REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

APPEAL NO. E032 OF 2025

DAVID OUMA OCHIENG…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(Being an appeal against both conviction and sentence by Hon. Tsimonjero (SRM) dated 10/6/2025 in Ukwala PMCC SO No. E024/2023)

JUDGEMENT

1. The Appellant herein **David Ouma Ochieng** has lodged the present appeal against the Judgement of **Hon Edward Tsimonjero (SRM)** in Ukwala Principal Magistrate's Court Sexual offences case **NO. E024 of 2023** dated 10/6/2025 wherein the Appellant was sentenced to life imprisonment for the main count of defilement contrary to section 8(1) as read with section 8(20 of the Sexual Offences Act.

2. The Appellant was aggrieved by the conviction and sentence and filed a Petition of Appeal dated 16/6/2025 where he raised the following grounds of appeal:

   i) That the learned trial magistrate erred in law and fact when he misled his mind in believing the unproved prosecution's evidence and thereby convicted the Appellant.

   ii) The learned trial magistrate erred in law and fact when he convicted the Appellant yet there was no medical report to support the allegations.

   iii) The learned trial magistrate erred in law and fact when he convicted the Appellant based on the provisions of Section 124 of the Evidence Act.

   iv) The learned magistrate erred in law and fact when he convicted and sentenced the Appellant to life imprisonment and failed to accord the Appellant his constitutional rights vested in Article 50(2)(b)(c) (g) and (h) of the Constitution.

   v) The learned magistrate erred in law and fact when he dismissed the Appellant's alibi.

   The Appellant therefore prayed for the appeal to be allowed and that the judgement conviction be quashed and sentence set aside and that the Appellant be set at liberty.

3. This being the first appellate court, its duty is to evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own independent conclusion. This court has to take into account the fact that it did not hear or see the witnesses testify and hence it has to make due allowance for that. See **Okeno – VS – Republic (1972) EA 32**, where it was held that;

> ***"An appellant is entitled to expect the evidence as a whole to be submitted 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 the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.''***

4. The Appellant had been charged before the Principal Magistrate's court at Ukwala with a main charge of defilement contrary to **Section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The

particulars were that on 21st day of December 2023 in Katieno B. Sub Location, East Ugenya Location, Ugenya Sub County within Siaya County intentionally caused his penis to penetrate the vagina of S.T.A a child aged ten (10) years.

The Appellant also 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**. The particulars were that on 21st day of December 2023 in Katieno B. Sub Location, East Ugenya Location, Ugenya Sub County within Siaya County intentionally touched the vagina of S.T.A a child aged ten (10) years with his penis.

5. **PW-1 S. T (**name withheld), a Grade 5 pupil at Bar Ndege Primary School and resident of Ukwala testified on oath afresh on 7/08/2024 that on 21, December, 2023, she went to the Appellant's house after he requested that she brings him *mandazi*. That upon her arrival, the Appellant pulled her behind the door inside his house, removed her dress and panties, and proceeded to lift her dress before penetrating her with his penis. That the incident occurred in the evening hours, with no neighbors present outside the residence at the time. That the assault was interrupted when the complainant's brother, Fanuel, arrived first and inquired whether she was inside the house. That shortly thereafter, the complainant's mother also arrived at the scene and called out to her daughter, who was found concealed behind the door inside the Appellant's dwelling house. The mother of the complainant instructed her to exit the house. Following

this discovery, the complainant was immediately taken by her parents to Kanyumba Police Station to report the incident, after which she was escorted to Bar Ndege Hospital for medical examination and treatment before being returned home.

On cross-examination, she stated that she had brought *mandazi* to the Appellant's house at approximately 7:00 p.m. and acknowledged that the incident occurred behind the door inside his residence. She further confirmed that her brother was the first to arrive and inquire about her presence, followed by the mother who called her out of the house. The complainant maintained that she had told the court the truth regarding these factual circumstances surrounding the encounter and that she and her family were not framing the Appellant.

6. **Fannel Zedekiah (PW2),** a 14-year-old pupil at Bumala RC Primary School, testified afresh that he recalls an incident from 21st December, 2023. That he remembers that his sister left their mother's house around 7:30 pm, taking mandazi to David's house after David had asked her to do so. That David had come to the business place, and that his mother had given his sister mandazi to take to David. That she then went back quickly, and after an hour, they went to David's house. That he knocked on the door and that his mother entered the house and found his sister behind the curtain. That his mother beat the complainant who then ran away. That his mother called his father after the incident who came and beat the Appellant before escorting him to. He clarifies that

his mother accompanied them to Kanyumba Police stationion, and he insists that he was not being framed**.**

On cross-examination, PW2 detailed how his sister (Pw1) left their home with *mandazi* to deliver to David (Appellant), who had asked her to do so. Fannuel described the sequence of events leading to his mother beating of S.T.A, and how his mother called his father afterward. He also stated that his mother accompanied them to the police station and asserted that the Appellant was not being framed.

7. **Joseph Nyanda Onkoba (PW3),** testified that he had been alerted by his wife that one of the children had overstayed at the home of the Appellant and that he rushed there and then instructed the Appellant that they needed to go to the police station to establish the truth. That they proceeded to Kenyumba Police Station but the complainant suddenly ran away. He reported to the officer that the Appellant was suspected of having committed an offense against the child. He explained that they then went to the hospital or dispensary at Bar Ndege that evening, where medical personnel administered first aid to the child. Following the examination, the doctors referred them to Ukwala Sub-County Hospital for further assessment. That the doctors at Ukwala examined the child and confirmed that she had been defiled by the Appellant who was then placed in the cells. He further stated that he possesses the child's birth certificate and then identifies Ochieng (Appellant) as the accused and confirms his identity. He concluded by

reaffirming that Ochieng is the individual on trial, as supported by the birth certificate and medical evidence, and emphasized that all procedures were followed in accordance with the law.

On cross examination, he stated that he was called at 7:30 pm, and together they proceeded to the police station around 8:00 pm. He claimed that he went to the house in anger, using force to pull the Appellant and insisted that he took her to the hospital. He refuted claims that he assaulted the Appellant or stepped into his private parts. That the medical examination confirmed that a crime had been committed by the Appellant warranting action being taken against him. He further denied that his wife and children were involved in framing the Appellant. He insisted that he did not pull the Appellant to the ground when taking him to the police when he arrived at the Appellant's house.

8. **Irene Akinyi Oseme (PW4),** a clinical officer testified that on 21/12/2023 she received PW1 who came with a history of defilement and that she examined her as she was in pain. That PW1s private parts had lacerations on the vagina as there was also a cut. That the hymen was broken and there was bleeding in the vagina. That there was blood and epithelial cells. She produced the P3 form, lab request form and PRC as P-exhibits 2, and P-exhibit 3 and P-exhibit 4 respectively.

9. **Winnie Akinyi (PW5),** a resident of Ihula-ugenya, testified afresh that on 21st, December 2023, she sent her 10-year-old daughter, S. T. A. (PW1), to a chemist at approximately 1900 hours. After the child failed to return by 1930 hours, she followed her and was informed by other children that a man named Ochieng (Appellant) had taken the child to his house under the guise of paying for *mandazi*. Accompanied by her son Fanuel (PW2), she reached Ochieng's residence, where the Appellant confirmed that the child was inside. That upon hearing this, she entered the house and observed her daughter (PW1) running out from behind a curtain. She stated that following the confrontation, her husband arrived and apprehended Ochieng (Appellant), taking him to the police station while the she took the child to Bar Denye dispensary for first aid at 2000 hours. That the child (Pw1) was subsequently taken to Ukwala Sub-county Hospital the following day for a formal medical examination. She further produced the child's birth certificate (s/no 1365258), confirming her daughter's date of birth as 7th April 2013, to establish the victim's age as ten years at the time of the incident.

On cross-examination, she clarified that the child was not involved in selling *mandazi* but was merely delivering them at the request of Anyango's son while returning from school. She denied allegations that the case was a frame-up, stating that she personally found the child in the Appellant's house and that the Appellant only emerged after her son knocked on the door. While she did not witness the specific acts

committed against the child, she maintained that the medical examination would serve as proof of what occurred

10. **No. 255649 PC Dennis Macharia (PW6),** of Kenyumba Patrol Base, testified that on 21st December 2023, while on duty, the Appellant arrived at the station accompanied by a young girl and her father. That the party reported that the girl (Pw1) had been discovered in the house of the Appellant after missing for some time. That he subsequently escorted the group to Bar Ndege Dispensary for initial medical attention before they were referred to Ukwala Sub-County Hospital for further assistance. The following day, medical examinations were conducted on both the victim and the Appellant at the hospital, which confirmed that the girl (Pw1) had been defiled. Based on these findings and the report that the victim was found in the Appellant's residence by her mother and brother, he escorted the Appellant to Ukwala Police Station, where he was formally charged. He explicitly identified the individual in the dock as the person he had arrested and processed.

Under cross-examination and re-examination, he clarified that although he did not personally visit the crime scene, he recorded a statement from the victim's brother, Phanuel, (Pw2) who arrived at the station later. He maintained that the decision to charge the Appellant was based on sufficient evidence, including the medical confirmation of defilement and the fact that the Apellant was found with the victim. When questioned about potential ulterior motives, he stated

that he was unaware of any personal differences between the Appellant and the victim's mother (Pw5).

11. The trial court later ruled that a prima facie case had been established by the prosecution and that the Appellant was thus placed on his defence. The Appellant opted to tender a sworn testimony and did not call any witnesses**.**

12. **David Ouma Ochieng (DW1)** testified that he is a Ugandan national who operated a video show business in Butula before his detention. He testified that on 21st December 2023, he completed his workday normally, but upon returning home, his wife shared a premonition that something bad would happen and that he would be arrested. The following morning, 22nd December 2023, he was arrested while traveling to work on a motorcycle and informed of the allegation that he had defiled a girl, a charge he categorically denies. That he saw the complainant and her parents at the police station. That he knew the complainant as she used to bring him mandazi. That the alleged offence did not take place on that day.

During cross-examination, Mr. Ochieng explained that he knew the victim only because she used to sell him snacks (*mandazi*) prepared by her mother. He asserted that he never allowed children into his video room and had no prior disputes with the victim's family. He further clarified his living arrangements, noting that he stayed in a house at the market centre belonging to a friend named Charles Ochieng,

and mentioned that he had also worked as a water supplier and casual laborer during his four years in the area.

13. Regarding the specific timeline of the allegations, the Appellant claimed that he did not see the victim on 21st December 2023 though he did see her mother and requested that her son bring him *mandazi* instead. He testified that on the night of 22nd December 2023, the complainant's mother and brother came to his house and found the snacks on the table. He maintained his innocence throughout the proceedings, stating that he knew nothing about the charges and that the alleged offense did not occur on the date specified by the prosecution.

14. When considering the evidence on record, the learned trial Magistrate observed that the defense brought by the Appellant did not in any way cast doubt on the prosecution's case and convicted him under section 215 of the Criminal Procedure Code.

15. The appeal herein was canvassed by way of written submissions. Both parties duly complied.

16. I have given due consideration to the record of appeal and the submissions tendered. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.

17. This being a criminal case, the duty to prove the guilt of the Appellant rested squarely on the shoulders of the

Respondent throughout the trial. (See **Woolmington Vs Dpp [1935] AC 462.)**

18. 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. These ingredients are provided for under section 8(1) of the sexual Offences Act No. 3 of 2006 and that each must be proved for a conviction to ensue. **(**See **George Opondo Olunga vs. Republic [2016] eKLR.)**

Section 8(1) of the Sexual Offences Act No. 3 of 2006 provides as follows: -

> ***(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.***

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.

19. As regards the aspect of the age of the complainant, it is noted that the charge sheet indicated the complainant's age as ten (10) years. The Respondent managed to avail the birth certificate of the victim which indicated her date of birth as 7/4/2013 which placed her age at ten years, eight months and fourteen days. I find that the same falls within the category of a child below the age of eleven years old and was thus a child within the meaning described in section 2 of the Children's Act. 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).**

20. Regarding proof of age, it is noted that the importance of proving the age of a victim in sexual offences is paramount considering that under the Sexual Offences Act, the

prescribed sentence is determined by the age of the victim. Section 2 of the *Children's Act* defines a child as a person under the age of eighteen (18) years.

21. There are various ways which can be used to prove a victim's age as held in **Mwalengo Chichoro Mwajembe V Republic, Criminal Appeal No. 24 of 2015 (UR**) where the court stated as follows***:***

"……..the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary 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" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence

presented in proof of the victim's age, it has to be credible and reliable..."

22. In the present case, the prosecution fully discharged its burden of proving the complainant's age, which is a critical ingredient under Section 8 of the Sexual Offences Act. PW6, the complainant's mother, produced the birth certificate **(p-exhibit 1)**, confirming the child's date of birth as **7th April 2013**, placing her at ten (10) years, eight months and fourteen days at the time of the offence. Kenyan courts have consistently held that documentary evidence such as birth certificates constitutes the clearest and most authoritative form of age verification. In ***Fappyton Mutuku Ngui v Republic*** **[2012] eKLR,** the Court of Appeal affirmed that age may be proved through a variety of credible means and that no single mode of proof is mandatory. Additionally, the mother's oral testimony on the child's age provides strong corroboration. In ***Francis Omuroni v Uganda*** **(Criminal Appeal No. 2 of 2000) (**a decision repeatedly cited with approval in Kenyan jurisprudence) the court held that a parent's testimony alone is sufficient to establish age, as parents are presumed to know their children's ages. This position has been reinforced locally in cases such as ***Kaingu Elias Kasomo v Republic*** **[2014] eKLR** and ***Hadson Ali Mwachongo v Republic*** **[2016] eKLR,** which recognize parental testimony as both credible and reliable, even in the absence of documentary evidence. The medical evidence from PW4, which also recorded the child as being ten years old, further corroborates this.

23. I find that the evidence on age is uniform and unchallenged. The PRC Form, P3 Form, and all testimonies consistently place the child at ten years of age and below eleven years at the time of the incident. There was no contrary evidence offered by the defence. In line with the foregoing authorities, including ***Republic v Dennis Mutuku Nzomo*** **[2019] eKLR**, i find that the prosecution satisfied the requirement of proving age beyond reasonable doubt. The trial court therefore correctly found that the complainant was ten years old, bringing the charge within the meaning of Section 8(2) of the Sexual Offences Act. I find that the ingredient of age was therefore sufficiently proved by the Respondent beyond reasonable doubt.

24. As regards the aspect of penetration, Section 2 of the Sexual offences Act No. 3 of 200 defines **"*penetration*"** as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Penetration is proved through the evidence of the victim. The testimony of the victim in this case coupled with evidence from other witnesses was sufficient to determine whether penetration occurred. **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."

25. _In the case **of Bassita vs. Uganda S.C. Criminal Appeal No. 35 of 1995,** the Supreme Court of Uganda had the following to say in respect of proving penetration: -

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is 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 prove 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."

26. In the present case, the prosecution proved penetration to the required legal standard through clear, consistent and

medically corroborated evidence. The complainant gave a detailed account of how the Appellant removed her dress and panties and penetrated her with his penis, which satisfies the statutory definition of penetration under Section 2 of the Sexual Offences Act, requiring only the slightest intrusion. Her account was immediately reported to her parents and was consistent throughout. The same was also confirmed by the clinical officer (PW4) who examined her and noted laceration on the vagina and which also had a cut and that the hymen was broken with a bleeding vagina and that there was blood and epithelial cells and spermatozoa and confirmed that there was penetration. The said witness also confirmed on cross-examination that she also examined the Appellant herein who had had blood and pus cells.

27. Kenyan courts have repeatedly held that a child's testimony on penetration need not be scientifically perfect so long as it conveys the fact of intrusion. In **Mark Oiruri Mose v Republic [2013] eKLR**, the Court of Appeal stressed that a victim's account of how the male genitalia came into contact with her genitalia is sufficient to prove penetration.

28. The medical evidence in this case strongly corroborated the complainant's testimony. PW4, a qualified clinical officer, the clinical officer's examination revealed lacerations and a broken hymen, which are consistent indicators of penetration. Medical evidence is vital in corroborating the victim's testimony. These findings were captured in both the

P3 form and the Post Rape Care (PRC) form, and were unequivocally classified as injuries "consistent with penetration." Courts have consistently accepted medical findings of genital injuries as conclusive corroboration of penetration. In **Hilary Nyongesa v Republic [2010] eKLR and Kassim Ali v Republic [2006] eKLR,** the Court of Appeal reaffirmed that hymenal tears, whether fresh or healed, together with vaginal lacerations constitute strong proof of penetration.

29. Furthermore, Kenyan jurisprudence makes clear that medical evidence is not indispensable where the complainant's testimony is credible, but in this case, it is overwhelmingly present and supportive. In **Fappyton Mutuku Ngui v Republic [2012] eKLR and Geo Philip Muthuka v Republic [2015] eKLR,** the courts held that penetration may be proved through either direct testimony or circumstantial indicators such as genital injuries. Here, the clinical findings are direct, immediate, and consistent with recent sexual intrusion. In any case, the victim was examined in less than 72 hours. The defence offered no expert evidence to challenge these findings nor cast any doubt on the evidence presented by the Respondent. As such, the trial court correctly held that the element of penetration was proved beyond reasonable doubt.Hence, I find that the second ingredient namely penetration was adequately proved based on the victim's evidence and the medical evidence.

30. As regards the aspect of identification of the Appellant as the perpetrator, the evidence tendered by the Respondent was firm, consistent, and free from any possibility of mistake. The complainant knew the Appellant prior to the incident and positively recognized him as the perpetrator. Indeed, the Appellant admitted on cross-examination that he knew the complainant as she used to deliver mandazi to his house. This was therefore a case of recognition rather than identification of a stranger, which Kenyan courts have consistently held to be the most reliable form of identification. In ***Anjononi & Others v Republic*** **[1980] eKLR,** the Court of Appeal held that recognition is "more reliable than identification of a stranger because it is based on the witness's prior knowledge of the accused." The complainant's evidence was direct, unwavering, and supported by the circumstances of close physical proximity during the commission of the offence, which left no room for doubt.

31. The environmental circumstances also favoured accurate identification. The incident occurred in a setting where the complainant had sufficient opportunity to see and recognize the Appellant. The Court of Appeal in ***Wamunga v Republic*** **[1989] eKLR** emphasized that courts must evaluate lighting, distance, and duration of encounter when assessing identification. Here, the interaction was prolonged, intimate, and involved direct contact, making misidentification practically impossible. The complainant's emotional distress immediately after the incident further supports the reliability

of her identification. Further, she described the perpetrator by name to PW2 and PW5 without hesitation.

32. The identification is further reinforced by the testimonies of PW-2 (Fanuel Zedekiah), PW-5 (Winnie Akinyi), and PW-4 (Irene Akinyi Oseme). PW-2 corroborated PW-1's account by stating that he arrived at the Appellant's house and found his sister concealed behind a curtain, confirming the Appellant's involvement in the incident. PW-5, the victim's mother, also testified that she encountered the Appellant in connection with her daughter's disappearance, establishing a direct relationship between the Appellant and the victim's situation. The eyewitness accounts provide a consistent narrative that strengthens the identification of the Appellant.

33. Furthermore, the Appellant's own conduct reinforced the prosecution's case on identification. His presence with the complainant shortly before the incident, his inconsistent explanations, and the absence of any credible contrary account undermine the defense and strengthen the recognition evidence. Courts have held that where recognition is supported by the conduct of the accused and surrounding circumstances, the evidence is exceptionally strong. **In *Simiyu & Another v Republic* [2005] eKLR,** the Court of Appeal held that prompt and consistent reporting of the assailant's identity enhances evidential reliability. In this case, the complainant reported the Appellant's name immediately, PW2 and PW3 confirmed the consistency of her

report, and no evidence exists of animosity or mistaken identity. Indeed, the Appellant confirmed on cross-examination that he had no differences with the family of the complainant and hence the likelihood of a frame-up does not arise at all. Further, it came out clearly that the Appellant and the complainant were somehow found in flagrant delicto and thus upon the arrival of PW1 and PW2, the Appellant hurriedly urged the minor to hide behind a curtain and no sooner had her mother and brother arrived at the scene, she took off. It is clear that the entire evidence placed the Appellant at the scene of crime as the perpetrator of the crime. The identification was therefore accurate, reliable, and proved beyond reasonable doubt. I find the ingredient of identification was therefore sufficiently proved.

34. Going by the above evidence, it is clear that the cumulative and conjunctive elements in a charge of defilement all proved and that the evidence was consistent and corroborative hence sufficient to convict the Appellant for the offence. Consequently the finding on conviction by the trial court was proper and must be upheld.

35. As regards the aspect of sentence, it is trite law that sentencing is the discretion of the trial court. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus as regards interference with sentence: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must

be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

Also, Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist." (Emphasis added**)**

36. In the case of **Republic v Elijah Munee Ndundu and another [1978] eKLR** the court while considering the purpose of penalties in criminal cases observed: **- "Reformation is a fair enough consideration but not**

the main object of penalties in criminal cases. One of the aims of punishment is to deter the individual offender and also to deter others who may be tempted to commit similar offences (see *Samuel v The Republic* [1968] EA 1). It is an important function of any State to protect its citizens. This involves protection of society from crime and criminals." The court went further to observe **"In considering whether to impose custodial sentences, and particularly long terms of imprisonment, one consideration that plays an important role is the need to remove the offender from society. However, as stated by Lord Denning before the Royal Commission on Capital Punishment, the punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them."**

37. The sentence imposed by the trial court was lawful, proportionate, and fully supported by the circumstances of the case. The Appellant was convicted under section **8(1)** as read with **8(2)** of the **Sexual Offences Act,** which prescribes a mandatory minimum sentence of life imprisonment where the victim is aged 11 years or below. In this case, the victim was 10 years eight months and fourteen days at the time of the crime which was below the age of eleven (11) years which is within the bracket that attracts a sentence of life imprisonment upon conviction. It is noted that the trial court imposed a sentence of life imprisonment, which was in line with the statutory minimum. This approach

reflected the court's consideration of mitigating factors, including the Appellant's age at the time of the offence. The sentence therefore cannot be said to be harsh, excessive, or illegal; if anything, it was sufficient considering the circumstances of the case in which the Appellant preyed on the young and hapless complainant. The Appellant who claimed in his defence that he was married with a wife was thus expected to protect young children but not to molest them. The actions of the Appellant has left the complainant scarred both physically and emotionally for the rest of her life. This therefore called for a deterrent sentence. The trial court considered the aggravating factors in which the victim was a child of tender years and has suffered trauma.

38. Looking at the circumstances of the case, I find that the Appellant has not demonstrated that there exists any reasons for this court to interfere with the sentence. **Section 8(2)** of the **Sexual Offences Act** No. 3 of 2006 provides that the sentence for the offence of defilement is imprisonment for life. I find the sentence to be commensurate with the offence committed. Further, the Supreme Court of Kenya in **Petition No. 18 of 2023 Republic Vs Joshua Gichuki and Others [2024] eKLR** has held that all the sentences imposed under the Sexual Offences Act No. 3 of 2006 are lawful and remain to be so until the same are declared unconstitutional. That being the position, this court's hands are tied and cannot interfere with the sentence.

39. In the result, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed. The conviction and sentence by the trial court is hereby upheld.

Dated and delivered at Siaya this 16th day of April 2026.

D.KEMEI

JUDGE

In the presence of:

David Ouma Ochieng……Appellant.

M/s Kauma……for Respondent.

Maurine……Court Assistant.