the said incidences, including the escapade within the school dormitory where the appellant works. Later towards the end of Ramadhan, the appellant did invite the complainant to visit him at his work place but she did not go and eventually opened up to PW4 explaining to her what had transpired over a period of three months.

28. PW3 also confirmed that they came with the appellant from the same manyatta and corroborated PW1 evidence that the appellant would call her and request to have PW1 clean his house for which he would pay ***Kshs.200/=.*** PW4 who physically resided with PW1 also corroborated this evidence too. Having reanalyzed the evidence adduced I do find that PW1 evidence was cogent and did prove that indeed several incidences of having intercourse with the appellant did occur, which left her emotionally scared to the extent of her breaking down crying while testifying in court

29. On the final issue of identification, both parties confirmed that they knew each other. PW3 confirmed that they were from the same Manyatta with the appellant, who also in turn confirmed that he had known the complainant from childhood. This was therefore a case of recognition of a know person, and nothing turns on this issue.

30. In defence, the appellant stated that the complainant and her mother had set him up and made false allegations against him, since he had arrested the complaints brother on 05.04.2024 over a burglary incident, which had occurred within Marsabit Boys Secondary school, which incident was recorded under OB;45/5/04/24. While this maybe true, the prosecution evidence remained corroborated by the witnesses who testified as to the appellants indiscretion prior to the said burglary incident.

31. Secondly, it was not the appellant who arrested the complainant's brother as he stated clearly that he was called and informed of the burglary incident and dashed to school. Further he was not was he the complainant that basis upon which PW1 family would hold a grudge with him. Finally when he had the opportunity to cross examine PW3, the appellant further failed, to ask her any question relating to her son being arrested, and/or pointing to the fact that they had any prior unresolved family grudge. Therefore, the appellant failed to establish to the courts satisfaction that indeed he had been setup as alleged and, on that score, failed to upset the prosecutions case.

32. Finally on sentence, ***Section 8(4) of the sexual offences Act No 3 of 2006*** provides for a minimum sentence of

fifteen (15) years for defilement of a minor aged between sixteen to eighteen years.

33. In ***Republic vs Joshua Gichuki Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)*** the Supreme Court reiterated its decision in **Muruatetu II** that the sentences in the Sexual Offences Act were legal and went on to overturn a reduction of sentence imposed by the Court of Appeal. The Court held;

> ***"In the Muruatetu case, the Court solely considered the mandatory sentence of death under section 204 of the Penal Code as it was applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that applied for example to capital offences, were vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the legislature, took into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities. Stern sentences ensured that prejudicial myths and stereotypes no longer***

culminated in lenient sentences that did not reflect the gravity of sexual offences."

"…..However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

34. In ***Shitula v Republic [2025] KECA 12 (KLR)*** the Court of Appeal recently, (January 2025) based on the above Supreme Court decision, held that life imprisonment imposed by court was a legal sentence and upheld it. It observed that;

"The Supreme Court has spoken clearly through the Gichuki case (supra) and we are bound by that decision-age, rehabilitation and remorse notwithstanding, the minimum life sentence meted out was legal and must be upheld, as we hereby do. The appeal thus fails in its entirety and is dismissed".

35. The sentence passed by the trial Magistrate was the prescribed sentence by the statute and is therefore lawful.

D. DISPOSITION

36. Having considered all factors in this case, I do find that the Appellant's appeal both as against conviction and sentence failed and his Appeal is therefore dismissed.

37. Right of Appeal 14 days.

38. It is so ordered.

Judgement written, dated, and signed at Machakos this 18th day of MARCH 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of MARCH 2026.

In the presence of;

Present in court ..... Appellant

Mr. Mburugu ..... For O.D.P.P

Mr. Jarso ..... Court Assistant