



**Omollo v Republic (Criminal Appeal E066 of 2023)  
[2026] KEHC 4606 (KLR) (24 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4606 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E066 OF 2023  
PJO OTIENO, J  
MARCH 24, 2026**

**BETWEEN**

**ALLAN OLALA OMOLLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon. J K Ng'arng'ar (then CM) in Kitale CMC SO Case No. E203 of 2022 delivered on 24<sup>th</sup> August 2023)*

**JUDGMENT**

1. The appellant was arraigned before the Chief Magistrate at Kitale in Sexual Offences Case No. E0203 of 2022 charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were set out to be that on diverse dates between 5<sup>th</sup> December 2022 and 10<sup>th</sup> December 2022 at [Particulars Withheld] village within Trans Nzoia County, the Appellant intentionally caused his genital organs namely the penis to penetrate into the genital organ namely vagina of EN, a child aged 8 years.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were set out to be that on diverse dates between 5<sup>th</sup> December 2022 and 10<sup>th</sup> December 2022 at [Particulars Withheld] village within Trans Nzoia County, the Appellant intentionally touched the vagina of EN, a child aged 8 years, with his penis.
3. The Appellant pleaded not guilty to the charge, and the matter proceeded to a full trial during which the prosecution called six (6) witnesses. Their evidence may be summarized as follows:
4. The court conducted a voire dire examination on the complainant, who testified as PW1. Upon being satisfied that she possessed sufficient intelligence and understood the duty of telling the truth, the court



- directed that she gives sworn evidence. She stated that she was eight years old and a Grade Two pupil. She recalled that in December 2022, while at home, the Appellant called her. She heeded his summons and went to his house, where the appellant placed her on a bed, removed her clothes, and inserted his “dudu,” which she explained meant his penis, into her private parts. After the act, the Appellant gave her Kshs. 20/- and warned her that if she told anyone he would beat her. She nevertheless informed her mother, who reported the incident. She further stated that the Appellant had previously inserted his “thing” into her vagina and given her Kshs. 5/-, adding that he had done so on three occasions. She further testified that she was later taken to hospital.
5. On cross-examination, she stated that she had since left [Particulars Withheld] School and was now in Matuu. She added that one Madam Lilian informed her to appear before the court and clarified that she does not live with her.
  6. PW2 testified that she was a neighbor of the Appellant. She stated that on 10.12.2022 she received a call from one Lilian, who informed her that PW1 had been defiled. She went to Lilian’s house and found PW1 seated there. PW1 informed her that the Appellant had called her, defiled her, and given her money. Although PW1 claimed that she had been given Kshs. 100, the amount she showed them was Kshs. 50. They then contacted members of the Nyumba Kumi initiative, after which the complainant was taken to hospital. She further stated that PW1 lived with her grandmother about one kilometer from her home. She added that PW1’s father was a drunkard, that she had never seen PW1 attending school, and that PW1 was later taken to a children’s home.
  7. PW3 testified that she was a neighbor of PW1, who lived about ten meters from her home. She stated that on 13.12.2022 at about 9:15 p.m., she was at home when PW2 brought a child to her house and requested that the child spend the night there and that she assists in taking her to hospital. She subsequently took the child to Kapsara, where she met a teacher to whom she handed over the child. She further testified that when she spoke with the child, the child informed her that the Appellant had called her and given her money to buy shoes. She added that she knew the Appellant as the son of one of her neighbors.
  8. PW4 testified that she was an ECD teacher at [Particulars Withheld] School and that the complainant had been her Grade One pupil. She recalled that on 11.12.2022 at about 3:00 p.m., while at home, a neighbor informed her that PW1 had an issue and wished to speak with her. She met PW1, who informed her that the Appellant had defiled her and given her Kshs. 50. PW4 then called PW2 and informed her of what had been reported, and PW2 also spoke with the child. Members of the Nyumba Kumi initiative subsequently rescued the child and later took her to Kapsara Sub-County Hospital. She added that she knew the Appellant, although not for a long time.
  9. PW5 testified that he was the investigating officer. He recalled that on 14.02.2021, while on duty, members of the public accompanied by a Children’s Officer came to the police post and informed him that they suspected that PW1 was being defiled by the Appellant. He advised them to take the child to hospital for examination, which they did. Members of the public later brought the appellant to the police post. He conducted investigations which established that PW1 was ten years old, after which he charged the appellant. He produced the age assessment report, which was marked as PEXH 4.
  10. On cross-examination, he stated that PW1 was examined in the absence of the Appellant and that the Appellant himself was not examined. He further stated that although the girl initially said she was eight years old, medical examination later established that she was ten years old.
  11. PW6, a clinical officer at Kapsara Health Centre Sub-County Hospital, testified that he examined the genitals of PW1 and established that she had pus present, bruises on the outer labia majora, and a broken hymen that appeared old, confirming earlier penetration. He added that there were blood stains



- and infection in the urine. However, no sexually transmitted disease was detected and the swab test revealed no spermatozoa. He stated that he treated the child and administered preventive medication, and that he also filled the relevant medical assessment form.
12. On cross-examination, he stated that PW1 walked into the facility and that he did not observe any blood or discharge in the urine sample.
  13. The testimony of PW6 marked the close of the prosecution's case. The court ruled that a prima facie case had been established and accordingly placed the accused on his defence.
  14. The Appellant testified as the sole defence witness. In his sworn testimony, he stated that on 05.12.2022 he was at home. Being a Sunday, he attended church in the morning and returned home at about 3:00 p.m. He further stated that on 10.12.2022, which he described as a Friday, he attended a church meeting that takes place every Friday, where he usually arrives at about 1:00 p.m. and leaves between 4:00 p.m. and 6:00 p.m.
  15. On cross-examination, he stated that he attends the Salvation Army Church.
  16. The Appellant's testimony marked the close of the defence case. Judgment was subsequently delivered on 24.08.2023, whereupon he was convicted and sentenced to twenty (20) years' imprisonment on the main count.
  17. Dissatisfied with the judgment of the trial court, the Appellant lodged the present appeal seeking to have the conviction quashed and the sentence set aside. The appeal is premised on the grounds that he pleaded not guilty; that the element of penetration was not proved; that the age of the alleged victim was not established beyond reasonable doubt; that his rights under Article 49(f) of *the Constitution* were violated; and that the prosecution's evidence was riddled with contradictions and inconsistencies.
  18. From the record, only the Appellant filed submissions in support of the appeal, which may be summarized as follows:

### **Appellant's Submissions**

19. On the ground that the element of penetration was not proved, the Appellant submits that the clinical officer testified that he was not certain who occasioned the injuries observed on the complainant. The Appellant further argues that the evidence of the clinical officer ought not to have been relied upon because the witness stated that he examined the complainant for suspected defilement and not specifically for penetration. According to the Appellant, such evidence does not conclusively establish penetration. In support of this contention, the Appellant relies on Samuel Barasa v R, Criminal Appeal No. 2960 of 2012 and Vincent Yatich v R, Criminal Appeal No. 88 of 1992, for the proposition that where the accused person is not subjected to medical examination, the evidence may be insufficient to sustain a conviction.
20. On the ground that the age of the alleged victim was not proved, the Appellant submits that whereas PW1 testified that she was eight (8) years old, the investigating officer stated that PW1 was ten (10) years old. The Appellant argues that the prosecution failed to conduct a proper age assessment of the complainant and instead relied on hearsay in estimating her age. He relies on Hillary Nyongesa v R, Eldoret Criminal Appeal No. 129 of 2009, for the proposition that where the age of the complainant is not conclusively proved, a conviction ought not to be sustained.
21. On the ground that his rights under Article 49(f) of *the Constitution* were violated, the Appellant submits that he was arrested on 14.12.2022, a Tuesday, and was produced before the court on 16.12.2022, a Friday, in contravention of the constitutional requirement that an arrested person be



arraigned in court as soon as reasonably possible, and in any event not later than twenty-four (24) hours after arrest.

22. On the ground that the prosecution's case was marred by contradictions and inconsistencies, the Appellant points to several alleged inconsistencies in the evidence. First, he contends that PW1 stated at one point that she was coming from a children's home, later mentioned that she was coming from home, and subsequently stated that she was not coming from home. The Appellant further argues that the complainant's testimony that it was madam who instructed her to come to court suggests that her testimony may have been influenced.
23. The Appellant also points to inconsistencies regarding the amount of money allegedly given to the complainant. He submits that the complainant initially stated that she was given Kshs. 20/-, later mentioned Kshs. 5/-, while PW2 referred to an amount of Kshs. 50/-.
24. Further, the Appellant questions why the complainant was taken to the home of PW3 instead of being taken directly to hospital, and reiterates his contention that no proper age assessment was conducted to establish the complainant's age.
25. The Appellant also refers to the testimony of PW6, the clinical officer, whom he argues gave contradictory evidence. He points out that PW6 testified in examination-in-chief that the complainant's private parts had pus and blood stains and that there was infection in the urine. However, during cross-examination, the witness stated that he did not observe any blood or discharge in the urine sample and that the pus was only observed under a microscope.
26. The Appellant submits that where the prosecution's evidence is riddled with contradictions and inconsistencies, such evidence becomes unreliable and any doubt arising therefrom ought to be resolved in favor of the accused person. In support of this proposition, he relies on *Richard Appera v R* [1981] CA 945 and *Augustine Njoroge Ritho v R* [1986].

### **Issues, Analysis, and Determination**

27. Having considered the grounds of appeal, the record of the trial court, and the submissions of the Appellant, this Court identifies the following issues for determination:
  - a. Whether the ingredients of the offence of defilement were proved by the prosecution against the Appellant beyond reasonable doubt;
  - b. Whether the Appellant's rights under Article 49(1)(f) of *the Constitution* were violated; and
  - c. Whether the evidence of the prosecution witnesses was fraught with contradictions and inconsistencies.

### **Analysis**

#### **Whether the ingredients of the offence of defilement were proved against the Appellant beyond reasonable doubt**

28. Section 8(1) of the *Sexual Offences Act* stipulates that any person who engages in an act that results in the penetration of a child shall be guilty of the offence known as defilement.
29. In *George Opondo Olunga v Republic* [2016] eKLR, the Court held that to establish defilement, the prosecution must prove three essential elements: the age of the victim, penetration, and proper identification of the perpetrator.



### **Age of the victim**

30. The Court of Appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR emphasized that proof of the victim's age is an essential element, noting that the prescribed sentence depends on the age of the child.
31. In *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the Court observed that the age of the victim may be proved through credible documentary evidence, such as a birth certificate or baptismal card, by oral evidence from the child if sufficiently intelligent, by testimony of parents or guardians, or through medical evidence. The Court stressed that the evidence, regardless of its form, must be credible and reliable.
32. The Appellant contends that the age of the victim was mere guesswork. However, PW5 produced an Age Assessment Report, marked PEXH 4, which placed PW1's age at ten (10) years.
33. The Court finds that this report constitutes sufficient and credible proof of the victim's age.

### **Penetration**

34. Section 2 of the *Sexual Offences Act* defines penetration as the act of partially or fully inserting the genital organ of one person into the genital organs of another person.
35. Section 124 of the *Evidence Act*, Cap 80, provides that the testimony of a victim is sufficient to establish penetration, provided the Court is satisfied that the victim is speaking the truth.
36. PW1 testified that in December 2022, the Appellant called her to his house, placed her on his bed, removed his clothes, and inserted what she described as "dudu" (the Appellant's penis) into her private parts. She stated that the Appellant warned her not to tell anyone and gave her Kshs. 20/-. She further testified that the Appellant had committed the act on three separate occasions, previously giving her Kshs. 5/-.
37. PW6, a Clinical Officer, corroborated her account, testifying that he examined PW1's genitals and observed pus, bruises on the outer labia majora, a broken and old-looking hymen, blood stains, and infection in the urine.
38. The Appellant challenged PW6's evidence, noting that on cross-examination the officer stated he did not observe blood or discharge in the urine sample. The Court has considered the testimony and finds that the apparent discrepancy relates to different observations: the blood stains referred to by PW6 were on the vagina, whereas the urine sample itself did not show discharge.
39. PW6's evidence therefore corroborates the complainant's testimony that penetration occurred. The prior acts of defilement, as recounted by the complainant, are further supported by PW6's observation that the hymen was broken and old-looking.
40. The Court is satisfied that the prosecution proved the element of penetration beyond reasonable doubt.

### **Proper identification of the perpetrator**

41. It is well established that identification of a perpetrator must be certain and free from error. In *Mercy Chelagat v R* [2022] eKLR, the Court observed that identification evidence must be positive and reliable.



42. In the instant case, the victim testified that she had been defiled by the Appellant on multiple occasions and positively identified him as the person standing in the dock. A holistic review of the evidence further indicates that the Appellant was a neighbor of the complainant. PW3 confirmed that she lived nearby and stated that she knew the Appellant as the son of her neighbor.

43. This evidence establishes that the Appellant was positively and reliably identified as the perpetrator.

**Whether the Appellant’s rights under Article 49(1)(f) of *the Constitution* were violated**

44. The record shows that the Appellant was arrested on 14<sup>th</sup> December 2022 (Wednesday) and produced in court on 16<sup>th</sup> December 2022 (Friday).

45. It is therefore true that the Appellant was produced in court more than twenty-four hours after arrest, in contravention of Article 49(1)(f) of *the Constitution*, which provides:

“An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than—

- (i) twenty-four hours after being arrested; or
- (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.”

46. However, a breach of Article 49(1)(f) of *the Constitution* does not, in itself, vitiate a trial. An aggrieved party may seek redress by pursuing compensation or other remedies against the State as provided under *the Constitution*. In *Julius Kamau Mbugua v Republic* [2010] KECA 109 (KLR), the Court of Appeal held:

“Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial-related prejudice to the Appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the Appellant was charged. The alleged unlawful detention does not exonerate the Appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72(6). That is the appropriate remedy which the Appellant should have sought in a different forum.”

47. Accordingly, the Appellant’s request for acquittal on the basis of unlawful detention fails.

**Whether the evidence of the prosecution witnesses was fraught with contradictions and inconsistencies**

48. In *Dickson Elia Nsamba Shapwata & Another v Republic*, Cr. Appeal No. 92 of 2007, the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court must decide whether inconsistencies and contradictions are minor or whether they go to the heart of the matter.”

49. Aside from the discrepancy regarding the clinical officer’s evidence, other inconsistencies cited by the Appellant include the amount of money allegedly given to the complainant and where she came from when she appeared before court. The Court finds these discrepancies to be immaterial and not



indicative of any lack of truthfulness on the part of the complainant. They do not go to the core of the act of defilement.

50. The Appellant further contended that the complainant's testimony, indicating that she was asked by "madam" to come to court, suggested that she had been coached. The Court, however, finds that the complainant was merely informed by madam of her expected appearance to give evidence, and there is no indication that she had been coached.
51. In the end, the Court finds that the prosecution proved all the ingredients of the offence of defilement against the Appellant beyond reasonable doubt.
52. The appeal is accordingly devoid of merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 24<sup>TH</sup> DAY OF MARCH 2026.**

**PATRICK J O OTIENO**

**JUDGE**

