

KENYA / JUDGMENT

Amunavi v Republic

[2026] KEHC 1429 (KLR)

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COURT

High Court

BEFORE

JRA Wananda

CASE / FILE NUMBER

Criminal Appeal E115 of 2023

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Amunavi v Republic (Criminal Appeal E115 of 2023) [2026] KEHC 1429 (KLR) (13 February 2026)
(Judgment) Neutral citation:

[2026] KEHC 1429 (KLR) Republic of Kenya In the High Court at Eldoret Criminal Appeal E115 of 2023 JRA Wananda, J February 13, 2026 Between Aggrey Sagala Amunavi Appellant and Republic Respondent (Appeal against the Judgment of Hon. O. Mogire - SPM, delivered on 6/12/2023 in Eldoret Chief Magistrate's Court Criminal (Sexual Offences) Case No. E012 of 2022)

Judgment

1. The Appellant was charged in the said Magistrate's Court Criminal Case 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 were that on diverse dates in the month of December 2021 at [xxxxxxxxxx] area, in Turbo Sub-County within Uasin Gishu County, he intentionally caused his penis to penetrate the vagina of NK, a child aged 4 years. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The accusation was that on the same date, time and place, he intentionally touched the vagina of the same child aged 4 years with his penis. 2. The Appellant pleaded not guilty to the charges and the case proceeded to full trial in which the Prosecution called 6 witnesses. At the close of the Prosecution case, the Court found the Appellant with a case to answer and put him on his defence. In his defence, he gave a sworn statement and called no other witness. By the said Judgment delivered on 6/12/2023, he was convicted on the main charge, and sentenced to 40 years imprisonment. 3. Dissatisfied with the decision, the Appellant filed this appeal on 12/07/2023 challenging both the conviction and sentence. His Petition of Appeal is crafted as follows: i. That the learned Magistrate erred in law and fact by failing to find that the Prosecution witness was inconsistent and untrustworthy to be relied on. ii. That the learned Magistrate erred in law and fact by failing

to find that the medical evidence produced in Court failed to disclose the act of penetration.

iii. That (I) am rehabilitated, reformed and remorseful person since (I) have learnt to take responsibility of (my) own action.

iv. That sentence imposed was manifestly excessive as (I) rely on High Court Petition No. E017/2021 at Machakos by G.V Odunga.

v. That more grounds to be adduced during the hearing and determination of this Application.

4. However, the Appellant, in his Submissions filed subsequently and dated 8/09/2025, included what he described as “Supplementary Grounds of Appeal”. The same contains 13 lengthy grounds framed which I will not recount herein since it is a pointless copy and paste reproduction of what is again repeated in the Appellant’s Submissions which I will recount.

5. I will now recount the testimonies and evidence of the witnesses before the trial court.

Prosecution evidence

6. PW1 was Dr. Irene Simiyu, a Medical Officer from the Moi Teaching and Referral Hospital (MTRH). She testified that the complainant (PW4) was attended to at the facility on 10/1/2022 with history of having been defiled by a person known to her. She stated that examination conducted on PW4 revealed that she had healed hymenal tears at 3, 6 and 9 o’clock, and that urinalysis and HIV test gave negative results. She stated that the incident occurred in December 2021, that the object used was a blunt object, and that PW4 had not received any treatment since that time. She testified that the findings were consistent with defilement, and she then produced the P3 Form signed by her.

7. PW2 was a minor, who introduced herself as “B.A.” Due to her age, she was taken through a *voire dire* examination upon which the Magistrate, satisfied that the minor understood the importance of telling the truth, allowed her to give sworn testimony, which she then did.

8. PW2 then testified that she was a Grade 4 primary school pupil and lives with her mother (PW3), her aunt, and her sister, N (PW4). She stated that in the month of December 2021, “Ras” put his “dudu” on her sister’s (PW4) private part, and then he put it to hers as well. She is then recorded to have pointed at her genital area, and referred to it as “the place for urinating”. She testified that PW4 cried as the Appellant put his “dudu” on her genital organ, that as PW2 was watching, the Appellant instructed her not to look at him, instructions which she obeyed and looked the other side as she feared the Appellant, who then came and also removed PW2’s clothes, and also put his genital organ into PW2’s, and she screamed as he did so. She stated that the acts happened at the Appellant’s house where the two girls had gone with the Appellant’s sister, G, who was older than PW2 and in Class 5, and that it was around 6.30 pm. She stated that when they entered the compound, G told them that she had forgotten her shoes and went out for them, she asked them to wait for her but as they were standing, “Ras” appeared and asked them to get into the house. She described the house as a one roomed mud house with a bed, stove, utensils and a radio, and stated that when they got in, the Appellant switched on the radio and instructed them to dance while naked, that she was wearing a black top, a sweater, short and pants, while PW4 was wearing a dress, a biker and a sweater, which all the Appellant removed.

9. She stated that similar acts occurred on different dates but the above incident was the first and, on another date, the Appellant found PW2, PW4, and another girl standing outside the gate while their aunt was inside cooking, the Appellant held PW4 by hand and when PW2 inquired, the Appellant grabbed her hand as well, and took them to a different house, which looked just like “Ras” house, where a friend of the

Appellant joined them. She testified that the two men then sent PW2 to go and buy bread and milk for PW4, which she did, when she returned, she found PW4 crying in the house, the two men took the milk and bread and left with PW4, and they locked PW2 inside the house. She testified that she cried for help but as the house is isolated, and the nearest neighbour is a far distance away, no one responded, but later, PW4, came and opened the door for her, and they went home. She stated that it had begun getting dark and they found no one at home, as their mother arrived later when they were already sleep. She stated that the following morning, their mother asked them where they had been and she explained to her that they were playing but did not disclose to her the truth since “Ras” had threatened to kill them all, including their mother. She testified that they were then instructed to bathe and as she was bathing PW4, she noticed whitish “things” on PW4’s genital organ which were also spread on PW4’s biker, and she told her mother about the discharge. She testified that on another date, she was with other children when the Appellant appeared and grabbed her, took her to another house which had a chair and a bed, and locked it, he removed her clothes and promised to give her chips, soda and cake, he removed his clothes and pushed his genital organ into hers, that it was pitch dark inside the house, and she slept there until morning when the Appellant opened the door and asked her to go home. She stated that when she arrived home, she found PW4 sleeping and “Mama K” and her mother (PW3) looking for her, her mother asked her where she had spent the night but she feared to disclose the truth since the Appellant had vowed to kill all of them in their family, but as she was beaten, she finally revealed the truth that she said she had spent the night at “Ras” house. 10. She testified that they (PW2 and PW4) were then taken to the police station, and later to hospital, where they were examined and given treatment. She stated that “Ras” was someone she knew well and then identified him as the Appellant seated in Court. In cross-examination, she reiterated that the Appellant defiled them on several occasions, not on one day. She also confirmed that the Appellant had slapped PW2’s mother (PW3) on a certain morning when she was drunk, and threatened to hit her (PW3) with a stick, but she denied that her mother threatened the Appellant with dire consequences. She also confirmed that on a certain date, her mother came for them at the Appellant’s house and asked him why he had taken the girls to his house. She also stated that the first time the Appellant defiled her, he covered her mouth and she could not therefore scream. She confirmed that on the date of the first act of defilement, they were neither taken to the police or hospital. Regarding the second act of defilement, she stated that the Appellant found them playing a “hide-and-seek” game known as “are you ready?” and that the Appellant got her as her friends had, as part of the game, gone to hide. She reiterated that she got injured when the Appellant pushed his genital organ into hers. 11. PW3 was CK, the two girls’ mother, who described herself as a waiter at a nightclub, and testified that she works at night, and lives with the girls, PW2 and PW4. She stated that sometime in the month of December 2021, she noted the tendency, several times, of children going to spend time at the house of “Ras”, the Appellant herein, who lived alone, whom she informed about her discomfort with that arrangement, and asked him not to allow her young girls to go to his house. She stated that on a certain date, she took her children away from the Appellant, upon which an altercation with the

Appellant arose, and the Appellant slapped her. She stated that when she inquired from the children, they told her that the Appellant was playing music for them, that on another date, while PW2 was bathing PW4, she (PW2) noticed some whitish discharge on PW4's private parts, and notified PW3, who washed her and took her to hospital, where the doctor, upon examination, informed her that the evidence had been washed away. She testified that on 8/11/2022, she gave her neighbour by the name "Mama K" money to buy breakfast for her children whom she left behind, when "Mama K" returned back from the shops, she did not find PW2, neighbours begun looking for PW2 to no avail, the following morning, PW2 emerged and found the neighbours gathered, PW2, on being interrogated, revealed that the Appellant had taken her to a house and defiled her. She testified that PW2 also revealed that the incidents occurred on several occasions but she had feared to disclose them since the Appellant had threatened to eliminate their entire family, and also revealed that PW4 had also been defiled by the Appellant. She stated that she then went with the children to the police station and reported the matter, and they were they were referred to hospital. She testified that PW2 was aged 8 years and the complainant, PW4, was 4 years, having been born in the year 2017. She then stated that PW2 had also revealed that the Appellant had defiled her about 3 times. She denied having any grudge against the Appellant. In cross-examination, she stated that she and the Appellant are basically neighbours as they live in the same area 12. PW4 was the complainant, N.A., also a minor. Due to her age, she, too, was taken through a *voire dire* examination upon which the Magistrate, not satisfied that the minor understood the importance taking an oath, directed that she gives unsworn testimony, which she then did. 13. PW4 then testified that she lives with her mother (PW3) and her sister (PW2), and is in PP2. She recalled that that the Appellant ("Ras") put his "urinating organ" into hers then did the same to her sister, and instructed them not to tell their mother. She testified that on a later date, her sister (PW2) spent a night at the Appellant's house, and that is how their mother got to learnt of the defilement. She then identified the said "Ras" as the Appellant seated in the dock. She stated that on that date, she was wearing a dress and a pant which the Appellant removed and they remained naked, that the Appellant's house is a simple room, a mud house with a bed and a radio, seats and a stove, and that the Appellant pulled her to the seat and defiled her. She further testified that on a certain day, her mother went to collect them from the Appellant's house and the Appellant slapped her (PW4's mother) when her mother asked him why he had asked the girls to go to his house. She stated that they were later taken to the police and later to hospital. She stated further that they had been taken to the Appellant's house by G, that on another date, the Appellant found the girls playing and held PW4's and PW2's hands and promised to give them milk and bread and threatened to kill them if they reported him. In cross-examination, she stated that when she screamed, her aunt came and asked the Appellant to let PW4 go. She denied that her mother had instructed her on what to say in Court. In the end, she stated that she did not report the incident to her mother immediately because the Appellant had threatened to kill all PW4's family. 14. PW5 was JA. She recalled that on 8/11/2022 at around 7.00 pm, PW3 (PW2 and PW4's mother) who works during the night, asked her to watch over her children for the night. PW5 testified that she then left to

go and look for her siblings who reside nearby but when she returned at around 10.00 pm, a neighbour, alerted her that PW2 was not at home, that, together with neighbours, they looked for PW2 for around 3 hours to no avail and went to sleep. She stated that she woke up at around 6.00 am and continued with the search for PW2, who shortly afterwards appeared, they tried to speak with her but she kept silent, PW2's mother was agitated when she arrived and learnt of the matter, and wanted to beat up PW4 but the neighbours prevailed upon her, and after speaking to PW4 in a friendly manner, she finally opened up and revealed that it is the Appellant who had asked her to go to his home immediately after her mother left. The witness stated that the angry neighbours wanted to invade the Appellant's house but later decided to go and report the matter to the police, which they did. She stated that she, accompanied by a police officer, later accompanied the two girls to MTRH, where the girls were examined and medical reports made. She stated that they did not wash PW2, and that the examination confirmed that she had been defiled. She then identified "Ras" as the Appellant seated in Court, whom she knew from their neighbourhood. She stated that PW2 explained her ordeal to the police, and reiterated that PW3 works at night and thus leaves the children in the house at night. In cross-examination, she stated that PW3 had once told her that she had got into an altercation with PW3 when she went to collect her children from the Appellant, and during which the Appellant slapped PW3. She took the position that PW3, as a mother, was right to get concerned about the Appellant hosting young girls yet he used to stay alone. 15. PW6 was Corporal Caroline Kipkorio attached to the Baharini Police Station, the Investigating Officer. She stated that she was in the Station's Crime Office on 9/11/2021 when 2 children (PW2 and PW4) were brought to the Gender Desk by their mother and members of the public, one of the witnesses (PW5) and neighbours reported that the children had been left by their mother on 8/11/2021 at around 6.00 pm under the care of PW5 when the mother went out for night duties but one of the children, the elder one (PW2), went missing, that a search within the neighbourhood did not bear any fruit but the girl later returned at around 6.00 am in the morning, and upon interrogation, she disclosed that she had been taken by the Appellant to his house, where she spent the night, and that the Appellant defiled her the whole night. PW6 stated that she then spoke to the girls, and the elder one, PW2, informed her that PW4 had also been subjected to defilement by the same Appellant in December, 2021. PW6 then testified that she recorded the reports and escorted the girls to MTRH, where they were issued with P3 Forms. She testified that she visited the scene of crime, where she established that the Appellant's house was made of iron sheets, that the girls and their mother resided on the opposite side, and that the mother used to go out at night. She stated further that she then recorded witness statements and went to the Appellant's house with other officers and arrested him, and he was later charged before Court. She also produced an Age Assessment Report and testified that the Appellant's house is about 150 metres from the girl's house, and that the Appellant's house was a single room with a sofa set. In cross-examination, she stated that the case herein is about the younger 4 years old girl, and the Appellant was also charged in a separate case for also defiling the elder girl, and which case was also ongoing. She thus confirmed that the incident which the Appellant had been charged with in this case was the one for December 2021. She also stated

that she visited the scene on 11/12/2022 and arrested the Appellant on 12/12/2022, and that the girls identified the Appellant as the assailant. 16. As aforesaid, at the close of the Prosecution case, the trial Court found the Appellant as having a case to answer and put him on his defence. The Appellant then, in his defence, gave a sworn statement, and called 3 other witnesses. 17. The Appellant, testifying as DW1, stated that he is a Chef in a hotel, that on 11/01/2022, he woke up at around 5.00 am and left for his place of work where he stayed up to until 10.00 pm, when at around 11.00 pm, he heard a knock at the door and when he opened, 6 police officers entered the house, asked him to introduce himself, then handcuffed him with a promise that he would know the reason for his arrest at the Station, and also conducted a search in the house. He stated that was taken to Baharini Police Station where he was accused of committing an unspecified offence, the following morning at 9.00 am, two women, whom he recognized, and 2 children, whom he had never seen, were brought in, and he was informed that he had defiled the 2 children, and he was later taken to MTRH where he was examined and tested. He claimed that he was framed for the two cases as he had differences with the girl's mother who was drunk at the time and behaving indecently in front of the children in broad daylight, that as a parent, he decided to caution her against misbehaving in the presence of the children but she, in response, hurled indecent insults at him, and held him by the collar of his shirt and told promised to ensure that he was incarcerated, which threat, he thought was coming out of the drunkardness at that time. 18. As aforesaid, after the trial, by the Judgment delivered on 6/12/2023, the Appellant was convicted on the main charge of defilement and sentenced to 40 years' imprisonment. 19. The parties then filed written Submissions. The Appellant's Submissions is dated 8/09/2025, while the Respondent's (State) is dated 23/07/2025. The Respondent also filed the Supplementary Submissions dated 7/10/2025, and also the "Notice of Enhancement of Sentence", dated 7/07/2025. Appellant's Submissions 20. The Appellant, in a lengthy narrative, submitted that the Prosecution failed to prove its case beyond reasonable doubt and that the conviction and sentence are unsupported considering major unresolved contradictions in the Prosecution's case. On the issue of "age, he contended that there were three different ages alleged in respect to PW4, that the mother indicated that she was born in 2017 but could not specify the date or month but indicated that she could have been about 5 years, that the doctor estimated the age as 4 years, and the Age Assessment estimated an age as 3 years old. He submitted that this lack of uniformity was a clear signal that the ingredient of age was not established. Regarding "identification", he averred that PW4 referred to "someone having done something bad" to her, considering that there was an allegation that the Appellant had a friend in his house during the alleged time of the offence, raises doubt on the identity of the perpetrator. According to him, his implication in the offence was as a result of being coached, and due to vengeance. On the issue of "penetration", he urged that there was no evidence to prove that he is the one who defiled PW4. He questioned the credibility of the allegation since the report was not made on time, and also doubted the excuse that the offence was not reported in time because of threats of death. In his view, this points to a scheme to settle scores. He also contended that the P3 Form lacked authenticity as the doctor presented a wrongly filled form which was attributed

to lack of evidence, and wrote exculpatory evidence in the wrong space for lack of what to write for a non-existent offence. 21. He also pointed out that although an examination was conducted on him, no evidence on the results thereon, and no P3 Form, were presented. He also wondered why the complainant was brought in as witness number 4, and also why the doctor stated that she was in Court on behalf of the complainant, which according to him, meant the doctor was an intermediary yet he was not so appointed, and the complainant was also not declared a vulnerable witness. He submitted further that most of the Prosecution witnesses gave evidence, not from personal knowledge, but from what they were told thus amounting to hearsay. He cited the case of William Kiprotich Cheruiyot vs Republic (2021). He further contended that the case was founded on a defective charge sheet since the testimonies of the Prosecution witnesses were all about the incident alleged to have taken place on 8/01/2022, which however did not relate to the case indicated in the Charge to have occurred on diverse dates in December 2021. He cited Section 134 of the Criminal Procedure Code (CPC), and urged that the defect is not curable under Section 382 thereof. He claimed that he raised the issue of the defect during the trial but the trial Court ignored it. He also took issue with the lack of the specific date of committing of the offence, which date could have put him in a position to answer the charge and offer a defence. He pointed out that PW2 alleged that the Appellant and his friend defiled them on an unknown date in December, but wondered why the alleged friend was not arrested, or record a statement, nor his name mentioned. In respect to “sentence”, he urged that Section 333(2) of the CPC was not complied with since the trial Magistrate did not factor the period of about 1 year and 11 months that he had spent in pre-trial detention. He also submitted that the sentence of 40 years was excessive, and should have been 21 years like in South Africa since the trial Magistrate equated life sentence to 40 years. He also contended that his age of 49 years was not taken into consideration. Respondent’s Submissions 22. Prosecution Counsel Ms. Claire Muriithi, on her part, restated the ingredients of the offence of defilement as set out in the case of George Opondo Olunga v Republic [2016] eKLR. On the issue of “age”, she cited the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR, and urged that PW3, the victim’s mother, testified that PW4 was aged 4 years and was born in the year 2017, and that PW6, the Investigating Officer, produced an Age Assessment, which indicated PW4’s age as 3 years. Counsel also pointed out that the Appellant did not dispute production of the Age Assessment Report, or challenge its veracity, and urged that although there was a disparity between the age indicated in the Charge Sheet, and the one the Age Assessment Report, the same was not fatal, since the age was within the bracket indicated in Section 8(2) of the Sexual Offences Act . 23. On “penetration”, she submitted that the same was proved through the evidence of the victim as corroborated by medical evidence, and also the evidence of PW2, who stated that PW4 was brought in with a history of defilement by a person known to her, and who was expressly named in the P3 Form as “Ras Aggrey”. On “identification”, Counsel cited the Court of Appeal case of Peter Musau Mwanzia Vs Republic (2008) eKLR, and pointed out that PW2, PW3 and PW4 all identified the Appellant in the dock, and were all also persons who knew him very well, and the Appellant too confirmed that he knew PW3 as PW2’s and PW4’s mother. She thus observed that identification was not only by way

of dock identification, but also by recognition. Regarding the Appellant's defence, she submitted that it was a mere denial, and could not dispel the overwhelming evidence tendered by the Prosecution. On sentence, she cited the provisions of Section 8(2) of the Sexual Offences Act, and urged that the trial Court erred in substituting the life imprisonment sentence with a 40-year sentence. She cited the Supreme Court case of Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR), and urged this Court to enhance the sentence to life imprisonment, as prayed in the Notice of enhancement. 24. In her Supplementary Submissions, in respect to the allegation that the charge sheet was defective, Counsel cited the Court of Appeal case of Benard Ombuna vs Republic [2019] eKLR, and pointed out that the Appellant answered to the charges when taking plea, and that the particulars in the charge sheet made clear reference to the offence of defilement, as well as the diverse dates the offence is alleged to have been committed, and also the identity of the complainant. She contended that the Appellant fully participated in the trial, and even prepared for his defence, and he cannot now state that he misunderstood the nature of the charges against him, or the offence he was being accused of having committed against the complainant. On the allegation that the evidence was contradictory, Counsel agreed that where contradictions are material and tend to show that the witnesses are not honest or truthful, the Court will cast doubt on the evidence, but submitted that where contradictions are minor, they are ignored. He cited the Court of Appeal case of Erick Onyango Odeng vs Republic [2014] eKLR. According to her, the Appellant has not demonstrated any contradictions that go to the root of the Prosecution case, and averred that the trial Court was satisfied that the witnesses were truthful, and the Appellant's assertion that PW3 contradicted herself on the existence of a grudge between her and the Appellant lacks merit. On Section 333(2) of the CPC, she referred to the "Notice of Enhancement" of the sentence to life imprisonment, and submitted that should the Court agree to enhance the sentence, then Section 333(2) would not apply as life imprisonment is an indeterminable sentence.

Determination

25. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see Okeno vs. Republic [1972] E.A 32) 26. The issues for determination in this matter are evidently the following: i. Whether the Charge Sheet was defective. ii. Whether the defilement charge against the Appellant was proved beyond reasonable doubt iii. Whether the sentence of 40 years' imprisonment imposed against the Appellant was justified, or whether it should be enhanced to life imprisonment. 27. In respect to the contention that the Charge Sheet was defective, Section 134 of the CPC provides as follows: "Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the Appellant person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." 28. The above position was amplified by Kimaru J (as he then was), in the case of Kipkurui Arap

Sigilani vs Republic, (2004) 2 KLR, 480, in which he stated that: “ The principle of the law governing charge sheets is that an Appellant should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the Appellant may be able to plead to specific charge that he can understand. It will also enable the Appellant to prepare his defence.” 29. Applying the test above and upon keenly perusing the charge sheet, I find that the particulars of the offence were clearly spelt out, and these included the section of the law creating the offence, the place of the offence, the act constituting the offence and the name of the victim. As the offence was allegedly committed repeatedly and on dates not specifically verified, the use of the phrase “on diverse dates” is acceptable and does not render the charge sheet defective in any way. The record reveals that the Appellant fully participated in the trial, cross-examined witnesses, and also put up a defence. He cannot now therefore, belatedly, claim to not have understood the charges he was facing. In the circumstances, this ground of the Appeal fails without further ado. 30. On whether the charge of defilement was proved, Section 8(1) and 8(2) of the Sexual Offences Act , under which the Appellant was charged provide as follows, respectively: “ 8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” 8.(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.” 31. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely, the age of the victim, penetration and positive identification of the offender. (see George Opondo Olunga v Republic [2016] eKLR). 32. In respect to proof of the “age” of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, stated 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.” 33. Further, in the Ugandan case of Francis Omuroni v Uganda, Court of Appeal; Criminal Appeal No. 2 of 2000, the following was stated: “ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ...” 34. For purposes of the Sexual Offences Act , the Prosecution needs to demonstrate that the victim was below the age of 18 years. As stated in the authorities above, a Certificate of Birth is not the only mode of proving age in cases of defilement. In this case, PW4 (the complainant), testified that she was 4 years old, a position that was reiterated by her mother (PW3), who testified that PW4 was born in 2017. PW6, on her part, produced the Age Assessment Report which estimated PW4’s age at about 3 years old. This slight disparity in the ages indicated herein cannot be material, and obviously, cannot be fatal as the ages are clearly within an acceptable margin of error, and both estimates are also well within the

range of “a child aged eleven years or less” stipulated under Section 8(2) of the Sexual Offences Act . In the circumstances, I have no reason to fault the trial Magistrate’s finding that the “age” of the minor was proved. This ground, too, therefore fails. 35. On the issue of “penetration”, Section 2(1) of the Sexual Offences Act defines the term as: “ The partial or complete insertion of the genital organs of a person into the genital organ of another person.” 36. In regard thereto, the Court of Appeal, in the case of Mark Oiruri Mose v R (2013 eKLR, guided as follows: “ In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence if spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.” 37. In this case, the charge sheet indicates that the Appellant defiled PW4 on diverse dates in December 2021. PW4 herself testified that sometime in December 2021 the Appellant (“Ras”) put his “urinating organ” into hers then did the same to her sister (PW2), and instructed them not to tell their mother. She testified that the Appellant pulled her to the seat and defiled her there. She stated that they had been taken to the Appellant’s house by G, and also described her dressing on that day as wearing a dress and a pant, which the Appellant removed and they remained naked. She also vividly described the Appellant’s house as a simple room, a mud house with a bed and a radio, seats and a stove. She further testified that on another date, her mother went to collect them from the Appellant’s house and the Appellant slapped her (PW4’s mother) when her mother asked him why he had asked the girls to go to his house. She testified that on yet another date, the Appellant found them (PW2 and PW4) playing and held them by the hands, and promised to give them milk and bread and threatened to kill them if they reported him. She testified that on yet another date, her sister spent a night at the Appellant’s house, and that is how their mother got to know of the cases of their defilement by the Appellant, and they were taken to the police, and later to hospital. In cross-examination, she stated that she did not report the incident to her mother immediately because the Appellant had threatened to kill PW4’s entire family. 38. I must also say that in a charge of defilement, the victim’s testimony may require to be corroborated. In any event, the complainant, having given an unsworn statement, her testimony needed to be corroborated. In that regard, I cite the case of Oloo v R (2009) KLR, in which the Court of Appeal stated the following: “ In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives child unsworn evidence. (See Johnson Muiruri v Republic (1983) KLR) in law evidence of a child given on oath after voir dire examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”. 39. In respect to corroboration, PW2 also testified that sometime in December 2021, “Ras” (Appellant) put his “dudu” on her sister’s (PW4) private part, and he then also put it to hers (PW2) as well. She is then recorded to have pointed at her genital area, and referred to it as “the place for urinating”. She testified that her sister (PW4) cried as the Appellant put his “dudu” on her genital organ, that as PW2 was watching, the Appellant instructed her not

to look at him, the Appellant then removed PW2's clothes and also put his genital organ into hers, and she screamed as he did so. She stated that the acts happened at the Appellant's house where the two girls had gone with the Appellant's sister, G, a Class 5 pupil, and that it was around 6.30 pm. She stated that when they entered the compound, G told them that she had forgotten her shoes and went out for them, and she asked them to wait for her but as they were standing, the Appellant appeared and asked them to get into the house. Like PW4, she, too, described the Appellant's house as a one-roomed mud house with a bed, stove, utensils and a radio, and stated that when they got in, the Appellant switched on the radio and instructed them to dance while naked. She stated she was wearing a black top, a sweater, short and pants, while her sister (PW4) was wearing a dress, a biker and a sweater, which all the Appellant removed. She also stated that after these acts, the Appellant again committed similar acts on them on other different subsequent dates. 40. She also testified that on yet another date, the Appellant found them (PW2, PW4, and another girl) standing outside the gate, while their aunt was inside cooking, the Appellant held her sister (PW4) by hand and when PW2 went to inquire, the Appellant also grabbed her hand as well, and took them to a different house, just like his, where a friend of the Appellant joined them. She testified that the two men then sent PW2 to go and buy bread and while they remained behind with PW4. She stated that when she returned, she found PW4 crying, the two men took the milk and bread and left with PW4, and locked PW2 inside. She testified that she cried for help but as the house is isolated, and the nearest neighbour is far, no one responded, but later, PW4 came and opened the door, and they went home. She stated that in the morning, as she was bathing PW4, she noticed "whitish things" on PW4's genital organ which were also spread on PW4's biker, she told her mother about it but feigned ignorance of where the same had originated from. She testified that on yet another date, she spent the night in the Appellant's house and when she returned in the morning, when pressed, she disclosed that she had spent the night in the Appellant's house, and also revealed that the Appellant had also been defiling PW4, and that this is how her mother also learnt of PW4's defilement by the Appellant, and reported to the police. Regarding the second incident of defilement, she stated that the Appellant found them playing a "hide-and-seek" game known as "are you ready", and that the Appellant got to her as her friends had, as part of the game, retreated to hide. She reiterated that she got injured when the Appellant pushed his genital organ into hers. 41. Medical evidence was provided by PW1, the Clinical Officer, who testified that PW4 was attended to at the facility on 10/1/2022 with history of having been defiled by a person known to her. She stated that examination conducted on PW4 revealed that she had healed hymenal tears at 3, 6 and 9 o'clock caused by a blunt object, and that the findings were consistent with defilement. She then produced the P3 Form. 42. Regarding PW2's and PW4's use of the terms "dudu", and "the place for urinating", the Court of Appeal, in the case of *Muganga Chilejo Saha v Republic* [2017] eKLR, acknowledged that these are acceptable descriptions of defilement especially where penetration is established. In accepting that in Kenya, the society has adopted such terms as euphemism to mean the phrases generally used by children, and even adults, to describe sexual acts, the Court of Appeal stated as follows: " Naturally children who are victims of

sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), “he used his thing for peeing”, (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added).” 43. In this case therefore, there is the corroborating evidence that at least on one occasion, PW2 actually witnessed the Appellant defiling PW4, before turning to PW4 and also defiling her. There is also indication that the Appellant’s alleged defilement of PW2 was the subject of a separate case. Regarding a second act of defilement of PW4 by the Appellant on a later date, PW2 also gave strong circumstantial evidence by stating that on that subsequent date, the Appellant took both girls to a different house, where a friend of the Appellant joined in, and they sent PW2 out to go to the shop while retaining PW4 in the house, and when PW2 returned, she found PW4 crying. According to PW2, it is on the same night that when bathing PW4, she noticed a whitish discharge from PW4’s genitals. PW3, the girls’ mother, and PW5, the neighbour whom PW3 under whose care the mother would sometimes leave the girls, also gave circumstantial evidence that strongly implicated the Appellant in the offence of defiling PW4. There was also the medical evidence given by PW1, who also produced the P3 Form, In my view, the eye-witness account given by PW2, taken together with the circumstantial evidence referred to, sufficiently corroborated the testimony of PW4. In view of the above, I cannot also find any reason to fault the trial Magistrate’s finding that “penetration” was proven. This ground, too, therefore fails. 44. On the issue of “identification”, the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows: “Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the Appellant which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”. 45. In this case, PW2, PW3, PW4, and PW5 all testified that the Appellant lived in the same neighbourhood as they, and all referred to him by his nickname of “Ras”, a nickname which the Appellant did not deny. The evidence, too, indicates that the witnesses gave the Appellant’s name to PW6, the Investigating Officer. I also note that the Appellant, in his defence, basically admitted knowing PW3 and her

children (PW2 and PW4) by alleging that he had been framed by the children's mother (PW3) because of a dispute that arose when he cautioned PW3 against behaving indecently in the presence of her children while drunk. PW6, the Investigation Officer also testified that she visited the scene and established that the Appellant's house is only about 150 metres from PW3's house. 46. I therefore find the above to be a case of "recognition", rather than identification of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification". In respect thereto, in the case of *Reuben Tabu Anjononi & 2 Others v Republic* [1980] eKLR, the Court of Appeal guided as follows: " This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported). We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him. We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1." 47. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. This ground of Appeal therefore also fails. 48. Looking at the defence offered by the Appellant, I also agree with Ms. Muriithi, that the same defence was a mere denial and incapable of dispelling the overwhelming evidence tendered against him. His claim that he was framed because of the altercation that occurred between him and the girl's mother is also not convincing noting the evidence that the altercation did not arise out of a disagreement over a separate or prior issue but was itself in respect to the Appellant's alleged inappropriate proximity to, and indecent conduct with the children, including playing for them music and asking them to dance for him, actions which the mother frowned upon, long even before learning of the acts of defilement, noting that the Appellant lived alone. 49. That the law requires corroboration of testimony of a minor-victim where she is the sole or single witness is clear from Section 124 of the Evidence Act . However, there is the proviso to that same Section to the effect that, in cases of sexual offences, there need not be such corroboration if the trial Court believed that the minor-victim told the truth, and recorded its reasons. The Section and the proviso stipulate the following: " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Appellant shall not be liable to be convicted on such evidence unless it is corroborated by other 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 Appellant person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” [Emphasis is mine] 50. From the foregoing, it is clear that the proviso to Section 124 of the Evidence Act allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. In this case however, Section 124 above need not even be invoked since, as already observed, there was sufficient corroboration, including by way of an independent eye-witness account, and also by medical evidence. 51. Regarding the sentence of 40 years imprisonment, the applicable principles in re-considering sentence at the appeal stage, were restated by the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms: “ It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist”. 52. In this case, the Prosecution has faulted the trial Magistrate for failing to impose the life sentence stipulated under Section 8(2) of the Sexual Offences Act , and has therefore filed a Notice seeking enhancement of the sentence of 40 years imprisonment to one of life imprisonment. In accordance with the guidelines laid by the Court of Appeal in the case of *Kesusa & Another vs Republic* [2022] KECA 546 (KLR), I ascertained, when this matter came up in Court on 8/07/2025, that the Notice had been served upon the Appellant, and he also confirmed that he fully understood its implication. He however still made the firm decision to proceed with the Appeal. With this assurance, the matter of enhancement of sentence formally became a live issue for determination herein. 53. As earlier observed Section 8(2) of the Sexual Offences Act provides as follows: “ 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. Section 8(2) above therefore prescribes only one mandatory sentence - life imprisonment. Nevertheless, the current jurisprudence is that strict adherence to mandatory or minimum sentences is discouraged and Courts retain the discretion to depart therefrom, where necessary. This was the guidance given by the Supreme Court in the famous case of *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR. In this case, the trial Magistrate imposed, not life sentence, but the lesser sentence of 40 years imprisonment. 55. However, another angle arising is that by the subsequent clarification made by the same Supreme Court in its subsequent directions given in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that *Muruatetu* only applied to murder cases, and not to any other type of case, not

even sexual offences. The Supreme Court reiterated these directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), in which the Supreme Court set aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside a mandatory minimum prison sentence of 20 years imposed by the High Court. 56. In respect to the life sentence, there has also been emerging jurisprudence questioning its constitutionality. In regard thereto, I cite the Court of Appeal case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) 7 July 2023) (Judgment), which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence of life imprisonment, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal, the Supreme Court faulted the Court of Appeal for abrogating itself jurisdiction to determine the issue yet it had not been canvassed at the Court of Appeal, and also usurping the role of the Legislature by purporting to declare the life sentence as unconstitutional, which it then swiftly reinstated. This was in the case of *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR), in which the Supreme Court held as follows: “ 70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7 th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the Sexual Offences Act .” 57. There is also the Supreme Court case of *Republic v Ayako* (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment), delivered concurrently with the case of *Manyeso* (supra). In the *Ayako* case, like in the *Manyeso* case, the Supreme Court similarly reinstated the life sentence imposed on the Appellant by the Magistrate’s Court in respect to a conviction for defilement of a minor, and which the Court of Appeal had set aside on the ground that life sentence is unconstitutional, and had substituted it with a prison sentence of 30 years. As in the case of *Manyeso*, the Supreme Court found that the issue of constitutionality of the life sentence had not been raised or canvassed before the High Court, and the Court of Appeal could therefore not assume jurisdiction on the issue at that stage. 58. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the life sentence imposed in this case, on the sole basis that the life sentence is unconstitutional. 59. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now proceed to do. 60. In respect to sentencing, the Supreme Court, in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR), guided that the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant. 61. Similarly, in the case of *Daniel Kipkosgei Letting v Republic*

[2021] eKLR, the Court of Appeal held as follows: “ we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.” 62. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated that: “ The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four-tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.” 63. Applying the above principles to the facts of this case, I consider that the crime of defilement is treated as a heinous and serious offence under Kenyan law and society at large, and is always severely punished. I may also repeat that the Appellant was liable to a sentence of life imprisonment, but the trial Magistrate, in his wisdom, gave out 40 years imprisonment. It is also relevant to note that the victim in this case was a 4-year child of tender age, such a vulnerable soul who required protection from all, including, from the Appellant, a neighbour, whom she must have trusted. I do not have to be a psychologist to discern that the minor will suffer lifelong trauma resulting from the act, and will forever be reminded that her chastity and innocence were robbed from her at such an early age. The whole family must also be silently suffering from untold trauma caused by the act. Taking all these factors into account, it cannot be denied that the offence merited a stiff and deterrent sentence. It is also not in dispute that the Appellant was given the opportunity to mitigate, which he did, and which the trial Magistrate stated that he had considered. In my view, the sentence of 40 years was appropriate and commensurate with the offence committed, considering its gravity. 64. The Appellant has failed to demonstrate that the trial Court, in imposing the sentence, overlooked any material factor, or took into account wrong material, or acted on the wrong principles. In the circumstances, I find no reason to fault the trial Magistrate for imposing the prison sentence of 40 years, which I hereby uphold, and also decline to enhance. 65. Regarding the issue of Section 333(2) of the Criminal Procedure Code provides as follows: “ (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.” 66. On the issue, the Court of Appeal in the case of Bethwel Wilson Kibor vs. Republic [2009] eKLR stated as follows: “ By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us

that as at 22 nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

67. On its part, The Judiciary Sentencing Policy Guidelines (2014) provides the guidance that: “ The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.” 68. From the record, the Appellant was arrested on 12/01/2022, and sentenced on 6/12/2023, a period of about 1 year and 11 months, which period he spent throughout in remand custody. In accordance with the proviso to Section 333(2), the Appellant is entitled to that period being taken into account. Final Orders: 69. In the end, I make the following Orders: i. The appeal against the conviction and sentence of 40 years imprisonment imposed on the Appellant in Eldoret Chief Magistrates’ Court (SO) Criminal Case No. E012 of 2022 fails, and the sentence and conviction are upheld. ii. Regarding the prison sentence however, the same shall be computed from the date of arrest, namely, 12/01/2022. DELIVERED, DATED AND SIGNED AT ELDORET THIS 13 TH DAY OF FEBRUARY 2026 WANANDA JOHN R. ANURO JUDGE Delivered in the presence of: Appellant present Ms. Muriithi for the State Court Assistant: Brian Kimathi

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