



REPUBLIC OF KENYA



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**Wetoto v Republic (Criminal Appeal E093 of 2022)  
[2025] KEHC 18931 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E093 OF 2022  
AC BETT, J  
DECEMBER 19, 2025**

**BETWEEN**

**JOHN SIFUNA WETOTO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of J.R.Ndururi P.M dated/delivered in Kakamega CMC SO No E104 of 2021 on 6th July 2022)*

**JUDGMENT**

**Background**

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. The particulars of the said offence were that on the 13th day of June 2021 at [Name withheld] village in Navakholo Sub-County within Kakamega County, the Appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of Z.B., a girl child aged 8 years.
2. The Appellant denied the charges, and after a hearing, during which the prosecution called seven (7) witnesses, he was convicted of the said offence and sentenced to life imprisonment.
3. Aggrieved by the conviction and sentence, the Appellant lodged this appeal in which he set out the following grounds of appeal;
  1. That, the learned trial magistrate erred in law and fact when he convicted the Appellant in the instant case, yet failed to note that the trial was unfair.
  2. That, the learned trial magistrate erred in both law and fact when he convicted and sentenced the Appellant herein to life imprisonment and yet failed no note that the prosecution witnesses were incredible and unreliable rendering the conviction unsafe.



3. That, the learned trial magistrate erred in both law and fact when he founded a conviction on insufficient evidence without adducing evidence of a key witness named by PW2 as the person who had custody of PW1 when PW2 was away.
4. That, the learned trial magistrate erred in law and fact when he convicted the Appellant in the instant case yet penetration was not proved against the Appellant.
5. That, the learned trial magistrate erred in both fact and law when he convicted the Appellant and yet defilement was not conclusively proved against him.
6. That, the learned trial magistrate erred in law and fact when he convicted and sentenced the Appellant herein to life imprisonment, an inhumane, torturous, oppressive and degrading punishment contrary to *the Constitution*.
7. That, other grounds may be adduced at the hearing of this appeal.

### **Prosecution's Case**

4. The victim was Z.B., a minor who gave an unsworn statement after voire dire. She stated that on 13<sup>th</sup> June 2021, she was taken by the Appellant, whom she knew as the grandfather, to a maize plantation. The grandfather raped her, putting her on the ground and lying on her. She was wearing clothes, was undressed, and was instructed not to disclose the fact to anyone. She left the plantation and returned home, finding no one there. She stated that it was the third time the Appellant had raped her. She informed her elder sister, Neshi, and she was taken to the hospital. Her evidence was corroborated by the other prosecution witnesses and by the medical reports admitted into evidence.

### **Defence Case**

5. The Appellant gave unsworn testimony in his defence and denied committing the offence. He stated that he was framed.
6. The appeal was canvassed through written submissions.

### **Appellant's Submissions**

7. The Appellant submits that the trial court violated Article 50 of *the Constitution* and Criminal Procedure Code (CPC) provisions, specifically Section 214 CPC. He argues that the charge was amended from incest contrary to (Section 20(1)) to defilement contrary to (Section 8(1), 8(2)) of the Penal Code without recalling witnesses, denying him his rights under Section 214(ii) to demand further cross-examination. He relies on the case of Rattiram v State of M.P. (India), in which a three-Judge bench held that fair trials must eliminate prejudice and injustice, a standard which he argues was not met by the trial court, which was in breach of Article 50(2)(k), prejudicing the unrepresented Appellant. He argues that the court's failure to enforce Section 214 of the CPC exacerbated his disadvantage and undermined the fairness of the trial.
8. The Appellant also submits that the prosecution withheld P3, PRC, and age assessment forms in violation of Article 50(2) of *the Constitution*. He relies on the following cases: Thomas Patrick Gilbert Cholmondeley v Republic, where he submits that the Court of Appeal mandated pre-trial disclosure of all relevant materials, a principle echoed in R v Ward (UK) and R v Stinchcombe (Canada), which require ongoing disclosure of evidence, including scientific reports - also OHM & Another v Attorney General [2002] 2 E. A 508 and George Ngotho Juma & 2 Others v Attorney General to reinforce this duty. The Appellant submits that non-disclosure prejudiced his ability to challenge medical or age evidence.



9. The Appellant submits that the trial court failed to enforce Article 50(2)(h) by not assessing his ability to afford Counsel. He argues that he could not defend himself in a complex case. He relies on *Gideon v Wainwright* (U.S.), in which the U.S. Supreme Court held that indigent defendants are entitled to counsel to ensure equality before the law. The Appellant cites Lord Denning in *Pett v Greyhound Racing Association* (UK), who noted unrepresented parties' inability to examine witnesses or articulate defence. He argued that *Macharia v Republic* and *Dominic Kamau Macharia v Republic* (Court of Appeal) affirm this right in complex or capital cases, supported by Section 36(1) of the [Legal Aid Act](#).
10. He argues that the court-imposed life imprisonment without mitigation violates Article 50(1) of [the Constitution](#) and contends that the precedent in *Francis Karioko Muruatetu v Republic* establishes that mitigation is part of a fair hearing and therefore its absence prejudiced him.
11. The Appellant contends that the court omitted final submissions, breaching Sections 213 and 310 CPC, which require oral submissions to complete a trial. This denied him the opportunity to clarify issues. He relies on the cases of *Dean Salui v Republic* [1966] EA 272, *Neru v Republic* [1980] KLR 108, *Robert Fanali Akhuya v Republic*, and *Henry Odhiambo Otieno v Republic* [2006] eKLR, in which convictions were quashed for this flaw. The Appellant asserts that the lack of submissions in the trial prejudiced him.
12. The Appellant avers that on February 14, 2022, the court ignored his ill health and proceeded with four witnesses (PW1–PW4) in one session, despite his unpreparedness which violated Article 50(2)(e) on the right to a speedy but fair trial and *Natasha Singh v CBI* (India) He relies on *Okeno v Republic* and *K. Ambazhagan v State of Karnataka* (India), which mandate fresh appellate scrutiny, and on the fact that the rush prejudiced him.
13. The Appellant further argues that the prosecution's witnesses were inconsistent. He contends that PW1's evidence contains contradictions. On this, he submits that PW1 initially claimed the defilement occurred in a maize plantation, and later stated it occurred in a sugarcane plantation. He argues that this is an impossible dichotomy. Further, she alleged prior defilements, yet PW2 left her with his wife. He submits that this undermines the credibility of the case. The Appellant relies on the case of *P.N.W v Republic* [2017] eKLR, which he argues gives him the benefit of contradictory testimony.
14. The Appellant avers that there was inconsistency in the evidence. PW2, who is allegedly not an expert, claimed PW1's private parts were swollen, but was contradicted by PW6, who was reportedly a medical expert whose findings show no swelling. The Appellant relies on *J.O.O v Republic* [2015] eKLR to argue that weak evidence fails to meet the standard of proof.
15. The Appellant argues that a key witness, Neshi (PW1's Elder Sister), was not called, yet PW1 testified that she informed Neshi of the defilement. He cites the case of *Zahira Habibulla v State of Gujarat* (India), which holds that uncalled material witnesses deny a fair trial. According to him, PW2 left PW1 with Nasiondo (Appellant's Wife), a crucial witness who should have been called to clarify events, and her absence suggests no defilement occurred, as a wife would likely report such behaviour. He relies on *Bukenya & Another v Uganda* [1972] EA 549, in which it was held that the evidence of uncalled witnesses is presumed to be adverse to the prosecution. He submitted that *Jharkhand v Sanjay Mandal & Others* (India) and Section 150 of the CPC mandate the summoning of essential witnesses, and that the omission prejudiced him.
16. The Appellant argues that an unqualified witness was allowed to testify. He argues that PW6 (Oluoch Tobias) provided no proof of qualifications or registration, relying on "history of defilement" and alleging a vague vaginal infection. He argues that a child's discharge could stem from hygiene, not sex.



He relies on the case of Pravin Singh Dhalay v Republic (Nbi Misc. Cr. App. No. 10 of 1997), which deems such testimony inadmissible. He also cites Irregularity, noting that the court summoned Nolita Ojulo, but PW6 (Oluoch Tobias) testified without explanation, thereby undermining the reliability of his testimony.

17. The Appellant argues that contradictory testimonies, uncalled witnesses, and a lack of medical evidence mean defilement was not proved beyond reasonable doubt. J.O.O v Republic [2015] eKLR emphasizes this standard, which was not met here due to the prosecution's weak case.
18. The Appellant further contends that the mandatory life sentence is unconstitutional, per Francis Karioko Muruatetu v Republic, as it's oppressive and torturous. Imposed without mitigation, it violated Article 50(1).

### **Respondent's Submissions**

19. On whether there was a violation of section 50(2)(b), the Respondent relied on the case of Chacha v Republic [2022]KEHC 16370 (KLR). In this case, the court held that every charge or information must clearly state the specific offence(s) to which the accused is charged, including sufficient details to inform the accused of the nature of the offence reasonably. The Respondent argues that both the original and amended charge sheets complied with Section 134 of the Criminal Procedure Code and Article 50(2)(b) of *the Constitution* of Kenya.
20. On whether there was a violation of section 50(2)(j), they also relied on the aforementioned case where it was held that the Appellant was adequately informed of the evidence against him and had sufficient time to prepare for the trial. The Respondent maintains that the Appellant received the witness statements well in advance of the trial, thereby enabling him to understand the charges and plan his defence. Therefore, Article 50(2)(j) of *the Constitution* was not violated in this matter.
21. The Respondent refutes the claim that the evidence was contradictory, inconsistent, uncorroborated, or malicious. The Respondent maintains that the discrepancies were insignificant and insufficient to destroy the case. The Respondent argues that courts acknowledge minor inconsistencies, but only profound contradictions permit the evidence to be rejected. The Respondent contends that the prosecution's case, relying on PW1's evidence, supported by PW2, PW3, and PW6, was logical and sincere.
22. They rely on the case of Michael Mumo Nzioka v Republic [2019] eKLR, which referred to Twehangane Alfred vs. Uganda, Joseph Maina Mwangi vs. Republic, and Philip Nzaka Wawatu vs. Republic. The Respondent argues that the cases hold that minor inconsistencies or contradictions do not go to the root of the prosecution's case.
23. The Respondent also avers that they proved the matter by addressing the age of the victim. The Respondent relies on the report prepared after the minor's age assessment, produced as PW6 and marked as prosecution exhibit 4, which proves that the minor was 8 years of age. The Respondent relies on two cases: Francis Omuroni v Uganda and Richard Wahome Chege v Republic, which address how to determine the age of victims in defilement cases and emphasize that medical evidence is crucial and that a Doctor is the most qualified to determine a victim's age when other evidence is lacking. The Respondent argues that they have satisfied this requirement.
24. The Respondent submits that it was able to prove penetration by relying on the testimony given by the minor in court. PW2, PW3 and PW6 corroborated her statement. The Respondent relies on section 124 of the *Evidence Act* on the corroboration of witness statements. They further submit that the trial court conducted a *voire dire* to assess the child's competence to testify, finding that she understood



the importance of truthfulness and possessed sufficient intelligence; hence, her testimony was found credible. They rely on the case of *Samson Oginga Ayieyo v Republic* [2006] eKLR, in which the Court of Appeal considered the legal provision that permits a trial court to convict an accused on the testimony of a child victim without requiring corroboration.

25. On the issue of identification, the Respondent argues that the Appellant was identified by recognition, asserting that he was well known to the victim, who identified him as 'grandfather'. The Respondent submits that the Appellant failed to defend himself, as he only inadequately denied the allegations.
26. Lastly, the Respondent argues that the trial court rightly sentenced the Appellant to life imprisonment under Section 8(1)(2) of the *Sexual Offences Act* for defiling a child aged 11 or younger and referred to the cases of *Bonface Andayi Hezron v Republic* [2020] eKLR and *Wanfema v Republic* (1971) EA 493, which emphasize that appellate courts should only intervene in sentencing if it is based on improper considerations or excessively harsh.

### Analysis and Determination

27. This is a first appeal; therefore, the duty of the court is to re-evaluate the evidence before the trial court afresh with a view to making its own independent decision while being conscious of the fact that, unlike the trial court, it did not have the benefit of observing and hearing the witnesses as they testified. The Court of Appeal in *Odhiambo v Republic* [2005] eKLR held as follows:-

“On a first appeal, the court is mandated to look at the evidence adduced before trial afresh, re-evaluate and re-assess it and reach its own independent conclusions. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their direction.”

28. I have perused the Memorandum of Appeal, the Parties' submissions, and the record of the trial court and the following issues arise for determination:-

- a. Whether the Appellant suffered an unfair trial due to a violation of Article 50 of *the Constitution*.
- b. (c) Whether the prosecution's evidence had contradictions, was inconsistent and lacked corroboration.
- c. Whether the elements of defilement were proved to the required standard.

29. The court will first deal with the preliminary issues raised by the Appellant, that his constitutional right to a fair trial under Article 50 of *the Constitution* was violated by the amendment of the charge sheet from incest contrary to Section 20 (1) to defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006, without being given the opportunity to recall witnesses as stipulated in Section 214 of the Criminal Procedure Code. I have perused the proceedings and find that the Appellant did not object to the amendment of the charge on 4<sup>th</sup> June 2022, that the fresh charges were read and explained to him, and that he pleaded not guilty to the same. Secondly, the amendment did not prejudice the Appellant.

30. Notably, there was nothing new that the amendment raised that would have warranted a recall of the witnesses, as the particulars of the offence remained the same, save that what changed was the fact that the victim was henceforth not considered a close relative of the Appellant. From the evidence led during the trial, there was no doubt that the charge facing the Appellant was that he defiled a child



aged eight years old. Hence, there was no variance between the charge and the evidence as envisaged in Section 214 of the Criminal Procedure Code, which states:-

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

- (i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

In *Josephat Karanja Muna v Republic* [2009]Eklr, the Court of appeal considered the import of an amendment that does not materially alter the charge and stated:-

“...The spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word.”

- 31. In the same vein, I find that the amendment in the present case was a minor one that did not introduce a new element to the charges facing the Appellant to warrant a recall of witnesses.
- 32. Regarding the issue of legal representation, the record shows that before the plea was taken, the Appellant was informed of his right to legal representation. At no point did he apply for legal aid and was denied. In any event, the Appellant was not facing a capital offence, nor was the evidence against him too technical or complex. Moreover, he was able to cross-examine all the prosecution witnesses, a demonstration that he was able to follow the proceedings and effectively conduct his defence. In



Republic v Karisa Chengo & others [2017] KESC 15 (KLR), the Supreme Court addressed the issue of legal representation and held as follows:-

“... a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will both be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of Legal Aid Act, various other factors which include:-

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused; and
- (vi) the complexity of the charge against the accused.”

33. As to whether Article 50(2) (j) was breached, the record shows that after the Plea was taken, the Appellant was furnished with witness statements. Witness statements ordinarily include documentary evidence in this case: the P3, PRC, and age assessment reports. The hearing was adjourned several times and so the Appellant had ample time to prepare his defence. There was no evidence that the Appellant claimed not to have been furnished with the treatment notes, P3 forms, PRC and age assessment forms at any stage in the hearing. When the Clinical Officer testified on 30<sup>th</sup> May 2022, the Appellant did not object to the production of the treatment records and the P3 form. He cross-examined the witness, and so did the trial Magistrate. In the case of *Chrispine Julius Chacha v Republic* [ 2022] KEHC 16370 (KLR), the court stated thus:-

“Lastly, whether sub article 2(j) was breached, the court record speaks for itself. The appellant was arraigned in court on January 18, 2021 for plea and before the hearing commenced on March 23, 2021, the appellant had been supplied with witness statements on February 1, 2021 over 1 ½ months before the hearing commenced. The appellant was aware of the charge he faced in good time to enable him prepare his defence. The right under sub article (2) (j) was not violated.”

34. This court is of the view that the Appellant was informed of the evidence that was against him in advance and that he had adequate time to prepare for his trial. Therefore, there was no contravention of the stated provisions of the Constitution. This finding is also in respect to the claim that the Appellant was prejudiced by the testimony of four witnesses on 14<sup>th</sup> February 2022. The Appellant first appeared in court on 21<sup>st</sup> June 2021. Thereafter, the case was adjourned three times. On the date of the hearing, the Appellant claimed to be unwell. The trial court observed that he looked fine and ordered that the matter proceed. This court cannot interfere with the discretion of the trial court unless it is demonstrated that it was not exercised in a judicious manner. The Appellant did not adduce any evidence of ill health, and the trial court made its decision based to proceed on the scheduled date based on its visual observation of the Appellant.



35. Regarding the claim that the Appellant's rights were violated when the court failed to ask the parties to tender closing submissions, the court is of the view that such a failure does not automatically vitiate the proceedings. The case at the trial court was based on the factual evidence. Neither party tendered submissions and when the court retired to write its judgment, it cited the relevant statutes and case law. The Appellant has not demonstrated that the omission occasioned a miscarriage of justice.
36. The ingredients of defilement as set out in *George Opunda Olunga v Republic* [2016] eKLR are proof of age of the victim, proof of penetration, and positive identification of the suspect. The Appellant submits that the prosecution failed to prove the case because it relied on unreliable witnesses and failed to summon a material witness.
37. In *Philip Nzaka Watu v Republic* [2016] KECA 696 (KLR), the Court of Appeal, while addressing the issue of contradictions and inconsistencies in a criminal case, had this to say:-

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

38. I have critically reviewed the evidence. The basis of the claim of unreliability is the victim's evidence-in-chief, who referred to the farm where she stated that she had been defiled as a maize plantation, then, in cross-examination, she said it was a sugarcane plantation. It is patently clear to the court from the evidence of the other prosecution witnesses that the victim made a report that she had been defiled in a sugarcane plantation. There was nothing to suggest that the said witnesses lied to the court. In any event, it is possible for a witness to have a slip of the tongue while giving evidence. Nonetheless, the discrepancy was minor and did not materially affect the prosecution's case, which was that the victim was defiled in a plantation. I find that the discrepancy in the victim's evidence did not constitute a contradiction, as it was fully resolved by the evidence of PW5, to whom the victim initially narrated her ordeal on the same day it occurred.
39. The other contradiction highlighted by the Appellant is that the victim alleged prior defilement, yet PW2 left her with the Appellant's wife. In my view, there was nothing to undermine the credibility of the prosecution's witness regarding this issue. The evidence was that PW2 was informed of the defilement that occurred on 13<sup>th</sup> June 2021. That does not mean there was no prior defilement. The victim clearly stated that after the defilement, the Appellant warned her not to tell anyone. There was no way PW2 would have known about the defilement unless she was informed.



40. Concerning the evidence of PW2, who alleged that the victim's private parts were swollen, whereas PW6 found no swelling, the treatment notes, which were produced as PEx2, showed that the victim presented herself with a history of defilement, with the latest being on 13<sup>th</sup> June 2021. The victim was being treated on 16<sup>th</sup> June 2021, which was three days after the defilement. It is possible that any swelling that may have been present had subsided by the time the victim was taken for treatment.
41. Moreover, the absence of any swelling does not negate the fact that the victim was established to have a venereal disease. The presence of a venereal infection is, in my view, conclusive evidence that penetration occurred. In the case of *Wayu Omar Dololo v Republic* [2014] KEHC 1774 (KLR), the court held that pregnancy is conclusive evidence of penetration and stated as follows:-

“The trial magistrate took judicial notice that a pregnancy results from a sexual activity and, as such, found penetration proved. On my part, I have carefully examined the evidence. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being. The trial magistrate had the opportunity to observe the demeanour of the complainant as she testified.”

42. In the same vein, I find that a child would not normally be infected with a venereal disease, which is sexually transmitted, unless there was penetration whether partial or incomplete. There was credible evidence that the victim was defiled.
43. In this case, the age of the victim was proven by age assessment and the prosecution produced an Age Assessment Form marked as PEx4. The Clinical Officer testified that he examined the victim. He determined that the victim was eight years old because the second molar had not yet erupted. PW2 testified that the victim was nine years old. PW2 is not the victim's biological mother. In *Hudson Ali Mwachongo v Republic* [2016] KECA 521 (KLR), the Court of Appeal deliberated on the age of sexual offences victim and stated thus:-

“Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The *Sexual Offences Act* provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment is imprisonment for life. Defilement of a child of 12 years to 15 years attracts 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment.

Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years etc., as at the date of defilement. It will be a few days or months above or below the prescribed age. The question then arises, is a victim who is, for example, 11 years and six months old at the time of defilement to be treated as 11 years old, or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed? In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?”

44. It is well settled that the age of a child victim can be proven through any credible means including the parents' or the guardian's testimony, birth certificate, baptism certificate, health or clinic card, and other



documents including age assessment reports. In the case of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the Court of Appeal held as follows:-

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.” “...we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

45. Although the victim said that she was twelve years old, and PW2 said that she was nine, the medical expert assessed her age at eight years and gave a cogent reason why he arrived at the assessment. What is evident is that the child was of tender years and was below ten years at the time of the offence. I find no reason to disagree with the trial court which conducted *voire dire* and took the victim’s evidence therefore having sufficient opportunity to observe her and confirm that the age was as stated by the medical report.
46. Having carefully reviewed the evidence herein. The court is of the considered view that any apparent contradictions and inconsistencies were not so grave or fundamental as to materially affect the prosecution’s case.
47. Regarding the submissions that the prosecution failed to call the victim’s elder sister and his wife as witnesses, it is clear from the proceedings that the victim informed the said sister, who in turn informed PW5 of her ordeal. It was not mandatory to call the said sister to give evidence, as she was not an eyewitness. As for the Appellant’s wife, she was clearly conflicted and may not have been willing to be a prosecution witness. PW5’s evidence was more crucial as she was the primary caregiver and was the one who made the formal report to the village elder. It is trite that the prosecution need not call all witnesses in a case, provided it calls the number of witnesses that are sufficient to prove that the offence was committed by the accused. Whereas the Appellant relied on the case of *Bukenya & another v Uganda* [1972] EA 549, to advance his argument that the court should have made an adverse finding due to failure to call the two persons as prosecution witnesses, it is important to note that the same court said that it is not necessary to call a superfluity of witnesses as any adverse inference can only be made if the evidence is insufficient.
48. The victim gave a clear recollection of the events and positively identified the Appellant. He was known to her as a grandfather and lived in close proximity. She recognized him, and it is trite that identification by recognition is the best form of identification. See *Reuben Anjanoni Tabu & 2 others v Republic* [1980] eKLR. Her evidence was corroborated by the medical report that showed that she had a sexually transmitted infection.
49. Be that as it may, the court notes that pursuant to Section 124 of the *Evidence Act*, corroboration in sexual offences matters is not an imperative. Section 124 provides :-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim



and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

50. The trial court was satisfied during *voire dire* that the victim knew the importance of telling the truth. It believed her testimony and pronounced the reasons for its belief. In *Samson Oginga Ayieyo v Republic* [2006] KECA 336 (KLR), the Court of Appeal held as follows:-

“The proviso, which we reproduced earlier, empowers the trial court to convict even without corroboration, an accused person on the basis of the evidence of the child affected, if it is satisfied that such victim was a witness of truth. That amendment came into force long before this case. The trial magistrate was satisfied that PW1 was truthful and so was the first appellate court. There was no necessity in law for corroboration.” See also *Fappyton Mutuku Ngui v Republic* [2014] KECA 570(KLR).

51. Having said that, I turn to the defence, which was a mere denial and a sham. The Appellant claimed that his child framed him but did not say which child his framed him.

52. The sum totality of the entire evidence brings me to the conclusion that the evidence was watertight and the conviction safe.

53. Regarding the sentence, Section 8(1) and (2) of the Sexual Offence Act provides:-

“(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.”

54. The *Sexual Offences Act* provide for minimum mandatory sentences and the trial court, having considered the appellant’s mitigation, imposed the statutory sentence. In *Republic v Evans Nyamari Ayako*[2025] KESC 20 (KLR) ,the Supreme Court set aside the judgment of the Court of Appeal that had delineated a life sentence to 30 years and reinstated the trial magistrate’s sentence of life imprisonment for the offence of defilement of a child aged eleven years and below.

55. Additionally, in *Francis Karioko Muruatetu & another v Republic* [2021]KESC 31 (KLR), the Supreme Court stated that:-

“14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*.”

56. Parliament in its wisdom prescribed minimum mandatory sentences for offences under the *Sexual Offences Act* and until the Supreme Court renders otherwise or Parliament amends the relevant Statute, the penalty is here to stay. The court’s hands are tied.

57. The upshot is that the appeal against the conviction and sentence fails and is dismissed.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 19<sup>TH</sup> DAY OF DECEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:



Appellant present at Naivasha Maximum Prison

Ms. Chala for the Respondent/State

Court Assistant: Polycap

