



**Kiptoo v Republic (Criminal Appeal E188 of 2022)
[2026] KECA 796 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 796 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E188 OF 2022
JM MATIVO, PM GACHOKA & WK KORIR, JJA
APRIL 24, 2026**

BETWEEN

DAVID TOROITICH KIPTOO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal by the judgment of the High Court of Kenya at Eldoret (H.A. Omondi, J.) delivered on 21st November 2019 in HCCRA No. 151 of 2015)

JUDGMENT

1. David Toroitich Kiptoo, the appellant herein, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 9th February 2013 at 1800 hours, at (Particulars withheld) Village, (Particulars withheld) Division, Marakwet East, within Elgeyo Marakwet County, the appellant intentionally and unlawfully committed an act which caused penetration, by use of his penis, into the vagina of M.J.K., a girl aged 9 years old.
2. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 9th February 2013, at 1800 hours, at (Particulars withheld) Village, (Particulars withheld) Division, Marakwet East, within Elgeyo Marakwet County, the appellant committed an indecent act with a child namely M.J.K., a girl aged 9 years, by causing his penis to come into contact with the vagina of M.J.K.
3. The appellant was arraigned before the trial court in the Iten Senior Principal Magistrate's Court Criminal Case (S.O.) No. 66 of 2013 where he pleaded not guilty to both counts. Upon full trial, the appellant was convicted on the main charge of defilement and sentenced to life imprisonment.



4. The appellant was dissatisfied with those findings. He lodged an appeal in the Eldoret High Court HCCA No. 151 of 2015. In her judgement dated 21st November 2019, Omondi, J. (as she then was), dismissed the appeal in totality. It is these findings that have precipitated the present appeal.
5. The appellant filed his notice of appeal dated 5th December 2019. He also filed supplementary grounds of appeal attached to his written submissions raising two grounds of appeal. In summary, the appellant complained that the minor's age was not proved to the required standard and the two courts below failed to take into account mitigating factors before sentencing him. For those reasons, the appellant prayed that his appeal be allowed by quashing the conviction and setting aside the sentence so that he is set at liberty.
6. The appeal was canvassed by way of written submissions on 18th February 2026. The appellant represented himself while Principal Prosecution Counsel Miss. Eunice Ronoh, acted for the State.
7. The appellant's undated written submissions argued that on the complainant's age, while she testified that she was nine 9 years old, the trial court relied on an exhibit belonging to Hillary Kipkoech. In his view, that demonstrated that age was not proved to the required standard. He urged this court to quash the conviction for that reason. Finally, on sentence, the appellant urged this Court to take into account that he was a first offender and had no previous criminal records. He thus ought to have benefited from the exercise of discretion in the event the conviction was upheld. For those reasons, he prayed that his appeal be allowed.
8. The respondent opposed the appeal. Counsel filed written submissions and a list of authorities dated 11th February 2026. Principal Prosecution Counsel submitted that all the ingredients to the offence of defilement were proved beyond reasonable doubt. Lastly, on sentence, it was submitted that the same was lawful and ought to be upheld. Counsel's prayer was that the appeal be dismissed.
9. The jurisdiction of this Court to hear second appeals is set out in section 361 of the Criminal Procedure Code. This Court in *Dzombo Mataza vs. Republic* [2014] eKLR enunciated our role as a second appellate court in the following words:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court...By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”
10. The prosecution called seven witnesses. The summary of the evidence tendered is as follows: 9-year-old PW1, M.J.K., the complainant herein, testified that she was a class 4 pupil at (Particulars withheld) Primary School, born in 2004. She recalled that on 9th February 2013 at 6:00 p.m., she was at home in the company of her brother and neighbor, both called CK . The appellant, whom she recognized as her father's brother, collected her and took her to the homes of Kimosop, Kimaiyo and Rima. He asked her to help him light fire with the firewood he was carrying. She saw him with the help of a lamp that shone in the house. They however didn't enter those houses as they were all locked.
11. While at Kimaiyo's home, PW1 complained to the appellant that she had bruised her leg. He lured her with a sweet but she threw it away. He then held her throat, hit her on her chest and shoved her to the ground. He threatened to kill her. He then removed his trouser, removed her underwear and sexually assaulted her. While this was happening, one TK , PW2, heard PW1 crying on his way home. He tried



- to rescue her by pulling her hand. However, the appellant grabbed PW2's legs, causing him to fall down. The appellant berated him, calling him a dog. In the process, PW2 ran away together with PW1.
12. On arrival at PW2's home, PW1's brother CK picked her and took her to their home. However, she could not eat as her throat was injured from the scuffle she had with the appellant. The following day, PW1 was taken to hospital by her brother. She was referred to Kapsowar Hospital where she was treated and visited by her mother PW5 Pricilla Chemtai Chebet. She later recorded a statement at the police.
 13. 16-year-old PW2 testified that he was a class six student at Charus Primary School. He knew the appellant as their neighbor. On that fateful day, PW2 visited PW1's brother CK to borrow a book. He found PW1, CK, Kirov and a baby. It was not dark. However there was a lit lamp as they were cooking dinner. As they were having a chat, the appellant, whom he referred to as Marado, knocked on the door, entered and sat down. He looked visibly unhappy. He asked PW1 to help him light firewood in his house. He instructed the other occupants not to finish food for them as they would return after lighting the fire. CK asked PW2 not to leave the house until PW1 and their uncle appellant returned.
 14. PW1 and the appellant left. About 7:00 p.m., PW2 left the house to call the dog belonging to PW1. In the process, PW2 heard a child crying. He then heard the child saying: 'stop killing father.' PW2 investigated and found the appellant lying on top of PW1. He could see that it was the appellant defiling PW1 due to proximity between himself and the crime scene. Immediately, PW2 rescued PW1 and took her to his home. The appellant ran away while PW1 took her inner wear. While there, PW2's sister applied oil to PW1's neck. PW2 then told PW1's brother who picked PW1 and went home. The following day, the appellant was arrested and taken to the police station.
 15. PW3 APC BenCK Komur received the appellant at Muron AP Camp on suspicion of having defiled PW1. He noticed that the appellant had been physically assaulted by the mob that had arrested him.
 16. PW4 CPL Nelson Gibore received the appellant while on duty on 11th February 2013. He conducted investigations, interrogated witnesses, recorded witness statements and collected the evidence. He then preferred the charges against the appellant. He adduced PW1's clinic card in evidence.
 17. PW5, the appellant's sister in law, testified that PW1 was 9 years old when the offence was committed. That evidence was corroborated by that of PW1's clinic card. She testified that on 9th February 2013, she attended a ceremony leaving her children at home. When she returned on 10th February 2013, she was informed what had transpired. PW5, together with other villagers, arrested the appellant and escorted him to Muron AP Camp. She then visited PW1 at the hospital. Later, she recorded her statement at the police station. She recalled that the appellant on one occasion stole her radio.
 18. PW6 Agnes Chepkoech Chebii, a clinical officer at Kapsowar Hospital, testified that she examined PW1. She found that her clothes were torn and stained with a whitish blood fluid. She had lacerations on her labia majora and her hymen was torn. She also found semen on her labia. The approximate age of injuries on her private parts were 2 days old. She had bruises on her interior neck. She concluded that PW1 had been defiled. She assessed that the minor was 8 years, 8 months old at the time of the offence. She produced her P3 form as evidence.
 19. PW7, Mary Kiboi, a clinical officer based at Chebimet sub-County Hospital, produced the appellant's P3 form that she had signed. Her observations were that he had torn clothing after being beaten by members of the public. He was limping from the injuries he had sustained. She did not find any linkage between the appellant and the commission of the offence. From the appellant's treatment notes produced in evidence, it was noted that the appellant sustained minor facial injuries and wounds on the occipital region, left index finger, left elbow joint and edema on his upper lip. His injuries, classified as harm, were treated.



20. At the close of the prosecution's evidence, the trial court formed the opinion that the appellant had a prima facie case to answer. He was placed on his defence. His sworn testimony was that the complainant's father was his elder brother. He recalled that they fought on several occasions and thus had a strained relationship. Resulting from this, the appellant lived with their mother from 2013. In 2009, PW5 had him arraigned in court for stealing her radio. He stayed in police custody for four months.
21. The appellant testified that he continued to fight with his brother as he went about his daily activities. Come 9th February 2013, the appellant was at his home alone. On 10th February 2013, the appellant met KPR officials upon their request. They were accompanied by three other boys. Suddenly, PW5 emerged screaming at him prompting villagers to physically assault him. He was rescued by KPR officials and taken to Maron Camp, placed in the cells and later transferred to Kapsowar Police Station. He was taken to Chebimet Hospital where he was treated and discharged. The following day, the appellant was arraigned in court. He denied committing the offence he had been charged with maintaining that he was framed because of the grudge PW5 and her husband had with him. He accused the prosecution witnesses of lying adding that PW6 had been bribed to give false information.
22. DW2 Philemon Angii from (Particulars withheld) Location testified that on 25th January 2013, during an initiation ceremony, the appellant stole beans belonging to PW5. He was arrested for committing the offence. However, she was not aware of the charges leveled against the appellant.
23. For the offence of defilement to sustain a conviction, the prosecution must prove the following conjunctive elements: the age of the complainant, penetration, and the identification of the perpetrator. On the complainant's age, PW1 testified that she was born in 2004. This was corroborated by her P3 form and her mother, PW5's evidence, who testified that she was 9 years old at the time of the offence. Though it is true that what is on record is the clinic card belonging to Hillary Kipkoech, that did not defeat the other evidence of the minor on record that proved the complainant's age.
24. Turning to penetration, PW6, a clinical officer testified that she saw the minor two days after she had been assaulted. From her observations, the complainant's clothes were torn and stained with a whitish bloody fluid. She had lacerations on her labia majora and her hymen was torn. She also found semen on her labia. She had bruises on her interior neck. She concluded that PW1 had been defiled. We find that the ingredient of penetration was proved in line with section 2 of the *Sexual Offences Act*.
25. What of the identity of the perpetrator? From the evidence, PW1 knew the appellant very well. He was her uncle, a fact confirmed by PW5 and the appellant himself. On 9th February 2013, PW1 testified that the appellant came to their home. He was seen with the help of natural light together with the light emanating from the lamp. He found her with PW2 who also corroborated this fact. According to PW1 and PW2, the appellant requested PW1 to accompany him to light firewood at his home. PW1 left with the appellant.
26. On reaching Kimaiyo's, the appellant gave PW1 a sweet but she threw it away. The appellant held her throat, hit her on her chest and shoved her to the ground. Threatening to kill her, the appellant removed his trouser, removed PW1's underwear and sexually assaulted her. In the process, PW2 heard a child screaming. On investigating, he caught the appellant red handed assaulting PW1. PW2 rescued PW1, took her to his home where she was picked by her brother and taken to the hospital.
27. From the evidence on record, PW1 and PW2 were credible witnesses.
They gave their evidence that was consistent and remained unshaken even during cross examination. We find that they were truthful witnesses. We do not think the charges were framed to settle scores with the appellant. At the risk of belaboring on this issue, PW1 and PW2 knew the appellant. This



was a case of recognition rather than identification. It leaves little to no room for mistaken identity. We therefore come to the conclusion that the aspect of the identity of the perpetrator was proved beyond reasonable doubt and shall not disturb that finding.

28. Turning to the sentence meted out, the appellant was sentenced to life imprisonment by dint of section 8 (2) of the *Sexual Offences Act*. The Supreme Court in *Republic vs. Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)* and *Republic vs. Manyeso [2025] KESC 16 (KLR)* affirmed that mandatory sentences are lawful and courts have no discretion to impose no less than what is prescribed in statute.
29. Accordingly, we find that the appeal herein lacks merit. We uphold the conviction and affirm the sentence meted out to the appellant.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF APRIL, 2026.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

