

KENYA / JUDGMENT

Kiio v Republic [2026] KEHC 4046 (KLR)

[2026] KEHC 4046 (KLR)**COURT**

High Court

BEFORE

RC Rutto

CASE / FILE NUMBER

Criminal Appeal E019 of 2025

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Kiio v Republic (Criminal Appeal E019 of 2025) [2026] KEHC 4046 (KLR) (26 March 2026)
(Judgment) Neutral citation:

[2026] KEHC 4046 (KLR) Republic of Kenya In the High Court at Machakos Criminal Appeal E019 of 2025 RC Rutto, J March 26, 2026 Between Bernard Mutunga Kiio Appellant and Republic Respondent (Being an appeal from the Judgment of Hon. Daffline Nyaboke Sure (PM) at Kangundo Court Sexual Offence Case No. E020 of 2021 delivered on 13th June 2024)

Judgment

A. Introduction 1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act Cap 63A has lodged this appeal. He seeks that his conviction be quashed and the life imprisonment sentence set aside. 2. The appeal is premised on the following grounds, that the Learned trial Magistrate erred in law and facts: to pronounce a life sentence not supported with sound evidence establishing elements of a defilement case herein; to give a mandatory life sentence which remained disproportionate with actual facts of the case; by not outlining the fair trial hearings by way of facilitating legal representation as per Article 50(2)(g) of the Constitution requirement; and that the defence was unjustly rejected in the trial court below. B. Background 3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8 (2) of the Sexual Offences Act .. The particulars of the offence were that on 11 th day of April 2021 in Kangundo sub-county within Machakos county, he intentionally caused his penis to penetrate the genital organ namely anus of RKN, a boy aged 7 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act . The particulars of the offence were that on 11 th April 2021 in Kangundo sub-county within Machakos County, he intentionally and unlawfully touched the anus of RKN with his penis against his will a child aged 7 years. 4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 4 witnesses. C. Prosecution Case 5. After a voir dire examination, PW1, RKN, testified that he was eight years old, and attended [Particulars Withheld] School in Kangundo, where he was in Grade

Two. He testified that he could not recall the date but he knew Benard Mutunga Kiio. He stated that he saw him in the hill at Kangundo as he was playing alone and then Benard called him to go with him to buy sweet but he did not buy the sweets. He testified that the accused took him to Matasya and put his thumb inside his anus and threw soil on his face and then covered his mouth using his hand. He stated that when his mother was bathing him, she found a big hole in his anus and he told her that Benard put his penis inside his anus and he did not scream and that he left him there and went. He testified that he was taken to Kangundo hospital and was treated. He further testified that he knows the person who put his thumb in his anus. 6. PW2, RM testified that she resided in Kangundo near the Mosque and was not employed. She recalled that on 11 th April 2021, her son, RKN went out to play in the afternoon, returned home, ate, and later went to sleep. At around 4:00 a.m., he complained of stomach pain and needed to use the toilet. She observed that his bowel movement was unusually fast and that he was experiencing pain in his anus. Upon inspecting him, she found his anus wet and bruised. When she asked him what had caused the injuries, he initially refused to tell her. After pressing him with a stick, he disclosed that a man named Mutunga had assaulted him. PW2 immediately informed her sister and the village elder, who assisted in apprehending the accused. She then took her son to the police station and to the hospital, accompanied by PCW officer Sabina. At the hospital, a P3 form was issued. PW2 confirmed that her son consistently identified Mutunga as the person who had assaulted him. 7. She stated that at the time of the incident, her son was eight years old and identified his birth notification, marked PMFI1. She also identified the P3 form marked PMFI2 and medical notes marked, PMFI3. She confirmed that Mutunga was well known to her, as his home was nearby. 8. PW3, Corazol Cherop, testified that she was a registered clinical officer, No. xxxxx based at Kangundo Level 4 Hospital. She stated that on 12 th April 2021, the victim was brought to the hospital by her mother, who reported that the child was defecating on himself, which was unusual. Upon inquiry, the child disclosed that he had been sexually abused by a person he knew on 11 th April 2021. PW3 conducted a medical examination and observed that there were no abnormalities from head to toe. However, the anal muscles were weak and the anal area was inflamed. Laboratory tests were conducted, including an HIV test and a VDRL test, which was negative. An anal swab revealed no spermatozoa but did show epithelial cells. The child was treated with antibiotics, post-exposure prophylaxis (PEP), and analgesics. PW3 produced the P3 form as PExb.2 and the treatment notes as PExb.3. 9. PW4, PC Sabina Arumu, testified that she was a police officer, No. xxxxxx based at Central Bank Kenya Eldoret, and formerly stationed at Kangundo Police Station. She stated that on 12 th April, 2021 at 4:00 p.m., she was directed to investigate a sodomy case reported under OB No. 16, relating to an incident that occurred on 11 th April 2021. She explained that she interviewed the mother and the child, who was eight years old at the time. The child reported that while playing with friends at Matasia, the accused, Mutunga, asked him to follow him. The child complied and was taken to a bush, where the accused ordered him to remove his clothes and then inserted his penis into the child's anus. The accused threatened the child not to disclose the act. The child went home, did not eat supper and slept. 10. That the following morning, he woke up his mother and requested to go to the toilet and when the mother took him to the toilet, he complained that he was feeling pain in his anus and so he requested his mother to smear Vaseline or wash him and at that point the

mother suspected something had taken place and so she inserted her finger and saw something that looked like sperm and that the anus looked unnatural. PW4 stated that the mother interrogated the child and he disclosed that their neighbour, Mutunga, had done the act and thereafter the mother alerted the village elder and reported. That the village elders arrested the accused and took him to Kangundo Police Station. 11. PW4 testified that she escorted the child to Kangundo Level 4 hospital where he was examined and treated. She produced the birth notification as PExh1. She testified that in her investigation, she gathered that the accused took the child into the bush and there was no witnesses to what he was doing. That the accused found children playing in the grounds and asked the child to follow him and he did because they are neighbours. 12. With the testimony of these four witnesses, the prosecution closed its case. Upon consideration, the trial court found that the prosecution had established a prima facie case, whereupon the appellant was placed on his defence. He elected to give unsworn evidence and did not call any other witnesses. D. Defence Case 13. In defence, DW1, the appellant, only testified that his name is Benrad Mutunga Kiio and lives in Kanzokea. That he is a farmer and does not know anything about the case. 14. Ultimately, the appellant was convicted of defilement and sentenced to life imprisonment. E. The Appeal 15. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the life imprisonment sentence set aside. The appeal was heard by way of submissions. The parties' submissions are as follows:

- a) Appellant's Submissions 16. The appellant contends that the prosecution failed to prove the essential elements of the offence beyond reasonable doubt. That the prosecution did not establish penile penetration, which is a mandatory component of the offence under Sections 2(1) and 8 of the Sexual Offences Act . 17. He points to the testimony of PW1, the child victim, and submits that he described the insertion of a thumb into his anus but gave limited details about the circumstances of the alleged penile penetration. That PW1 did not describe whether he was dressed or undressed, the position he was in, or how the act began, leaving critical evidential gaps. 18. The appellant also challenges the credibility of PW1, arguing that the child was coerced into identifying him as the perpetrator, as he did not initially disclose the incident to his mother, who allegedly had to use a stick to compel him to speak. The defence further submits that the alleged crime scene, Matasya, was not properly established. That PW1's account that the incident occurred on a hill and later at Matasya raises questions about the reliability of the location. The defence emphasizes the implausibility of committing the act in broad daylight without witnesses noticing the event. 19. Regarding the medical evidence, the appellant submitted that PW3, the clinical officer, examined the child one day after the alleged incident and found only weak anal muscles and inflammation, without documenting acute bruising or signs of penile penetration. That this contrasts with the mother's account of fresh bruises, casting doubt on the conclusiveness of the medical findings. He urged that these non-specific medical signs could result from causes unrelated to sexual assault. 20. The appellant thus argues that the prosecution failed to establish the essential element of penile penetration beyond reasonable doubt, that the victim's testimony is inconsistent and unreliable, the crime scene is unverified, and the

medical evidence is inconclusive. Accordingly, he prays that the Court allows the appeal, quashes the conviction and the life sentence imprisonment, and sets him free.

- b) Respondent's Submissions 21. The respondent noted that although the appeal contained four grounds, the appellant only argued two of them in his written submissions, thereby impliedly abandoning grounds 1 and 3. Consequently, the respondent addressed only the two argued grounds, namely that the trial court erred in failing to consider emergent jurisprudence on sentencing discretion and that the trial court failed to consider the defence tendered by the appellant. 22. On sentencing discretion, the respondent submits that the minimum sentences provided under the Sexual Offences Act have not been declared unconstitutional and therefore remain applicable. The respondent relies on the decision of the Supreme Court in *R v. Ayako* [2025] KESC 20 (KLR), in which the apex Court affirmed a life sentence imposed for defilement under section 8(1) as read with section 8(2) of the Sexual Offences Act. The respondent emphasized that the Supreme Court clarified that the reasoning in *Francis Karioko Muruatetu & Another v Republic* only applies to the mandatory death penalty for the offence of murder under sections 203 and 204 of the Penal Code and should not be extended to other offences carrying mandatory or minimum sentences. It is submitted that the Supreme Court faulted the Court of Appeal for extrapolating the Muruatetu reasoning to the Sexual Offences Act and stated that such application offended the doctrine of stare decisis. The respondent thus argued that the trial magistrate acted correctly in imposing a life sentence once the appellant was found guilty under section 8(1) read with section 8(2) of the Sexual Offences Act. 23. On the allegation that the trial court failed to consider the defence, the respondent reproduced the appellant's unsworn defence given on 29th February 2024, in which he stated that "his name is Bernard Mutunga Kiio, that he lives in Kanzokea, works as a farmer and that he knew nothing about the case." The respondent submitted that the trial court did in fact consider the defence, as reflected in the judgment where the magistrate stated that he had considered the evidence of PW1 and noted that the accused claimed ignorance of the matter. 24. It was also submitted that the appellant merely denied the allegations without offering any plausible explanation or calling any witnesses to support his defence, thereby adopting what the respondent described as an escapist approach. As a result, the trial court could not draw any substantive assistance from the brief statement of defence presented. 25. In conclusion, the respondent urged the Court to find that the appeal lacks merit and to dismiss it. F. Analysis and determination 26. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. However, in so doing, the Court must remain mindful that it did not see or hear the witnesses testify. See the cases of *Pandya v R* [1957] EA 336; *Ruwalla v R* [1957] EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR. 27. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: - i. Whether the offence of defilement was proved; ii. Whether the defence was properly considered; and iii. Whether the sentence was harsh. 28. Section 8(1) of the Sexual Offences Act provides that "a person who commits an act which

causes penetration with a child is guilty of an offence termed defilement”. While Section 8 (2) of the Sexual Offences Act provides that “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.” 29. In the case of *George Opondo Olunga v Republic* (2016) eKLR, the ingredients for the offence of defilement were set out as: a. Proof of the age of the victim; b. Proof of penetration or indecent act; c. Identification of the perpetrator. 30. On the issue of age, the prosecution bore the burden of proving that the complainant was a child within the meaning of the law. The record shows that PW1 testified that he was eight years old at the time he gave evidence and that he was in Grade Two at [Particulars withheld] School in Kangundo. His mother, PW2, also confirmed that the child was eight years old at the time of the incident and nine years old by the time she testified in court. In addition, PW4, the investigating officer, produced the child’s birth notification which was admitted in evidence as PExh.1. The document was admitted without objection and forms part of the record. Notably, the appellant did not contest the victim’s age in this appeal. This Court therefore finds that the age of the complainant was proved beyond reasonable doubt. 31. Turning to penetration, section 2 of the Sexual Offences Act defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The prosecution relied on the testimony of the complainant as well as medical evidence to establish this element. PW1 testified that the appellant called him while he was playing and took him to Matasia. According to the child, the appellant put his thumb inside his anus and later inserted his penis into the child’s anus. The child further testified that the appellant covered his mouth and threw soil on his face. Later, when the child was being bathed, his mother noticed that the anus appeared abnormal and the child disclosed that the appellant had inserted his penis into his anus. 32. The law is settled that the testimony of a child victim in sexual offences can sustain a conviction if the court believes the child to be telling the truth and records the reasons for such belief. Section 124 of the Evidence Act provides that a court may convict on the evidence of the victim alone in sexual offences if it is satisfied that the victim is telling the truth. The court conducted a voir dire examination and found that PW1 possessed sufficient intelligence to testify on oath. His evidence was therefore properly received. 33. The medical evidence also lends support to the child’s account. PW3, the clinical officer, examined the complainant on 12 th April 2021, one day after the alleged incident. The examination revealed that although there were no external injuries from head to toe, the anal muscles were weak and the anal area was inflamed. While the anal swab did not reveal spermatozoa, epithelial cells were present and the child was treated with antibiotics and post-exposure prophylaxis. It is not uncommon in sexual offences for spermatozoa not to be detected, particularly where some time has elapsed between the act and the medical examination or where washing has occurred. The child’s testimony was consistent with the medical findings of inflammation and weakened anal muscles. Furthermore, the conduct of the child shortly after the incident also supports the prosecution’s case. In the case of *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus; “ The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the

victims over evidence and corroborated by medical evidence or other evidence.” 34. Guided by the above authority, I find that the evidence of the victim, taken together with that of his mother, PW2, who examined him almost shortly after the incident and that of the PW3, the clinical officer, was sufficient to prove the ingredient of penetration and there is no reason to disturb the finding on this issue. 35. Turning to identification of the perpetrator, PW1 knew the appellant prior to the incident. Both PW1 and PW2 testified that the appellant was their neighbour. PW1 clearly stated that it was the appellant who called him and led him to the bush. The incident occurred during the day and there was no suggestion that visibility was compromised. PW2 also confirmed that when she questioned the child about the injuries, he named Mutunga as the perpetrator. The appellant was subsequently arrested by the village elders and taken to the police station. There is therefore no indication of mistaken identity. This was a person known to the complainant and identification was by way of recognition. I hasten to add that the appellant does not dispute the fact that the victim knew him. There was equally no allegation and/or prove of malice and /or grudge on the part of the complainant to want to fix the appellant. 36. The appellant raised doubts about the location of the incident and argued that the alleged offence could not have occurred in broad daylight without witnesses noticing. However, the fact that no one else witnessed the act does not in itself render the prosecution case implausible. This Court is also cognizant of the peculiarity of sexual offences, particularly those involving children. They are often committed in secluded places away from the eye of a third party. Hence requiring an eyewitness in those cases will be a great hindrance to justice for the victims. However, the Court also notes that in some cases, eye witnesses may be available. 37. In this case, the evidence of PW4 confirmed that the appellant led the child to a bushy area where the act took place. This explanation reasonably accounts for the absence of eyewitnesses. Having re-evaluated the entire record, this Court finds that the prosecution proved beyond reasonable doubt that the appellant was the person who committed the offence. He was sufficiently identified. Consequently, the Court finds that the prosecution sufficiently proved all the ingredients of defilement. 38. On the issue whether the defence was properly evaluated. The appellant elected to give an unsworn statement in which he simply stated that he is a farmer living in Kanzokea and that he did not know anything about the case. He did not call any witnesses. The only evidence he gave before the trial court then was that “he knew nothing about the case”. His defence did not raise any reasonable doubt in light of the evidence presented by the prosecution witnesses. The appellant’s statement amounted to a bare denial and did not address the detailed allegations made by PW1 or explain why the child and his mother would falsely implicate him. The defence therefore did not weaken the prosecution case. I am satisfied that the trial court did consider the defence and that its rejection of the same was justified. 39. I note that while before the trial court, the appellant gave no rebuttal to the prosecution case, he has, before this appellate Court, raised several issues in an attempt to “rebut” the prosecution evidence. An appellant ought to be well advised that the right forum for arguing his case and tendering his defence is before the trial court. Where one opts to remain silent or express ‘ignorance’ before the trial court, he/she cannot now raise new material evidence in defence before an appellate court. The appellate court considers that

what was before the trial court. Consequently, I find that the defence that was given before the trial court was considered and correctly dismissed. 40. On whether the sentence was harsh, the appellant was sentenced to life imprisonment. In passing sentence, the trial court stated thus, "I have considered the law and it favours imposition of the sentence set by the law. The accused is sentenced to life imprisonment." 41. This Court notes the recent decision of the Supreme Court in *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)* where the apex Court affirmed the mandatory sentences in the Sexual Offences Act. It therefore follows that the mandatory life sentence in Section 8(2) of the Sexual Offences Act that the appellant was sentenced to is a legal sentence and it is for upholding. 42. Following the above therefore, the appeal is dismissed in its entirety and the trial court decision is upheld. Orders accordingly. DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 26 TH DAY OF MARCH 2026 RHODA RUTTO JUDGE In the presence of;
.....for Appellant for Respondent Selina Court Assistant

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