



REPUBLIC OF KENYA



**Kamau v Republic (Criminal Appeal E046 of 2023)
[2026] KEHC 6150 (KLR) (6 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E046 OF 2023**

JM CHIGITI, J

MAY 6, 2026

BETWEEN

MARTIN MBURU KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars being that on the diverse dates of December 2021 and 11th day of February 2022 at [Particulars withheld] in Kigumo sub county of the Muranga county, the accused person intentionally caused his penis to penetrate the vagina of JWW a child aged 11 years.
3. In the alternative count, the accused person was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The case proceeded into a hearing that culminated in a judgment dated and delivered on 5th April 2023 Sexual Case No. E014 of 2022, wherein the appellant was convicted and the sentence to serve thirty (30) years imprisonment after the court considered the mitigation.
5. The prosecution called 4 witnesses while the appellant gave an unsworn statement.
6. Being dissatisfied with the judgment he challenges both the conviction and the sentencing.
7. It is his case that the prosecution did not prove his case beyond reasonable doubt and that he wasn't identified.
8. He argues that he was not afforded legal representation.



9. He advances this argument through Article 50 (2) of *the Constitution* of Kenya states:
- Every accused person has the right to a fair trial, which includes the right—
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly.
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.
10. Article 50 (2) (g) of *the Constitution* of Kenya (2010) guarantees every accused person the right to legal representation. This right is further reinforced by Article 50 (2) (h), which provides that if substantial injustice would result from the lack of legal representation, the State should provide such representation.
11. He places reliance in the case of *Katana & another v Republic (Criminal Appeal 8 of 2019) /20221 KECA 1160 (KLR)*, the Court of Appeal at Malindi stated at paragraph 6 that:
- “The operative circumstance that triggered the necessity of legal representation in criminal proceedings arising from the examination of Articles 50(2)(g) and (h) of *the Constitution* and decisions of the court was where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person or and the incapacity and inability of the accused person to participate in the trial. It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since the demanded it.” (Emphasis applied).
12. It is a Constitutional right for an accused person to be informed promptly of his right to choose, and be represented by, an advocate.
13. The Appellant argues that he was not represented by counsel during the trial, despite facing serious criminal charges carrying a potential life sentence. Defilement is a grave offence, and the complexity of such cases necessitates legal expertise, particularly because of the severe penalties involved.
14. He argues that this affected his ability to appreciate evidence, to challenge evidence and to mitigate.
15. He relies on in the case of *Republic v. Karisa Chengo & 2 others (2017)eKLR*, the Supreme Court of Kenya emphasized the principle that legal representation is fundamental to ensuring that justice is not only done but seen to be done. The court noted that in cases involving complex matters of law, the absence of legal counsel could result in a miscarriage of justice.
16. On another front he argues that the prosecution did not prove that there was penetration under Section 8 (1) (2) of the *Sexual Offences Act*, No. 3 of 2006.
17. According to Section 2 of the *Sexual Offences Act*, penetration is defined as “the partial or complete insertion of the penis into the vagina, mouth, or anus.” The law establishes that proof of penetration is crucial for a conviction of sexual assault, as it substantiates the claim of sexual violation.
18. He invites the court to consider the fact the complainant continued attending school and was not bleeding even after the allegations of repeated defilement.
19. He places reliance in the case of *Julius Kiunga M’mbirithi v Republic (2019] eKLR*, the court held that a significant delay in medical examination without proper explanation could weaken the probative



- value of the medical evidence, thereby creating doubt as to whether the offence was committed in the manner alleged.
20. According to him the delay of 9 days in seeking medical attention and that the P3 did not show any abnormality in her genitalia affected the probate value of the evidence. The unexplained delay according to him is fatal.
 21. In the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR, the court quashed a conviction for defilement where there was an unexplained delay in the reporting of the alleged crime and a subsequent delay in the medical examination. The court held that such delays, when not satisfactorily explained, undermine the credibility of the prosecution's case.
 22. Given the passage of time, there is no guarantee that the physical findings noted in the medical report are directly linked to the alleged offence.
 23. In sexual offence cases, the case of *Republic v David Otieno Okumu* (2004) eKLR held that the integrity of evidence is critical, and any delay in gathering medical evidence may raise reasonable doubt about whether the offence occurred as alleged.
 24. In this case, the nine-day delay creates a significant risk that the findings of the medical examination are not reflective of the alleged defilement and therefore cannot be relied upon to sustain the conviction according to him.
 25. In the front of the sentence he argues that the same did not consider the mitigation and it is harsh.
 26. Reliance is placed in the case of *Francis Karioko Muruatetu & Another v. Republic* (2017 eKLR, the Supreme Court of Kenya held that sentencing should take into account the circumstances of each case, including mitigating factors, and that mandatory minimum sentences can, in some cases, be unconstitutional. While this ruling initially applied to murder cases, the principle that sentences should be individualized and fair applies broadly to all criminal cases, including those involving sexual offences.
 27. The Kenyan Judiciary's Sentencing Policy Guidelines, includes retribution, deterrence, rehabilitation, and restoration. In the present case, the imposition of such a lengthy sentence may not serve the rehabilitative goals of sentencing, particularly where the offender has expressed remorse and demonstrated the potential for rehabilitation.
 28. The Appellant prays that this court exercises its discretion to reduce the sentence to a more appropriate term, in line with the objectives of justice, fairness, and rehabilitation.

On its part, the respondent opposes the appeal.

29. It argues that though the appellant was not informed of the right to legal representation, he participated in the proceedings and cross-examined witnesses effectively.
30. He did not suffer any prejudice.
31. It is its case that the delay in reporting was sufficiently explained.
32. PW1, the minor explained that she did not tell anyone what the accused was doing as she was afraid. PW2, the grandmother of the minor testified that she was called to school that her granddaughter had fainted. She went to the school, the minor was attended to at the local dispensary and was given medication.



33. The next day, PW was then called again to school as the minor had fainted. Disturbed, she decided to take her to Kigumo hospital and that is when the counsellor at the facility spoke to the minor where she revealed what had happened and necessary action was then taken.
34. This delay is well explained and the results of the medical evidence proved that she had been defiled.
35. The minor was also able to give cogent evidence that showed she was defiled on several occasions by the appellant who she was able to identify.
36. In the issue of sentencing the court considered all factors as appears on page 31 of the record of appeal.
37. The jurisprudence that emerged from Muruatetu on mandatory and minimum sentences has since been given a new lease pursuant to the Supreme Court decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) where the court held that there was a difference between minimum and mandatory sentences and the Sexual Offences Act applied to minimum sentences which issue had not been brought before it for determination.
38. It submits that the law on Sexual Offences remains that the court is to go with the provisions of law until such a time when Parliament makes an amendment.

Analysis and determination:

39. Following are the issues for determination:
 - i. Whether there was penetration.
 - ii. Whether the lack of legal representation is fatal.
 - iii. Whether the accused was identified.
 - iv. Whether the sentence was excessive.
 - v. Whether the appeal has merit.
40. This being a first appeal, the duty of the court was well stated in Okeno v Republic [19721 EA 32 thus:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post (1958)1 E.A 424. "

i. Whether there was penetration:

41. The ingredients of the offence of defilement must have the following ingredients: identification of the perpetrator, age of the victim and proof of partial or full penetration. (see section 81(1) of the Act.) All the three (3) ingredients must be proved in order to sustain a conviction. (see the case of George Opondo Olunga v Republic (2016) eKLR. In the present case, the age of the complainant.



42. Section 2 of the Act defines penetration as “The partial or complete insertion of the genital organ of one person into the genital organ of another person”. The crucial question in this case is, was penetration proved?
43. In the instant appeal, the court is satisfied that the appellant was positively identified by the complainant through the exposure and the proximity that was availed by the repeated defilement.
44. The penetration was proven through the medical evidence of the doctor.
45. The age of the child is not in doubt.
46. Though the appellants was not accorded representation, this court is satisfied from the proceedings that the appellant appreciated the proceedings.
47. I say so because he was able to take plea effectively. Over and above that I have looked at the cross examination that he mounted against all the witnesses. I have also noted that the app raised and brought out mitigation at the end of the trial.
48. There is no demonstrated demonstration of the prejudice that he suffered for the lack of representation is argued.
49. The appellant also raises an issue that the complaint took very long before seeking medical attention thereby watering down the evidence.
50. I find that the delay in reporting was sufficiently explained. PW1, the minor explained that she did not tell anyone what the accused was doing as she was afraid. PW2, the grandmother of the minor testified that she was called to school that her granddaughter had fainted. She went to the school, the minor was attended to at the local dispensary and was given medication.
51. The next day, PW 2 was then called again to school as the minor had fainted. Disturbed, she decided to take her to Kigumo hospital and that is when the counsellor at the facility spoke to the minor where she revealed what had happened and necessary action was then taken.
52. According to PW3, 11/2/22 the complainants age was estimated as 9 years. It was his evidence that the patient had an old broken hymen and there was white blood cells on the urinalysis which is an indication of infection. The HIV test was negative. He produced the P3 form - exhibit 1, Treatment notes - exhibit 2 PRC form - Exhibit 3. This is sufficient to prove that the offence had been committed.
53. The minor was also able to give cogent evidence that showed she was defiled on several occasions by the appellant who she was able to identify.
54. I have examined the minor and she seems not to understand the meaning of giving evidence under oath though she understands the duty to tell the truth.
55. She gave her account as follows; “While I was at my grandmother while going to collect milk the accused person used to follow me. When he got hold of me, he could take me to the bushes where he could remove my clothes and lay on me. He took me to the bushes several times. He could insert his thing for urinating in my place for urinating and I could bleed. He used to insert his organ which is in between his legs. I used to know his name. He is called Martin. He used to stay at the place where I was going to collect milk. He had his own house. I used to go collect milk from Giathi village. The accused had sexually had sexual intercourse with me on several occasions.



56. I have looked at the sentencing, and I find that the same is sound and in proportion to the offense and within the law section of the sexual offenses act, and I see no reason or justification to interfere with it and I saw hold.
57. The court considered all the factors around their crime and also the circumstances as set out by the witnesses, the age of the complainant and the mitigation in arriving at a sentence and I see no need or the justification or reason to set it aside.

Determination;

The appeal lacks merit.

Order:

The appeal is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ITEN THIS 6TH DAY OF MAY 2026.

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J. CHIGITI (SC)

JUDGE

