



**JAM v Republic (Criminal Appeal E032 of 2024)
[2026] KEHC 4434 (KLR) (12 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E032 OF 2024
TW CHERERE, J
MARCH 12, 2026**

BETWEEN

JAM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence in Nyamira
MCSO E051 of 2022 by Hon. B.Okongo on 06th December 2023)*

JUDGMENT

1. The Appellant, JAM, was charged before the trial court with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars alleged that on 05th September 2022 at Manga Sub-County, Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of JMN, a child aged 10 years. Appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the same Act.
2. The Appellant pleaded not guilty. The prosecution called five witnesses, whose evidence is summarised below.
3. PW1, the complainant (JMN), testified that on 05th September 2022 at approximately 4:30 PM, while playing in a nearby field, the Appellant, her uncle, summoned her on the pretext of running an errand. Inside his house, he grabbed her mouth, shut the door, forced her onto his bed, lifted her skirt, pulled down his trousers, removed her underwear, put on a condom, and penetrated her vagina. The assault lasted from 5:00 PM to 7:00 PM. He kept his hand over her mouth throughout to prevent her from screaming. She walked away in significant pain. Fearing his threats, she did not immediately disclose the incident to her mother. The following day, she resisted going to school but was compelled by her mother. Once at school, she confided in her teacher, Madam I. I contacted the girl's mother, who took



- her to Tombe Hospital. They then visited the local Chief for a referral letter, returned for medical attention, and lodged a report at Manga Police Station.
4. PW2, the complainant's mother, testified that the Appellant is her brother-in-law. On 06th September 2022, she compelled her reluctant daughter to attend school. At school, the teacher took the complainant aside and the daughter disclosed that she had been defiled by the Appellant, further revealing that the abuse had occurred on nearly four separate occasions. PW2 took her daughter to Tombe Hospital, obtained a referral letter from the local Chief, received medical attention, and proceeded to Manga Sengera Police Station to file a formal report. She also testified that during these events she received a phone call from a person named Judy, who informed her that her daughter had been found seated by the roadside.
 5. PW3, Wilkister Bitengo Abobo, the complainant's teacher, testified that on 06th September 2022 at around 8:40 AM she found JMN and her mother standing outside the classroom. She pulled the complainant aside and asked why she had refused to come to school, whereupon the complainant disclosed that her uncle had defiled her.
 6. PW4, Police Constable Agnes Migiro, the Investigating Officer, testified that on 17th September 2022 she was directed by the OCS to investigate the matter. She interrogated the complainant, issued her with a P3 form, and recorded witness statements. The Appellant was thereafter arrested and charged.
 7. PW5, Geoffrey Osoro, Clinical Officer at Manga Sub-County Hospital, examined the complainant on 07th September 2022. He found the external genitalia normal; the hymen was broken; there was no discharge which he said were consistent with evidence of sexual intercourse. He produced the P3 form (PEX2) and treatment notes (PEX3).
 8. In his sworn defence, the Appellant confirmed that the complainant is his niece. He stated that he was not at home when the offence was allegedly committed and explained that on 05th September 2022 at about 5.00 p.m. he left home to attend the funeral of a church member, one Nyangweso, at Omosocho Catholic Church, and returned at about 9.00 p.m.
 9. His first witness, Abel Oroti, the Area Chief, testified that he knew the Appellant and that on the material day at about 4:00 PM the Appellant was at his office. He attributed the complaint to a family land dispute engineered by the complainant's mother to disinherit the Appellant, who is an orphan. The second witness, SK, testified that the Appellant had been staying at her house due to illness and that on 05th September 2022 at about 4:00 PM he was at her house before leaving for a funeral. The third witness, HKO, stated that the Appellant had gone to a funeral on that day and was not at home, though she did not specify the time of departure or his whereabouts thereafter.
 10. After trial, the court delivered its judgment on 22nd November 2023, convicted the Appellant, and on 06th December 2023 sentenced him to fifteen (15) years' imprisonment.
 11. The Appellant appeals against both conviction and sentence on the following grounds:
 1. The offence was not proved beyond reasonable doubt
 2. The medical report was fabricated and malicious
 3. The investigation was scanty and shoddy
 12. In written submissions dated 26th February 2026, the Appellant contends that the prosecution failed to prove its case beyond reasonable doubt and raises several specific grounds.



13. First, the Appellant points to an alleged material contradiction regarding the date of the offence. PW1 placed the incident on 05th September 2022, whereas PW4 recorded that the complainant stated it occurred on 05th September 2023. The Appellant submits that this one-year discrepancy renders the prosecution evidence unreliable.
14. Secondly, the Appellant points to an alleged inconsistency regarding who notified PW2. PW1 testified that Madam I contacted the complainant's mother, while PW2 stated that she received a call from a person named Judy informing her that the complainant was seated by the roadside. The Appellant notes that Judy neither recorded a police statement nor testified at the trial and submits that these conflicting accounts undermine the prosecution narrative.
15. Thirdly, the Appellant questions the plausibility of the alleged defilement occurring between 5.00 p.m. and 7.00 p.m. without attracting attention.
16. Fourthly, the Appellant points to alleged chronological inconsistencies in the prosecution evidence. PW1 and PW2 testified that the matter was reported on 06th September 2022 and that the complainant was examined on the same day. However, PW5 indicated that the examination took place on 07th September 2022, while PW4 testified that the matter was reported on 17th September 2022.
17. Fifthly, the Appellant criticises the investigation as shoddy, arguing that key persons mentioned in the evidence, namely Madam I and Judy, were not called as witnesses, no scene visit was conducted, and the Investigating Officer relied primarily on the accounts of the complainant and her mother.
18. Sixthly, the Appellant relies on his alibi defence, supported by defence witnesses, and contends that the allegations were motivated by a family land dispute.
19. The Respondent submitted that the prosecution proved all three ingredients of defilement namely age, penetration, and identity beyond reasonable doubt. On sentence, the Respondent submitted that the 15-year term is not merely excessive but illegal and lenient, as Section 8(2) of the *Sexual Offences Act* mandates life imprisonment for defilement of a child aged eleven years or below. The Respondent invited this Court to exercise its revisionary jurisdiction to correct the sentence upwards. The Respondent prayed that the appeal be dismissed in its entirety.
20. From the grounds of appeal and the parties' submissions, the following issues arise for determination:
 1. Whether the prosecution proved the offence of defilement beyond reasonable doubt, particularly as regards the age of the complainant, penetration, and the identity of the perpetrator.
 2. Whether the prosecution evidence was affected by material contradictions or inconsistencies, including the alleged discrepancies regarding the date of the offence, the reporting of the incident, and the chronology of the medical examination.
 3. Whether the alleged inconsistencies concerning the persons who reported the matter and the absence of certain witnesses undermined the credibility of the prosecution case.
 4. Whether the investigation conducted was so inadequate as to render the conviction unsafe.
 5. Whether the Appellant's alibi defence raises a reasonable doubt as to his presence at the scene of the offence.
 6. Whether the sentence imposed by the trial court was lawful and appropriate.



21. This being a first appeal, the Court is required to re-evaluate the evidence on record and arrive at independent conclusions, while according appropriate deference to the trial court which had the advantage of seeing and hearing the witnesses. See *Okeno v. Republic* [1972] EA 32.
22. It is trite that for an offence of defilement under Section 8 of the *Sexual Offences Act* to be sustained, the prosecution must prove the age of the complainant; penetration of the complainant's genital organs; and the identity of the accused person as the perpetrator. (See *Shitula v Republic* [2025] KECA 12 (KLR).
23. In the present case, the complainant testified that she was 10 years old at the time of the incident. The prosecution produced her Birth Certificate (PEX1), Serial Number 0006xxx issued on 12th February 2020, which indicates that she was born on 28th April 2013.
24. From this documentary evidence contained in PEX1, the complainant was ten (10) years old on 05th September 2022, the date of the offence. A birth certificate constitutes primary and reliable documentary proof of age, and the document produced before the trial court as PEX1 conclusively establishes the complainant's age.
25. Accordingly, this Court finds that the prosecution proved the age of the complainant beyond reasonable doubt.
26. The second ingredient the prosecution must establish is penetration. Under Section 2 of the *Sexual Offences Act*, penetration is defined as the partial or complete insertion of the genital organs of one person into the genital organs of another person.
27. In the present case, the complainant gave direct testimony describing how the offence occurred. She testified that the Appellant held her mouth, placed her on his bed, lifted her skirt, removed her underwear, put on a condom and inserted his penis into her vagina. She further testified that the incident lasted from 5.00 p.m. to about 7.00 p.m., during which time she was unable to scream because the Appellant covered her mouth.
28. The complainant further stated that she experienced pain and difficulty walking afterwards. Her testimony was corroborated by the medical evidence of PW5, the clinical officer who examined her. PW5 testified that on examination, he observed that the complainant's hymen was broken. These findings, which were assessed as consistent with sexual intercourse, were recorded in the P3 Form (PEX2) and the treatment notes (PEX3) produced in evidence.
29. The complainant's direct account of the act, coupled with the medical findings, sufficiently establishes that there was penetration within the meaning of Section 2 of the *Sexual Offences Act*. Accordingly, this Court finds that the prosecution proved the element of penetration beyond reasonable doubt.
30. The third ingredient the prosecution must establish is the identity of the perpetrator. The court must be satisfied that the accused person before the court is the one who committed the offence.
31. In the present case, the complainant identified the Appellant as the person who defiled her. She testified that the Appellant was her uncle, a fact which was also confirmed by PW2, her mother, who stated that the Appellant is her husband's brother. The identification was therefore one of recognition rather than identification of a stranger.
32. The circumstances under which the offence allegedly occurred further support the reliability of this recognition. The complainant testified that the incident took place in the Appellant's house, where he placed her on his bed and defiled her. These were not fleeting circumstances involving a stranger but an encounter involving a person well known to the complainant.



33. In addition, PW3, the complainant's teacher, testified that when the complainant was questioned, she disclosed that her uncle had defiled her. Similarly, PW4, the Investigating Officer, confirmed that during the investigation the complainant identified the Appellant as the perpetrator. Significantly, in his sworn defence the Appellant himself confirmed that the complainant is his niece, thereby affirming the very relationship described by the prosecution witnesses.
34. The complainant was the sole direct witness to the act of defilement. The Court is therefore mindful of the provisions of Section 124 of the Evidence Act (Cap 80), which provide that where the only witness to a fact in issue in a sexual offence is the complainant, the court may proceed to convict on the evidence of the complainant alone, provided the court records the reasons for believing that the complainant is telling the truth.
35. The Court of Appeal recently reaffirmed this position in *Okemwa & Another v Republic* [2026] KECA 183 (KLR) where it held that in sexual offences the credible evidence of the complainant, if believed by the court, is sufficient to found a conviction without corroboration pursuant to the proviso to Section 124 of the Evidence Act.
36. Having carefully evaluated the complainant's testimony, this Court is satisfied that she was a truthful and credible witness. Her account of the incident was clear, detailed and internally consistent. She narrated the events in a coherent and spontaneous manner without material contradiction, and her evidence remained firm even under cross-examination.
37. In addition, the complainant's testimony was supported by the medical evidence which confirmed findings consistent with sexual intercourse, thereby lending further credibility to her account.
38. The complainant was the only direct witness to the incident. Under the proviso to Section 124 of the Evidence Act, a conviction in a sexual offence may be founded on the evidence of the complainant alone if the court believes the complainant and records reasons for that belief. Upon re-evaluating the record, this Court is satisfied that the complainant's evidence was credible and that the trial court was entitled to rely on it. In the circumstances, and bearing in mind that the Appellant was a person well known to the complainant, the possibility of mistaken identity does not arise.
39. The Appellant further contends that the prosecution evidence was marred by material contradictions. In particular, he points to inconsistencies regarding the date of the offence, the person who informed PW2 of the incident, and the chronology of reporting and medical examination.
40. On the alleged inconsistency concerning the date of the offence, the complainant testified that the incident occurred on 05th September 2022. The same date emerges from the testimonies of the other prosecution witnesses and from the surrounding circumstances, including the complainant's disclosure to her teacher on the following day and the subsequent medical examination. The Appellant relies on the evidence of PW4, who recorded that the complainant stated the offence occurred on 05th September 2023. However, the record shows that the investigation, medical examination and reporting of the matter all took place in September 2022, which strongly suggests that the reference to the year 2023 may have been a recording error rather than a substantive contradiction.
41. The Appellant also points to an inconsistency regarding who informed PW2 of the incident. PW1 testified that Madam I contacted the complainant's mother, while PW2 stated that she received a call from a person named Judy informing her that the complainant was seated by the roadside. Read in context, these accounts describe different stages in the chain of communication after the complainant disclosed the incident. The evidence shows that the complainant first reported the matter to her



- teacher, after which information was relayed to her mother and the child was then taken for medical attention and the matter reported to the police.
42. The law is settled that not every inconsistency in the evidence of witnesses will render a conviction unsafe. Only contradictions that are material and go to the root of the prosecution case are capable of creating a reasonable doubt. Minor discrepancies are to be expected in human recollection and do not necessarily signify falsehood. The Court of Appeal reiterated this principle in *Amollo & 2 Others v Republic* [2026] KECA 176 (KLR), observing that trivial inconsistencies which do not affect the substance of the prosecution case cannot vitiate a conviction.
 43. Applying these principles to the present case, this Court finds that the inconsistencies identified by the Appellant relate to peripheral matters concerning the recording of dates and the chain of communication after the incident. They do not affect the essential elements of the offence, namely the complainant's age, the occurrence of penetration, and the identity of the perpetrator. They therefore do not create a reasonable doubt as to the Appellant's guilt.
 44. The Appellant further criticises the investigation, contending that it was shoddy. In particular, he argues that certain persons mentioned in the evidence, namely Madam I and Judy, were not called as witnesses, that the Investigating Officer did not visit the scene of the offence, and that the investigation relied primarily on the accounts of the complainant and her mother
 45. It is not in dispute that the Investigating Officer did not record statements from Madam I and Judy, nor did she visit the scene of the alleged offence. The issue for determination is therefore whether these investigative omissions rendered the prosecution case unreliable or created a reasonable doubt as to the Appellant's guilt.
 46. The law is clear that the prosecution is not required to call a particular number of witnesses in order to prove a fact. Section 143 of the *Evidence Act* expressly provides that 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.
 47. The Court of Appeal recently reiterated this principle in *Njuru v Republic* [2026] KECA 433 (KLR) where it held that the prosecution is not obliged to call every person mentioned in the course of investigations, provided that the evidence adduced before the court sufficiently establishes the charge.
 48. In the present case, the prosecution case rested primarily on the direct testimony of the complainant, which this Court has already found to be credible. Her account was further supported by the medical evidence contained in the P3 Form (PEX2) and treatment notes (PEX3) as well as the surrounding circumstances in which the incident was disclosed and reported.
 49. In those circumstances, the failure to call Madam I and Judy as witnesses, or to conduct a scene visit, does not in itself render the prosecution case unsafe. The evidence placed before the court was sufficient to establish the charge beyond reasonable doubt.
 50. The Appellant also relied on an alibi defence, contending that he was not at home at the time the offence was allegedly committed. In his sworn defence, he stated that on 5th September 2022 at about 5.00 p.m. he left home to attend the funeral of a church member, Nyangweso, at Omosocho Catholic Church, and returned at about 9.00 p.m.
 51. The legal position regarding an alibi defence is settled. An accused person does not bear the burden of proving an alibi. The burden remains on the prosecution to prove beyond reasonable doubt that the accused person was present at the scene of the offence and committed the act complained of.



52. The Court of Appeal reaffirmed this principle in *Amollo & 2 Others v Republic* (supra) where it held that although an alibi may be raised late in the proceedings, the court must nonetheless consider it and weigh it against the prosecution evidence.
53. In the present case, the Appellant's defence witnesses testified that they saw him earlier in the day before he left for a funeral. However, none of those witnesses accounted for his whereabouts during the material period between 5.00 p.m. and 7.00 p.m., when the complainant testified that the offence occurred. The Appellant himself stated that he left home at about 5.00 p.m. to attend the funeral, but his evidence does not account for his whereabouts during the period when the offence is alleged to have been committed.
54. The alibi must therefore be weighed against the prosecution evidence. In this case, the complainant gave direct testimony identifying the Appellant as the person who defiled her and placed him at his house during the material time.
55. When considered alongside the prosecution evidence, particularly the complainant's direct testimony identifying the Appellant as the perpetrator, and the defence evidence which did not account for the Appellant's movements during the material period between 5.00 p.m. and 7.00 p.m., the alibi does not raise a reasonable doubt as to the Appellant's presence at the scene of the offence and therefore does not displace the prosecution case.
56. Upon re-evaluating the entire evidence on record, this Court is satisfied that the prosecution proved all the essential ingredients of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* beyond reasonable doubt.
57. The complainant's age was established by documentary evidence, the element of penetration was proved by both the complainant's testimony and the medical findings, and the identity of the perpetrator was established through the complainant's recognition of the Appellant, a person well known to her.
58. The issues raised by the Appellant regarding alleged contradictions, the adequacy of the investigation, and the alibi defence were carefully considered in light of the entire record and do not, either individually or cumulatively, create a reasonable doubt as to the Appellant's guilt.
59. In the result, the Court is satisfied that the conviction was properly founded and there is no basis for this Court to interfere with the finding of guilt reached by the trial court.
60. Upon conviction, the trial court sentenced the Appellant to fifteen (15) years' imprisonment. The Appellant contends that the sentence is harsh and excessive, whereas the Respondent submits that it is illegal and manifestly lenient. The Respondent argues that the complainant was ten (10) years old at the time of the offence and that under Section 8(2) of the *Sexual Offences Act*, defilement of a child aged eleven years or below attracts a mandatory sentence of life imprisonment. It is therefore contended that the trial court erred in imposing a sentence of fifteen (15) years' imprisonment, which corresponds to the penalty prescribed under Section 8(4) for defilement of a child aged sixteen to eighteen years.
61. The Birth Certificate (PEX1) establishes that the complainant was born on 28th April 2013 and was therefore ten (10) years old on 05th September 2022, the date of the offence. The applicable sentencing provision was consequently Section 8(2) of the *Sexual Offences Act*, which prescribes life imprisonment for defilement of a child aged eleven years or below. The trial court, however, imposed a sentence of fifteen (15) years' imprisonment, which corresponds to the penalty prescribed under Section 8(4) of the Act applicable to victims aged sixteen to eighteen years. The trial court therefore applied the wrong statutory provision in sentencing the Appellant.



62. As already noted, the complainant was ten (10) years old, bringing the offence within Section 8(2) of the *Sexual Offences Act*, which prescribes life imprisonment where the victim is eleven years or below. The sentence of fifteen (15) years' imprisonment imposed by the trial court was therefore erroneous in law.
63. However, this Court is precluded from enhancing the sentence because the Appellant was not issued with the requisite notice of enhancement under Section 354(3)(ii) of the Criminal Procedure Code. In the absence of such notice, the sentence of fifteen (15) years' imprisonment must remain undisturbed.
64. This Court has also considered whether Section 333(2) of the Criminal Procedure Code should apply so as to backdate the sentence to the date of the Appellant's arrest on 14th September 2022. That provision ensures that an accused person receives credit for the period spent in pre-trial custody.
65. However, the Court declines to apply Section 333(2) in the present circumstances for the reason that the sentence of fifteen (15) years' imprisonment is already below the mandatory sentence of life imprisonment prescribed under Section 8(2) of the *Sexual Offences Act*. Backdating its commencement would further reduce the punitive effect of a sentence that already falls short of what the law requires. The sentence shall therefore run from the date it was imposed on 6th December 2023.
66. Before concluding, this Court underscores the constitutional imperative to protect the privacy and dignity of children involved in criminal proceedings.
67. In *CMM (Suing as the Next Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* [2023] KESC 68 (KLR), the Supreme Court affirmed that the best interests of the child under Article 53(2) of *the Constitution*, read together with the right to privacy under Article 31(c), must guide judicial conduct in matters involving minors. The Court emphasized that the principle of open justice does not justify disclosure of identifying particulars of children and that courts must take proactive steps to safeguard their identities.
68. This Court therefore reiterates that in all proceedings involving minors, court records and judgments should avoid disclosure of identifying details and children should be referred to by their initials only.
69. From the foregoing analysis, this Court makes the following orders:
1. The appeal against conviction is dismissed and the conviction for defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* is upheld.
 2. The appeal against sentence is dismissed and the sentence of fifteen (15) years' imprisonment imposed on 06th December 2023 is upheld.

DELIVERED AT NYAMIRA THIS 12TH DAY OF MARCH 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Anita

Appellant - Present in person

For the DPP - Mr. Chirchir (SADPP)

