

KENYA / JUDGMENT

Kariuki v Republic [2026] KEHC 4578 (KLR)

[2026] KEHC 4578 (KLR)**COURT**

High Court

BEFORE

PJO Otieno

CASE / FILE NUMBER

Criminal Appeal E018 of 2025

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Kariuki v Republic (Criminal Appeal E018 of 2025) [2026] KEHC 4578 (KLR) (6 February 2026)
(Judgment) Neutral citation:

[2026] KEHC 4578 (KLR) Republic of Kenya In the High Court at Naivasha Criminal Appeal E018 of 2025 PJO Otieno, J February 6, 2026 Between James Kaitho Kariuki Appellant and Republic Respondent (Arising from the original conviction and sentence in Naivasha Chief Magistrate's Court Sexual Offences Case No. 75 of 2020 by Hon E. Kelly (PM))

Judgment

Background of the Appeal 1. The Appellant, James Kaitho Kariuki, was arraigned before the Chief Magistrate's Court at Naivasha, on 9/10/2020, charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act , No. 3 of 2006. The particulars of the charge were that on the 2/10/2020, within Gilgil Sub-County, in Nakuru County, he intentionally and unlawfully caused penetration with his penis into the vagina of PMC, a child then aged 12 years. 2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child with mental disabilities contrary to Section 11(1) of the Sexual Offences Act . The alternative charge was grounded on the allegation that on the same date and location, the Appellant touched the vagina, buttocks, and breasts of the complainant with his penis. 3. The Appellant pleaded not guilty to both counts on 9/10/2020. Following full trial, the trial Magistrate delivered its judgment on 31/07/2025. The court found him guilty of the primary charge of defilement and consequently sentenced him to twenty (20) years imprisonment on 11/09/2025. 4. Being dissatisfied with the trial court decision, the appellant lodged the instant appeal vide Petition of Appeal filed on 22/09/2025. The appeal challenges the safety of that conviction on multiple grounds, ranging from standard and degree of proof the minor's age to alleged material contradictions in the evidence in the exhibits. 5. The gravamen of the Appellant's appeal is that the prosecution failed to prove their case of defilement to the required standards of beyond reasonable doubt. The Appellant seeks a review of the sentence, arguing that the trial court failed to comply with Section 333(2) of the Criminal Procedure Code regarding time spent in remand. Summary of the Prosecution's Case 6. PW 1 was a child aged 13

at the time of her testimony on February 23, 2023. The court conducted a *voire dire* examination and found that she did not understand the nature of an oath but understood the duty of telling the truth, allowed her to give unsworn testimony. She testified that she knew the Appellant as a friend of her father, P. 7. Regarding the first incident on 02/10/2020, she stated her mother had sent her to Shiko's place to have her hair plaited. The Appellant met her and asked her to come to his house to pick up items for her father. At his house, after she washed utensils and bought him cigarettes and cake, he gave her tea. He then produced a blue-coloured knife, threatened to kill her if she screamed, and ordered her to undress. He inserted his penis into her vagina, causing her pain. Afterward, he gave her Ksh 5. 8. The victim further testified to a second incident at her own home while her mother was away. On that second incident, the Appellant allegedly defiled her on a chair and gave her Ksh

10. She stated, on the third incident which she never revealed the date, the Appellant again inserted his manhood into her vagina in their house on a chair after which he gave her Ksh
20. She testified she used Ksh 10 of that money to buy steel wool and matches for her mother and gave Ksh 5 to her neighbor, Esther. On cross-examination, she admitted she did not know the Appellant's name initially but learned it was Gaitho. She clarified that she disclosed the abuse to Esther only after Esther saw her urinating in pain and having trouble walking. 9. PW 2 was the mother of the complainant. According to the trial record, she was called to the stand but was stood down by the prosecution because they did not have the child's birth certificate ready for identification. She never returned to finish her testimony, leaving a gap in the direct evidence concerning the child's birth date and age. 10. PW 3, a Police Officer from the Gilgil Police Station, Gender Desk, received the Report on 4/10/2020. She testified that the minor arrived with her mother and reported being defiled by a man named Fundi. She testified to taking the minor to the Appellant's house, where the minor identified him before his arrest. She produced several exhibits; a Kifaru matchbox (Pex 2), steel wire (Pex 3), and Ksh 20 cash (Pex 4). She also produced the P3 form, PRC form, and an outpatient card which she claimed indicated the child was 10 years old in 2019. She admitted under cross-examination that the Ksh 20 produced was the cash allegedly given to the minor by the Appellant. 11. PW 4, a Medical Officer at Gilgil Sub-County Hospital, examined the complainant on 05/10/2020. He formed the opinion and testified that the complainant was a 12-year-old girl who reported being defiled three days prior. His physical examination revealed a broken hymen and bruises on the vaginal wall. He found pus cells and blood in the minor's urine. He concluded that the findings were consistent with penetration. The filled out the P3 form and the Post Rape Care form, identifying the child as 12 years old based on the hospital outpatient card and history provided. 12. When placed on his defence and given a chance to testify, the Appellant elected to give a sworn statement. He advanced a defense that was a total denial of the allegations. He stated that he was a farmer aged 70 years of age. He denied being at the scene of the alleged incidences but at his shamba during the period of the alleged offences. He however, admitted that he had no witnesses to corroborate his alibi. 13. He introduced a motive for his prosecution, claiming that he had a dispute with the employer of the complainant's mother. He alleged that the said employer

threatened to teach him a lesson and collaborated with the mother to frame him for defilement. He stated that he did not personally know the complainant's mother and suggested that the child's testimony was either coached or the result of mistaken identity. 14. It is that corpus of evidence the court relied upon to reach the conviction and sentence now subject of the challenge in this appeal. 15. The Court directed that the appeal be canvassed by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions which the court has had a chance of reading and will give due consideration to arrive at its decision. Summary of the Appellant's Submissions 16. The Appellant's written submissions were filed on 19/11/2025. The same seeks to dismantle the prosecution's case on several legal and factual fronts. The Appellant submits that age is the foundational element of defilement. He points out that the mother (PW

- 2) was stood down and never returned to prove the age, leaving the prosecution to rely on an outpatient card, which he submits was introduced unprocedurally for not having been verified by hospital staff, and was never supplied to the defense. He therefore contends that the age stated (12 years) was therefore based on hearsay, which is inadmissible to prove a critical ingredient of a crime. 17. The appellate cited the decision in Joseph Ndungu Kimanyi vs Republic [1979] KLR 283, to urge that the complainant's testimony was too inconsistent to be safe for conviction. He highlights that PW 1 initially claimed to know him well as Gaitho, a friend of her father, but later admitted she only learned his name at the Police Station. He also challenges the introduction of the alias Fundi by PW 3, which was never mentioned by the victim. 18. The Appellant points to contradiction regarding the Ksh
- s. 20 exhibit. PW 1 testified she spent Ksh
 - s. 10 of that money on matches and steel wool, yet PW 3 produced the same Ksh
 - s. 20 cash as an exhibit in court. The Appellant argues that it is logically impossible for money that was spent at a shop to be preserved by a neighbour and produced as an exhibit, suggesting the entire narrative about the money was fabricated. 19. Relying on BCT v Republic (2019) eKLR, the Appellant submits that the prosecution's failure to call Esther, the neighbour who discovered the pain, and Shiro, the hair-plaiter, leaves a massive gap in the evidence. He argues that since these witnesses were central to the discovery and reporting of the alleged crime, their absence should lead to an adverse inference that their testimony would have undermined the prosecution's case. 20. Finally, the Appellant argues that the trial court ignored the mandatory provisions of Section 333(2) of the Criminal Procedure Code. He spent five years in remand from 2020 to 2025, but the trial court ordered his 20-year sentence to run from the date of conviction, effectively making his total incarceration 25 years. 21. The appellant prays that the conviction be quashed for being unsafe and the sentence set aside, or at the very least, revised to commence from the date of arrest. Summary of the Respondent's Submissions 22. The Respondent filed submissions on 18/11/2025, urging the court to uphold both the conviction and the sentence. The Respondent argues that the victim positively identified the Appellant as a man she knew well

and assert that the Appellant was a frequent visitor to the victim's home, making this a clear case of recognition under the standards set in *Erick Onyango Ondeng vs Republic* [2019] eKLR. The respondent dismisses the naming of the appellant as alias Fundi to be a minor detail that does not displace the victim's ability to recognize her attacker. 23. The Respondent maintains that penetration was proved beyond reasonable doubt through the combination of the victim's testimony and the medical evidence provided by PW

4. They argue that the broken hymen and vaginal bruises are unshakeable physical evidence that a crime occurred. 24. Regarding age, the Respondent submits that the outpatient card and the trial court's own observation of the victim were sufficient. They cite Section 124 of the Evidence Act, arguing that the court is entitled to rely on the evidence of a child victim if satisfied she is telling the truth. They point out that the trial magistrate specifically recorded that she found the minor to be a witness of truth. 25. The Respondent argues that the Appellant's defense of a frame-up was unsupported by any evidence. The defense of alibi is termed as an afterthought that was never put forward during the investigation phase and the prosecution's case to afford it an opportunity to investigate and establish. Citing *Victor Mwendwa Mulinge v Republic* (2014) eKLR, it is argued that the prosecution has no duty to rebut an alibi that is introduced late and lacks any corroborative foundation. Issues, Analysis and Determination 26. The court has anxiously and thoroughly reviewed of the trial record, the memorandum of appeal and the rival submissions by both parties and identifies the issues for determination to be; - a. Whether the age of the complainant was proved beyond reasonable doubt? b. Whether the complainant was a child of tender years whose evidence could be received without being sworn as well as the evidentiary value of unsworn evidence? c. Only, if the two above are answered in the affirmative, if the sentence meted was commensurate? Whether the Age of the Complainant was Proved Beyond Reasonable Doubt? 27. The ingredients forming the offence of defilement were enunciated in the case of *George Opondo Olunga v Republic* (2016) eKLR are; age of the complainant, proof of penetration and positive identification of the assailant. 28. On the element of age, the court notes that this remains the most critical hurdle in a defilement cases. The Sexual Offences Act defines a child as any human being under the age of eighteen years. The burden of proving that the complainant falls within this protected category lies squarely on the prosecution and must be discharged to the standard of proof beyond reasonable doubt. 29. In *Edwin Nyambogo Onsango vs Republic* (2016) eKLR, the Court of Appeal held that age can be proved through various means, including birth certificates, baptism cards, medical evidence, or the oral testimony of a parent or guardian. However, the court emphasized that whatever form the evidence takes, it must be credible and reliable. The court held as follows:- "...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary 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" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Dennis Kinywa vs Republic*, Criminal

Appeal No. 19 of 2014) and (Omar Ucher vs Republic, Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni vs- Uganda Criminal Appeal No. 2 of 2000. “We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...” Emphasis provided 30. In the instant, the court notes that prosecution called PW 2, the mother of the complainant, but she was stood down without completing her testimony or producing a birth certificate and was never recalled. The prosecution then solely relied on an outpatient card (Pex 6) and the testimonies of the investigating officer (PW

- 3) and doctor (PW
- 4) who used that card to record her age as 12. 31. The Kenyan law allows for age to be proved by observation and common sense. In the above cited case of Evans Nyamari Ayako v Republic (2015) eKLR, the Supreme Court noted that even in the absence of a birth certificate, age can be established through a voire dire and the testimony of guardians. Here, even though the trial magistrate conducted a voire dire and observed the complainant, the only reason the court assessed her to be a child was the fact she was in Grade 1, at age 13, and had the physical appearance of a child. That the court finds to be unscientific and arbitrary when there was a chance to do better. It was the duty of the trial court to avail evidence not the court to supply that very critical cog in the prosecutions case. 32. The court notes that while such a position may be tenable in any other case, it is unsafe to do so in a defilement case where the age itself is the foundation of the case and goes further to determine the severity of the sentence to be meted. It is not just enough to be satisfied that the victim is a minor. The ages brackets delineated by section 8 of the Act, makes every detail and difference in age all crucial. That it takes just one day, a few weeks or a month to create a whole difference whether one gets a life imprisonment of just twenty years in jail. It thus matter whether one is exactly 11 year or eleven years and two days. That is a difference that may be lost or blurred from the eyes of a judge, however judicious, one may try to be. 33. The trial court’s holding that the complainant was 13 years is rooted on the information recorded in the outpatient card (Pex6) produced by the prosecution. The Appellant objects to the use of the outpatient card to prove age. The court finds the same to be problematic too for the following reasons. First, as correctly noted by the Appellant, the court finds the card was never marked for identification and was not identified by the mother or the complainant. The court views an outpatient card often as a record of information provided by the patient or their guardian at the time of registration. Its identification by either PW 2, the complainant and/or any individual who may have reportedly taken the victim to the hospital and furnished information recorded therein as to age at the time of its registration was therefore necessary. The consequence of such failure is to strip it of verifiability. 34. Secondly, an outpatient card is not a primary record of birth; it is a clinical document where the age is often recorded based on unverified information provided by the person seeking

treatment. As to the primary records for proof of one's age, Rule 4 of the Sexual Offences Rules states when determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document. Here, the same not having been identified by the custodians of such information, the court posits that unless the medical professional who filled out the card is called to testify on how that age was verified, it remains hearsay. Furthermore, PW 4, the doctor who testified as to the complainant's age merely read from the card and did not independently determine the age through scientific means. Notably and more concerning is that no age assessment was conducted to verify the biological age of the victim. This renders the evidence regarding the age in the card hearsay within hearsay. The conflict in the record, where PW 1 claimed she was 13 in 2023, while the card allegedly stated 10 in 2019, was never satisfactorily resolved. 35. Affirming the position in *Edwin Nyambogo Onsango vs Republic* (2016) eKLR, the Court of Appeal in *Munyathia vs Republic* [2025] KEHC 13989 (KLR) noted that where the prosecution relies on documents like birth notifications, they must be reliable and unchallenged. The complainant having reported to be in Grade 1, the recent development in registration of pupils demands that one avails birth certificate during registration. The court is convinced that the complainant would not have been registered in school without a birth certificate hence the failure to avail it ought to have invited the inference that had it been availed, it would have been adverse to the prosecution's case. 36. The court thus holds that the Appellant having challenged the outpatient card, and the prosecution's failure to provide the best evidence, birth certificate, a birth notification, a clinic card, baptismal card or the oral testimony of the parent on the age of the victim, despite having the opportunity to do so, rendered the proof of age to fall below the standard of proof required of the prosecution. Whether the complainant was a child of tender years whose evidence could be received without being sworn and the evidentiary value of such unsworn evidence? 37. A central question in this appeal is whether the complainant, PW 1, who stated she was thirteen years old, was a child of tender years requiring special procedural safeguards during her testimony. The Oaths and Statutory Declarations Act (Cap 15) governs the reception of evidence from such children but does not explicitly define the phrase "child of tender years". 38. However, Section 2 of the Children Act, 2022 (Cap 141), defines the phrase "child of tender years" to mean a child under the age of ten years. The Children Act, being the arching statute on child law and enacted after the Oaths and Statutory Declarations Act (1963), remains the primary statute on matters children and therefore the applicable age for children of tender years is by statute settled to be a child not older than the 10 years. 39. if a child of tender year is so defined then the question that follows is whether the trial court acted within the law in accepting and using the unsworn evidence of PW 1. 40. The foregoing position supersedes the judge-made-law which has, since 1959 in *Kibangeny Arap Kolil vs R* [1959] EA 92, and subsequently followed in *Samuel Wahini Ngugi vs Republic* [2012] eKLR and *Patrick Kathurima v Republic* [2015] eKLR set the age at fourteen. 41. Because the only evidence on the age of the complainant was her own unsworn evidence, believed by the trial court, alleging that she was thirteen (13) years old, also recorded in the outpatient card, she was placed outside the category of

children of tender years. Because of that, the trial court had no business administering voir dire upon her and proceeding to record her unsworn testimony. That was an obvious error upon the court which calls for correction. 42. By dint of section 19, Oaths and statutory Declaration Act, voir dire examination serves to test if the child is possessed of sufficient intelligence to appreciate the duty of telling the truth. It is also purposed to appreciate if the witness is able to comprehend questions and give rational answers. The third object is to determine if the witness understands the nature of an oath. Either way, whether the court finds that the child understands or not the nature of the oath, the child may give still evidence. If the child understands the nature of an oath the evidence may be taken on oath but even if one does not understand the nature of an oath but understands the duty of speaking the truth and is of sufficient intelligence, the child may give unsworn evidence. 43. The rationale of the stipulation is to ensure that the age of minority is not an automatic disqualification and a bar to evidence in possession of minors. However, when the evidence is taken as unsworn, it is not able to stand on its own in the absence of corroboration. 44. Here, the trial court having conducted a voir dire examination, which the court had determined to have been futile, allowed PW 1 to give unsworn testimony after having found she never understood the nature of the oath. A look at the record vindicates the appellant contention that the trial court failed to record the specific findings required by law. 45. The Court of Appeal has emphasized the important to set out the questions and answers given during the voir dire examination so that the appellate court can determine if the matter was rightly decided. 46. In this matter however, the witness was not of tender years and the evidence ought not to have been taken otherwise but on oath. As recorded, it amounted to no evidence at all. It cannot stand and wait to be corroborated. The court deems it nothing and will not give any regard to it in the determination of the appeal. 47. While the Respondent correctly points out that the proviso to Section 124 allows a court to convict on the sole testimony of a victim of a sexual offence if the court records specific reasons for its satisfaction that the witness is telling the truth, such evidence must pass the test of admissibility and be cogent and credible. Here the court determines that the evidence of the complainant was improperly taken and admitted. It cannot be the basis of the conviction unless there be other evidence to establish all the ingredients of the offence of defilement. 48. Where the sole testimony is admissible unsworn and comes from a child of tender years, the court must exercise even greater care. In *Samuel Wahini Ngugi vs Republic* [2012] eKLR, the Court of Appeal set aside a conviction because the trial court failed to properly ascertain the child's intelligence and understanding before receiving unsworn evidence. In this matter, even if the Complainant was a child of tender years, her evidence was still to be sufficiently corroborated to warrant a safer conviction. That it was no evidence at all make a conviction grounded upon it outrightly unsafe and must be quashed. 49. Because the foundational element of age was not proved to the required standard, failure by the mother, PW 2, to avail evidence of age left the court without a reliable basis for determining the complainant's status as a child. More importantly, lack of admissible evidence by the complainant renders the conviction most unfounded. 50. It would be enough to stop at this level and allow the appeal in whole but there is a recurring question on the compelling

nature of section 333(2), Criminal procedure code. In this appeal, there was the complaint that the trial court failed to account for the five years the appellant spent in remand custody pending trial. This is a question that keeps coming on appeals and revision files and need reiteration that it is a demand of the law, not a discretionary matter, that time spent in remand custody be applied to proportionately reduce the prison term imposed. 51. Section 333(2) of the Criminal Procedure Code is unequivocally commanding that in directing the date from which the sentence shall take effect, the court shall take into account the period, if any, during which such person has already been detained in custody in connection with the offence. That stipulation was interpreted by the court of appeal in Ahamad Abolfathi Mohammed v Republic (2018) eKLR, to be a command that it is not enough for a court to merely state it has taken into account the remand period. The court said that the law demand that the sentence must be proportionately reduced by such time spent in custody by adjusting the sentence so that it effectively starts from the date of arrest. Here, the trial court sentenced the Appellant to 20 years from the date of conviction, 11/09/2025. 52. Even if the appeal had failed, it would have been compelling duty of the court to declare the failure by the trial court as a glaring error that would have attracted the intervention of the court, if not for any other reason, for the sake of fidelity to the dictate that a court of law has no option but to apply the law as it is. 53. And so, even though the appeal has succeeded, making these observations moot, a repetition of the law is necessary to avoid recurrence of the error with the resultant avalanche of applications for review and appeals on that glaring point. 54. In the upshot, the appeal wholly succeeds in that the conviction is hereby quashed and the sentence founded on it set aside. Let the appellant be forthwith set free and out of prison unless otherwise lawfully held. DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6 TH DAY OF FEBRUARY, 2026. PATRICK J O OTIENO JUDGE

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Prepared on 28 October 2026 · Esheria