



REPUBLIC OF KENYA



**Kasia v Republic (Criminal Appeal E012 of 2023)
[2026] KEHC 5096 (KLR) (4 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 5096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E012 OF 2023**

TM MATHEKA, J

MARCH 4, 2026

BETWEEN

LUCAS MUOKI KASIA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Lucas Muoki Kasiawas charged with; Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on diverse dates between 12th and 19th day of October, 2020 at Nyayo Area in Kibwezi Sub-county within Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the female organ namely vagina of S.W a girl child aged 12 years.
2. In the Alternative Charge he was charged with 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 diverse dates between 12th and 19th day of October, 2020 at Nyayo area in Kibwezi Subcounty within Makueni County intentionally and unlawfully caused his male organ namely pennies to touch the vagina of S.W a girl child aged 12 years.
3. He pleaded not guilty and after a full trial he was found guilty of defilement contrary to Section 8(1) as read with Section 8(2) of the sexual offences Act ,and sentenced to 30 years imprisonment.
4. The matter was heard .
5. The trial court conducted voire dire in the following manner.
What is your name? SWK
How old are you?
15 years



When were you born? 13.07.2008

Do you attend school? N... primary school Which class are you?

Who is your class teacher? Mr. O...

Do you go to church or mosque? Church

Which church? AIC Nyayo How often?

Sunday Every Sunday

What happens to those who don't tell the truth?

If one does not tell the truth they will be disciplined What is an oath?

I don't know

6. The Court found that she was intelligent enough to give evidence but did not understand the meaning of an oath.
7. She told the court that she was class 6. She said in 2020 she was in class 5 and was 12 years old. She was residing with her parents and siblings one brother and two sisters. She was the last born.
8. On 12.10.2020 at midday she was cleaning utensils at home when one Muoki suddenly came and covered her mouth. She tried to push him away he told her not to push him away. He threw her on the ground right there and started defiling her. She spoke and in her words;

“Akaanza kunibaka’ ‘alinifanya tabia mbaya’. He did tabia mbaya. Sijui tabia mbaya ni nini. I don't know what tabia mbaya is. There is something he did on the body. He removed ‘kitu yake na akaweka kwangu. His thing and inserted in mine. He uses his thing to urinate. I don't know the name of the part in English, Kiswahili or Kikamba. The thing is big. I don't know what it looks like. He inserted in my body. Where I urinate. It is here (pointing at her vagina). I was wearing clothes. I was wearing a dress and underwear. He removed my underwear. He removed the underwear completely. Muoki was wearing clothes. He dropped down his trouser. I was down where he had fallen me. I was laying with my back on the ground. I was thus facing up. He lay on top of me facing me. I felt pain. I cried. He let go when I cried. My brother heard me cry. He is called Brian. That is Brian Muuo Kioko. He is 3 years old. He came and said he would report the same to mum. Muoki was still there. When Muoki saw B, he took his bicycle and left in a hurry. Brian reported to my mother the following day. I was there when he reported. My mother disciplined me and went to report to the police. When my mother disciplined me, I told my mother what Muoki did to me.”

9. After her brother reported to her mother, she was left at Nyayo then someone came and took her to police station at Kisayani. From there they were sent to Kibwezi hospital.

10. She further stated :

“It was the first time Muoki defiled me. On 19.10.2020 nothing happened between Muoki and I. I can see Muoki. I can see him through the computer screen. I know him as Muoki as he worked for my aunt one Mueni. Aunty Mueni resides far from my home. It was the first time on 12.10.2020 for me to see Muoki. I knew Muoki worked for Aunty Mueni. He was employed as a herder.”



11. She said she was cleaning utensils besides kitchen alone. There was a fence next to the kitchen She was outside while her brother was asleep at the time. She said she told her aunty about the incident after 2 days. That her mother was the first to hear of the incident. She said she had never differed with Muoki. At the same time, she stated that they had differed because of his coming to their home. That he had come to their home before 12.10.2020. That he would come and ask her to give him water. That she would tell him there is no water but he would insist that she be the one to put water for him. That she reported to her mum that he would disturb her over water. That what she had told the court is what happened and had nothing to do with their differences. She said she did not know how Muoki was arrested.
12. On Cross examination by accused she told the court that he was passing by when he defiled her .That it was around midday. She said she did not say the time was 11:00 a.m. in her statement. She said what she said is what happened and not what she was told. She said she did not tell her mother the same day but on another day. She said she told her mother that accused her defiled her . She said she told her ‘the other day’. She said she was not told what to say That she was taken to hospital when she reported but it was not the same day. That that did not mean that what she said was not true. She told the court that he had injured her. That he had injured her urinating part. She said she had no reason not report to her mother the same date. She asserted that he defiled her. That it was not inside the house but beside the kitchen where she was cleaning utensils. She asserted that he defiled her besides the kitchen where I was cleaning utensils. She said it was not true that what she had had told the court is what her mother had told her to say. she denied that her mother used to give accused work and did not pay him. She denied that her mother wanted a relationship with the accused
13. On re-examination she said it was not true that she was framing the accused on her mother’s request. She asserted that it was the accused who defiled her besides their kitchen as she cleaned utensils. That it was around midday. That during defilement she sustained injuries in her urinating part.
14. PW2 was Dr. James Mbiu attached at Kibwezi sub-county hospital. He told the court he had a bachelor’s degree in medicine and surgery from 2015 from Kenyatta University. He produced the P3 form for SWK aged 12 years which was filled on 24.10.2020 by Dr. Masila who by then was on study leave undertaking master’s degree. He said they had worked together for 3 weeks during the period he was handing over and was conversant with his handwriting and signature.
15. He told the court that the victim had a history of defilement on two occasions. On 12.10.2020 and 19.10.2020 by a person well known to her at their home. On examination she had laceration on the vagina and the hymen was broken, there was a whitish discharge through her vagina. There was no other positive finding. That the probable type of weapon was a penis. That the approximate age of injury was 4 days. That the degree of injury was harm. He also produced the PRC form and said that it had the same information as P3 form. He produced the laboratory reports for the victim dated on 22.10.2020 which showed that the tests for urinalysis, pregnancy, HIV ,VDRL and hepatitis B were all negative. There is also a full hemogram which shows all parameters were within normal range.
16. On Cross examination by accused he said that the victim was first examined on 22.10.2020 as per laboratory report. The PRC form examination was done on 24.10.2020. That there is no time frame within which a victim should be examined as it depends on when they visit the hospital. That they examined the victim who was brought. That they also got history from the victim that she was defiled by a person well known to her. That it was not mandatory for the suspect to be examined. That the suspect would have been examined if he had been presented to the hospital.



17. On re-examination he told the court that when filling the P3 form they were supposed to confirm nature of offence, estimated age of victim, findings upon examination on female victim, the labia majora, minor, vagina, hymen and indicate whether there was any discharge and bleeding.
18. PW3 ,DSK the mother to SWK told the court that on 22.10.2020 at around 11:00 a.m. she was at home preparing to go to the market when her son BM aged 3 years told her he wanted to tell her. The sister SWK , aged 12 years then told him to keep quiet. She asked SWK why she did not want BM to say whatever it was and told him to tell her. BM told her that Muoki who used to work for Mama did SWK tabia mbaya. She asked SWK about it She did not tell her anything so she 'disciplined' her. SWK told her to stop and she would tell her everything. SWK confirmed that BM was telling the truth. She asked her how many times it had happened. She told her it had happened twice. On 12.10.2020 was the first time. That Muoki found her with BM along the way. He held her fell her on the ground removed her clothes and did tabia Mbaya to her without even saying anything. Then on 19.10.2020 he did it again. That Muoki found her at home while was on the way to take livestock to drink water when he detoured into the homestead, found SWK and took her behind the water tank, removed her clothes. That SWK was screaming, he covered her mouth and then did tabia mbaya to her. SWK was at home washing utensils. That tabia mbaya was done after he removed her clothes, inserted his penis inside her vagina. That she felt a lot of pain. She asked her why she did not report to her. She told her Muoki told her if she reported to her or to anyone else, he would kill her.
19. PW3reported at Kisayani police post. She checked the child while lying on the bed. She noticed blood, lacerations and wounds on the outside part of her private part. The she took PW1 and a female police officer escorted them to Kibwezi Sub- County Hospital where she was examined and confirmed she had been injured. She could not begiven PP2 as three 3 days had elapsed . The pregnancy test was negative. The P3 form was filled. She recorded her witness statement they went to hospital. Muoki was arrested that night.
20. She said she knew Muoki as he worked for her sister's father and mother-in- law approximately ½ km from her own home and that it is the mother-in-law who was usually referred to as Mama in the area. That she had seen him work for Mama for close to 3 months. That he was well known by her children That she would sometimes leave her children at Mamas while she went to work, she identified Muoki before court
21. On Cross examination by accused she told the court that the day she learnt of the incident is the day she reported the matter to the police and took her daughter to hospital. That the incidences were on 12.10.2020. That she learnt of the same through her son BM on 22.10.2020. she asserted that the accused defiled her daughter . That the child did not report because he threatened, he would kill her. BM and the victim told her that he was the person who defiled PW1.
22. PW4 was BM . The trial court conducted voire dire.
- What is your name? BKK
- How old are you?
- I don't know
- When were you born? I don't know
- Do you attend school? Yes
- Which school? F academy Which class? Class 2.
- What is your teacher's name? Teacher Sofi



Do you go to church or mosque? Church

Which church?

I don't know

What happens to those who don't tell the truth? One will be disciplined

What is an oath?

I don't know

23. The court was of the view that the child was of average intelligence, seemed to understand the difference between the truth and falsehood and the importance of telling the truth but "he does not understand the nature of an oath. He will give unsworn evidence".

He told the court that his name was BK. That he lived with his mother and his sister S. That S

was done tabia mbaya by the bad man. The tabia mbaya was behind the tank. I heard Sofi cry. I woke up. I went and found her behind the tank. I found Sofi with Muoki behind the tank. I found them doing tabia mbaya. Muoki was wearing clothes. He was wearing a shirt. Sofi had a dress. Sofi was behind the tank doing tabia mbaya with Muoki. Muoki is before court (accused identified) Muoki resides at a mama Winnie. I don't know what he does there.

24. On Cross examination by the accused he told the court that he was 2 years old and could not tell when I started talking.
25. PW5 NO. XXXX PC Mercy Wambui Ndungu was at the material time attached at Kisayani police post and the investigating officer performing case duties and general duties. She told the court that on 22.10.2020 a report of defilement was made at the police post. She was informed by the in-charge of the police post by telephone to report to work and take up the matter. She did as instructed. She found the complainant one S in the company of the mother DK and escorted them to AMREF hospital where the complainant was examined and treatment given. She was discharged and they went back to the police station where she continued with her investigations into the matter. She recorded witness statements for complainant. She later found the culprit and charged him.
26. She testified that the doctor examined the complainant and found that the complainant had been defiled since here was laceration, vaginal discharge and semen found. She said that the complainant told her that she was home after being left there by the mother who had gone to work at the nearest market. She had been left home with younger brother PW4. That the accused first defiled her on 12.10.2020 and the second on 19.10.2020 and that this is the time the brother heard her cries and came and found them and reported to the mother. That on 12.1.2020 the incident was behind the tank at the home. That the same on 19.10.2020. That on the 12.10.2020 the accused lured her to the tank and forcefully removed her pant and inserted his male organ into her vagina. That he threatened her not to reveal to anyone so she kept to herself.
27. That on the 19.10.2020 the accused lured her behind the tank and forcefully removed her pants and inserted his penis into her vagina and while in the act the minor experienced a lot of pain and cried for help and that is when the younger brother woke up and found them behind the tank red-handed and thus informed the mother. That the accused was employed as a casual labourer for the neighbour. She did not find out which neighbour it was. That the children knew the accused who was working at the neighbours. That the doctor confirmed the allegations of the victim.



28. That the complainant was 12 years at time of offence. That she received a birth certificate which showed she was born on 13.07.2008. that when They returned to the police station from hospital, they found the accused in the cells having been arrested by the 'community policing'. She identified the accused in court .
29. On Cross examination by the accused she said that she knew the complainant was defiled from the doctor's report That she was present when the child was examined. That the child was taken to hospital on 22.10.2020. The report was on 22.10.2020. The child was defiled on 12.10.2020 and 19.10.2020. she said the inner wear had discharge. That the child had already changed Clothes since the last incident was on 19.10.2020. The report was done on 22.102020. That the mother knew about the incident after some time had lapsed and thus could not have known and kept the clothes That she was not there when that accused was arrested as she had escorted the child to hospital.
30. The mother to the complainant was recalled to produce the, the original birth certificate which showed that she was born on 13.07.2008.
31. The prosecution closed its case.
32. The accused was found to have a case to answer. He was put on the defence.
33. Through a sworn statement of defence he told the court that his name is Lucas Muoki Kasia, that he was a resident of Kibwezi. He knew the charges he was facing before court.
34. He told the court that in 2020 he was working for one Musyoka the sister of the person who had brought him to court. He said that the persons who gave him casual work were the ones who brought him to court. That they would pay him as agreed that and on this particular day he did work worth Ksh 750, the paid Ksh 500 and when he went for the balance of Ksh 250 They refused to pay the balance. One day on a Sunday he went to claim for the balance. They said they would not pay . As he left, they said that they would put me where his parents would not help me. That he was watching news when I was arrested on allegation, I had defiled a child for Mama B He was taken to Kisayani and was taken into custody at around 10:00 p.m. he testified that on the way with one Kyalo asked him for Kshs 20,000/= so that he could release him He told him I did not have the money. Kyalo asked whether he could call anyone to loan him money. He gave him his cousin's contacts. His cousin was one Jonathan Kioko Mulei. That Kioko called Jonathan who refused to give any money . After 2 days he was taken to Kibwezi police station where he stayed for a week and then he was arraigned before court and charged. He pleaded not guilty.
35. He said he used to reside with the children and he never thought of defiling them. Not even one day.
36. On Cross examination by the prosecutor, he told the court he was a casual labourer. That he was employed by the sister to the complainants' mother. He said he knew Mama B. He said he knew the mother of the complainant for around 3 years. He said she did not know all her children. He said he knew BM, and SWK and their mother and their aunt. He said he had done casual work for his employer many times. That it is when she did not pay him that these allegations came forth. He she said she would not pay him and would take him to the police and that neither he nor his family would get him out. He said that they had not differed with her. The only difference was for his balance.
37. He said he was arrested on 20.10.2022. He said he demanded for the money on 19.10.2020. That he was asked for Kshs 20,000/- by Kioko Mangala. That he gave his cousins number and he told them he would not pay and they could take him wherever they wanted .He said he would call his cousin as his witness. He said he did not go to the home of PW3 on 12.10.2020. he denied going to the complainant's home of finding PW1 washing utensils. He denied that he took her behind the home and defiled her.



- He denied that BM (PW4) found him defiling PW1. That PW4 was not talking then. He said it was not true that when PW4 saw him he wear his trousers and left. He confirmed that he heard the doctor testify and confirm that the complainant was defiled. He said that PW3 was framing him because of the money she owed him That they had never differed before.
38. On Cross examination by court, he testified that he was employed by Mr. Malekya the husband to PW3's sister as a herder and farm hand. That he started working for him in January, 2020. That Mr. Malekya's approximately 1km away from that of PW3. That he would do casual work for PW3 on Sundays when not at work. That he did the work of arranging bricks so that they could be burnt. He said the children must have been couched to come and lie against him. He said that the doctor did not examine the child in his presence ad that he was not examined to show that he was the one who defiled her. He asserted that the case was about the Kshs 250/=he was claiming from PW3.
39. DW2 was Dr. Jonathan Kioko Mulei who said he resided in Emali and was the Managing director of Kilome Hospital Emali. He said that the accused was his cousin. He testified that in 2020 August, the day the accused was arrested at around 09:00 p.m. He called him to pay some men who had arrested him and taken him to the police. He called using a number he did not know. He asked why he had been arrested. Before he could answer someone took over the phone and told him that Muoki had defiled a child and wanted Kshs 20,000/= so that they would not take him to the police station. He could hear the accused arguing that he had not done so. He DW2 thought that the accused had agreed with these people to defraud him so he hang up the phone. He later learnt that he was taken to police cells and arraigned before court.
40. Cross examination by prosecutor he told the court that the day was 20.08.2020 which was the day the accused was arrested .That the accused was facing defilement charges. That he did not know whether the alleged offence was committed on 12th or 19th October, 2020. He was not sure of the date of arrest. He said he had employed the accused previously for 4-5 years but was not residing with him at the material time. That the accused was residing over 100 Km away . That he would not be aware of what happened where the accused resided, he did not know whether the accused was known to the complainant or what the complainant testified about before court or that there was an eyewitness in this case.
41. He was shown the medical records for the complainant and stated that they showed lacerations on the vagina with hymen broken with reddening of vagina and urethra. That there was presence of whitish vaginal discharge. That this confirmed that the minor was defiled and it could mean that the child has been defiled severally. He said the documents could not rule out the accused as the perpetrator.
42. He said he did not follow up on the callers as he dismissed them as fraudsters. He concluded that the call was at made at Masongaleni where the accused was residing and he could not say it was made at police station. He did not follow up with the accused. He learnt later that he was taken to police station and arraigned before court. He said that due to the phone call he received he doubted the witnesses who attended court. He said he never met them anywhere.
43. From the foregoing evidence the learned trial court found the accused guilty of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and sentenced him to 30 years imprisonment. Aggrieved, the accused brought this appeal on the grounds that;
1. That, the learned trial magistrate erred in law and facts when he convicted and sentence me without observing that the charge before court were defective for both being great variance with the evidence on records.



2. That, the learned trial magistrate erred in both points of law and facts by convicting me without considering that there was no evidence to prove the offence of defilement to required standard in law of beyond reasonable doubt the PRC form and treatment notes was not attached here same were regularly produced as I relied in the case of RML-VS- REPUBLIC (2021) eKLR.
 3. That, the learned trial magistrate erred in both law and facts by convicting me by the evidence of PW1 which was contradictory in consistence and therefore unreliable
 4. That the leaned trial magistrate erred in fact and in law by shifting the burden of proof to the appellant and mis apperceiving and misdirecting himself on the evidence hence arrived at the wrong conclusion.
 5. That, the learned trial magistrate erred both law and facts when he dismissed the defence case which contained the possibility of being framed up without giving cogent reasons.
44. Parties agreed to file written submission and at the time of writing this judgement I only had the submissions of the appellant.
 45. It is the appellant's position that the case for the prosecution is set on evidence that was inconsistent, uncorroborated and inconclusive as far as the charge was concerned and that it could not sustain the conviction. That the court did not satisfy itself of the chain of events. He relied on R vs Silas Magongo Onsero alias Fredrick Namena [2017] eKLR.
 46. On the whether the charge was defective the appellant submitted that the charge sheet spoke about defilement on diverse dates between 12th and 19 th October, 2020. He referred the court to the testimony of the complainant where she stated that the accused had done tabia mbaya to her – and in the same breath said “ Sijui tabia mbaya ni nini” – I do not know what tabia mbaya is. Further that the prosecution ought to have raised specific charges for specific dates but instead left it vague – leading the investigating officer to not investigate the specific dates. He submitted that the charge sheet was defective - and relied on Isaac Omambia V R [1995] eKLR where the court dealt with Section 134 and 137 of the Criminal Procedure Code.
 47. He submitted that the evidence was in variance with the charge and hence the appeal ought to succeed.
 48. On penetration he submitted that the prosecution did not prove penetration as can be seen from the doctor's evidence. He relied on;
 1. Nicholas Mutua Wambua & Another Vs R MSA Criminal Appeal No. 373 of 2006
 2. Daniel Kyalo Lua V R [2016] eKLR
 3. Joel Mwangangi Mwongela Mwendwa V R [2014] eKLR
 49. He submitted that regarding the broken hymen the Doctor said there was old scar - and that in any event broken hymen is not conclusive proof of defilement. He submitted that the trial magistrate had not attempted to reconcile the discrepancies in the evidence of the witnesses which according to him, fatally affected the case for the prosecution. That there was a lot of doubt as to whether the incident actually happened as alleged. He relied on Josiah Afuna Angulus Cr. Appeal 277/2006 (UR) Charles Kiplangat Ng'eno Vs R CR. Appeal 77/2009 (UR) where he submits that the Court of Appeal reconciling contradiction and inconsistencies in the prosecution case rendered the entire evidence on record unbelievable and the accused was acquitted. He also cited Vincent Kasyula Vs R Cr Appeal no. 98/2014.



50. I have carefully considered the record, the submission by the accused and each ground of appeal, it is evident that the following issues arise for determination:-
1. Whether the charge sheet is defective
 2. Whether the prosecution proved the charge of defilement;
 3. Whether the evidence of PW1 was contradictory and inconsistent and unreliable.
 4. Whether the trial court shifted the burden of proof on the appellant.
51. The duty of this court as a 1st appellate court is settled – in a long line of authorities see *Okeno v. Republic* [1973] EA 31 It is to re-evaluate the evidence as given in the trial court – and draw its own conclusion always keeping in mind that it never saw/heard the witnesses. In essence it amounts to a re-trial based on the record.
52. Section 33 of the Sexual Offences Act clearly states that the circumstances surrounding an alleged offence are crucial in determining whether the alleged offence was committed against the victim on by the suspect and also the impact of the offence on the victim hence the final outcome on sentence.
53. It is not in doubt here that the key witnesses on the circumstances of the offence were 2 children aged 12 and 2 and their mother.
54. Regarding PW1 – the complainant – the court conducted the *voire dire* examination as required by section 19 of the Oaths and Statutory Declaration Act and made the following findings:-
The child is of average intelligence she understands the difference between truths and falsehood and importance of telling the truth. However, she does not understand the nature of an oath she will give unsworn evidence and be cross examined
55. The complainant said the incident happened at midday on 12/10/ 2020 outside besides the kitchen. That the accused come, threw her to the ground and did *tabia mbaya* to her. She said she did not know what *tabia mbaya* was – but proceeded to say that the accused took out his thing which he uses to urinate and put it into her urinating thing.
56. She described how accused removed her underwear completely dropped his trousers, lay on top of her and she fell pain, screamed and her brother PW2 came out, found accused on top of her and told him he would report him to her mother. That accused took his bicycle and ran away.
57. That the following day 13/10/2020 her brother told their mother, who beat her and then reported to police.
58. She said she told her aunty Mueni about this incident 2 days later – (14/10/2020) she stated categorically that nothing happened between her and accused on 19/10/2020.
59. The boy gave unsworn evidence – his evidence was simply – that his sister was done *tabia mbaya* by a bad man – he heard her cry and found them behind the water tank doing *tabia mbaya*.
60. Their mother DSK on her part testified that BK(PW2) told her on 22/10/2020 accused did *tabia mbaya* to PW1 . she beat up PW1 – until PW1 told her would tell her the truth.
61. She speaks of two incidents – on 12/10/2020 it happened “ along the way” – meaning a path? Where accused is said to have found both children – and defiled the girl; on 19/10/2020 where he went to the home, took her screaming to behind the tank and defiled her. DSK testified that SWK told her that accused took his penis and inserted in her vagina, yet SWK said she did not know the name of the thing



either in Kikamba, English/Kiswahili. DSK said she examined her daughter's vagina and saw blood, lacerations and wounds. According to the investigating officer – there were 2 incidents- on 12/10/2020 and on 19/10/2020 – that it is the one on 19/10/2020 that the younger brother heard cries, found them and reported to the mother. She said that on each occasion accused lured the minor behind the water tank – inserted his penis into her vagina – that it is only on 19/10/2020 that she felt a lot of pain – and cried out attracting the attention of the 3-year-old brother. From the testimony of PW1 – no incident happened on 19/10/2020. It is also noteworthy that according to the mother the complainant said she was defiled “along the way” on 12/10/2020; yet the testimony of the complainant is that she was defiled at home, beside the kitchen where she was washing utensils. According to the investigating officer the incident of 12/10/2020 happened behind the water tank. This would raise the question as to where the incident happened and which incident was witnessed by PW2.

62. According to the Investigating officer it is only the incident of 19/10/2020 that was witnessed by the child – as it was only on this day that complainant felt a lot of pain and cried – loudly.
63. Looking at the discrepancies, it is evident on the face of the evidence that the victim was reluctant to tell the mother what had happened between her and the accused person. She said the accused threatened her not to tell anyone. It is also evident that it is only after the toddler had told the mother of what he had seen that the mother beat the truth out of the victim, who stated that she also feared for her life if she was to reveal what happened.
64. From the evidence this was a 12-year-old girl. My reading of the record suggests that someone asked her whether she knew what tabia mbaya was . Her response was she did not know. This answer may appear to be contradicted by what she proceeded to describe in great detail as what happened to her. How the appellant found her washing dishes, pulled her behind the tank. She describes that she was lying on her back, that he was on top of her. He removed her panty, dropped his trouser. He inserted his urinating thing into hers. It appears to me that there was an assumption that she knew that the thing that was done to her bears the name ‘tabia mbaya’.
65. It is possible that she had or had not heard the term. She may not have been aware that what was done to her is what is referred to as tabia mbaya, I would therefore not consider what she said to be contradictory. In addition, the appellant cross examined her thoroughly and her testimony stood its ground. It is not in doubt that the child underwent an incident of defilement and since it was not reported immediately the dates could have been forgotten by the child. However, from her own testimony it is clear that she was describing what happened and it did not appear to be from coaching as alleged by the appellant. The toddler could only say that the accused did tabia mbaya to the sister. It is noteworthy that the prosecution did not get him to describe what he saw but the sister confirmed that he had been sleeping and came out to find them and thereafter the accused left. This fact of the child finding them is corroborated by the mother and the victim who state that had it not been for the toddler the incident would have gone unreported.
66. The case for the prosecution is that it happened on both dates 12th and 19th. The victim spoke of one time, the toddler did not elaborate but the mother said that the child told her it was on two occasions and that is what she reported to the police. It is the same evidence that is to be found on all the other records, at police station, on the P3 and PRC . This is the information she took to the police the same day she got from PW1.
67. It is true that the evidence on record speaks of a specific date when specific things were done to her during the period set out by the prosecution of diverse dates between 12th and 19th October 2021. It is a matter of notoriety that the prosecution has the practice of starting the evidence in chief by asking a witness whether they can remember a specific date, time and place and what happened there. The



same formula may not always work for children. A child requires to be given the leeway to tell the story with necessary measured prompts.

68. I have carefully considered the voire dire examination of the victim. I have considered the evidence she gave and the thorough cross examination by the accused person. I draw the conclusion that the victim described what happened to her one of those dates. It is my considered view that the appellant could not have been prejudiced by this because the prosecution appears to me to have taken into account the story of the child victim and to have drawn a time line for the offences committed against her. The charge sheet dates notified the appellant of the timelines for the alleged offences and he ought to have prepared his defence accordingly. Hence, I do not agree with him that the charge sheet was defective.
69. Further there is a consistency in the evidence that that the defilement happened on at least two occasions. Th fact that the victim stuck with one does not rule out the fact that defilement happened.
70. The argument is that the two children gave unsworn evidence and the court ought not to have relied on it. In *Ndung'u V R* (1979) KLR 282 , In *Michael Muriithi Kinyua v Republic*[2002] KECA 315 (KLR) the Court of Appeal had this to say:

“We hold, for the reasons we have advanced that, where a child of tender years is allowed by the court, upon proper investigations under section 19(1) of the *Oaths and Statutory Declarations Act*, to give sworn evidence, there is a requirement, as a rule of practice, that such evidence should be corroborated. It is a sound rule of practice which has stood the test of time and it ought not be disregarded for the sake of fair trial and justice to the offender. That corroboration should be in material evidence implicating the accused and the court ought to direct itself and the assessors as we have earlier shown in this judgment. It however, remains a rule of practice only and, subject to proper warning as we have shown, the court may convict upon such evidence without corroboration.”

71. The evidence of the two children is not totally worthless. It was corroborated by the mother who upon immediate receipt of the report, reported to the police and immediate action was taken. The medical evidence also corroborates the evidence of the victim as it confirms that there was penetration.
72. While the I.O did not investigate beyond the story of the child but relied on what she was told and the medical documents. This simply demonstrates failure on the part of the I.O and does not vitiate the victims’ testimony.
73. Did the medical report corroborate the evidence of the complainant? I perused the P3 form. It states

“There had been defiled on 12/10/2020 and 19/10/2020 by same person the perpetrator called her and when she refused, he pulled her towards the back of the house where he had penile vagina penetration at their home (minor’s home)

The approximate age of injuries was 4 days lacerations on vagina/vulva hymen broken reddening of the vagina whitish discharge.

74. The P3 is completed on 24/10/2020. This was two days after the mother’s observations of the victim’s private parts .The PRC sets out the circumstances of the offence. These are the same circumstances repeated in the P3. The P3 indicates it was filled on 22/10/2020 at 7.00pm on the same day the mother made the report. It indicated the date of incident as 19/10/2020 at 12.00pm
75. This evidence speaks for itself that there was penetration. The P3 appears to have internal contradictions – Though the doctor indicates the incident happened on 2 dates – 12th and 19th – October 2020 , one can see that there was an attempt to change this as the entry by deleting one date



and leaving the date 12/10/2020. Though this was not explained by the prosecution, it cannot be attributed to the child victim.

76. I have considered the defence of the appellant. He told the court that there was a grudge between him and the mother of the complainant and that she owed him Ksh 250. That when he demanded his money is when this case was planted against him.
77. The record will show that he put the questions about some payment to the complainant. When the mother testified, he did not ask a single question about this alleged grudge. If indeed it was the centre of this case, then the question that begs is why he did not ask her about it. By posing this same question the trial court did not shift the burden of proof upon the appellant. The trial court simply pointed out a fact that was glaring. The prosecution did not need to prove or disprove the alleged fact of a grudge.
78. I also considered the evidence of his witness. He could not account for the whereabouts of the appellant at the time of the offence. He also thought the appellant was trying to defraud him when some people said that they wanted Ksh 20,000 so as not to take him to the police. There is nothing to show that these people were doing it on behalf of the complainant. The trial considered this defence and properly disregarded it.
79. Looking at the evidence in its totality – and following analysis of the evidence, the prosecution was required to establish the ingredients of the offence of defilement: age of the victim, penetration and the perpetrator. The court was also required to consider the circumstances of the offence. There is proof the victim was 12 years old; there is evidence that there was penetration, and the perpetrator was known to the complainant, so his identity was not an issue.
80. On the sentence
Section 8 of the Sexual Offences Act Provides for Defilement inter alia
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.
81. Under the Sexual Offences Act the sentence is determined by the age of the victim. S. 8(2) refers to a child of 11 years and below. However, the age of the complainant herein was established to be 12 years at the time of the offence. It is noted that the Act is silent on the age between 11 and 12 years and s. 8(3) provides for the victim aged between 12 and 15 years.
82. Article 50 (2) (p) of *the Constitution* assists this court on what to do. It states
- (2) Every accused person has the right to a fair trial, which includes the right—
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
83. In this case then the appellant would be entitled to the sentence prescribed for a person who defiles a child aged 12 years old under s. 8 (3) of the SOA
84. The law states



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.

85. The totality of the circumstances of the offence point to the fact the victim was defiled by the appellant.
86. In the circumstances I find that the appeal is partly successful.
87. The Conviction is upheld. The sentence is set aside and substituted with a sentence of 20 years' imprisonment which is the minimum sentence provided by s. 8(3) of the Sexual offences Act.
88. When reading the final orders, I pronounced the sentence as 15 years as provided for under s. 8(3) of the SOA. It is clear that s. 8(3) of the SOA provides for the mandatory minimum of 20 years and that was an error.
89. This error is correctible under s. 346 of the CPC which states

“ 346. Errors and omissions in orders and warrants The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this Code, shall be held to render void or unlawful an act done or intended to be done by virtue of that order or warrant, provided that it is therein mentioned, or may be inferred therefrom, that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it.”

90. Hence the final order is that the appeal is partially successful. The conviction is sustained. The sentence is set aside and substituted with the sentence of 20 years imprisonment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH MARCH 2026.

MUMBUA T MATHEKA

JUDGE

SIGNED BY/FOR:

LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA

LADY JUSTICE MATHEKA, TERESIA MUMBUA

