

KENYA / JUDGMENT

LL v Republic [2026] KEHC 13708 (KLR)

[2026] KEHC 13708 (KLR)**COURT**

High Court

BEFORE

FR Olel

CASE / FILE NUMBER

Criminal Appeal E015 of 2026

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LL v Republic (Criminal Appeal E015 of 2026) [2026] KEHC 13708 (KLR) (16 September 2026)
(Judgment) Neutral citation:

[2026] KEHC 13708 (KLR) Republic of Kenya In the High Court at Marsabit Criminal Appeal E015 of 2026 FR Olel, J September 16, 2026 Between LL Appellant and Republic Respondent (Being an appeal arising from the conviction and sentence delivered on 15.04.2025, by Hon Christine Wekesa (SPM) in Marsabit MCSO No E001 of 2025)

Judgment

A. Introduction 1. 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 No. 3 of 2006. The particulars of the offence were that on the 16 th day of February 2025, at Songa Location in Marsabit Central Sub-County within Marsabit County, he intentionally used his penis to penetrate the vagina of S.L., a child aged 8 years. 2. 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 No. 3 of 2006. The particulars of the offence were that on the 16th day of February 2025, at Songa Location in Marsabit Central Sub-County within Marsabit County, he intentionally touched the vagina of S.L. with his penis against her will. 3. The Appellant took plea and pleaded not guilty to the charges. B. Prosecution Case 4. PW1, S.L., underwent voire dire examination and gave sworn evidence. She testified that she was a grade Two pupil at Songa Primary School, aged 9 years. She recalled that on Sunday, 16th February 2025, the Appellant, who is her blood brother, sent her to collect mangoes from the forest, which was not near their home. Unknown to her, the Appellant had followed her to the forest where, he held her hands and forcefully pushed her to lie down on the ground. He then pulled up her dress, pulled down his trousers, and then proceeded to do bad manners to her, while threatening to cut her with a knife should she shout. She further affirmed that this incident had happened during the day and was therefore certain as to the identity of the person who had defiled her. After the incident, the Appellant left her behind and on reaching home, she informed her mother of what had happened and was taken to hospital for treatment. In court, she identified the Appellant as the person who did bad manners to her and added that

she did not have any grudge against him. 5. PW2, Jonah Sirayoh, testified that he was a resident of Songa and a farmer. He stated that the minor (PW1) was his sister's child and recalled that on 16th February 2025, he received a call from PW1's sister Doris, who informed him that PW1 had been beaten, was bleeding and in dire need of help. She had called using a neighbor's phone, and he requested to speak to the neighbour, whom he requested to go and find out what had happened. The said neighbour later called back and reported that PW1 had been defiled. He then reached out to the conservancy management to assist in evacuating PW1. 6. He later arrived at the complainant's home and found her sleeping, in pain, and was still bleeding. The appellant, on realizing he was a suspect, escaped and they searched for him in vain. He then accompanied the complainant and her family to hospital, where PW1 further affirmed that it was the appellant who had defiled her. PW2 further described the appellant as a person known to have very bad reputation, who had done much evil, was a petty thief in the manyatta, and had previously defiled PW1's sister Doris, though their mother had covered up the said incident. 7. PW3, Abdi Dera Ibrahim, testified that he was the Area Chief of Songa Location. He recalled that on 16th February 2025, at about 5.45 p.m., he received a call from PW2 who informed him that his sister's child had been defiled and needed help. He instructed him to go to the said home and confirm the said incident. PW2 later called back and confirmed that the child had indeed been injured. He then rushed to the scene and found PW1 unconscious and bleeding. He then called the OCS Marsabit to inform him of the said incident and borrowed a vehicle from KWS Songa Conservancy, which was used to evacuate PW1 to hospital. He confirmed that he knew the Appellant as a resident of his location and was a brother to PW1. He further testified that as the area chief, he had never received any report of the Appellant being involved in such an offence, though he had previously received various report from his family concerning his indulgence in illicit brew. 8. PW4, Isaiah Leano, testified that he was a resident of Songa. He recalled that on 16th February 2025 at about 9.00 p.m., one Ledimore Lentemaga called him and informed him that PW1 had been raped. He rushed back to the manyatta where PW1 was staying and found many people gathered there, including PW3, but the appellant had escaped and was nowhere to be found. PW1 was placed in a vehicle and taken to Songa health Center, where she was examined and referred to Marsabit County Referral Hospital for further treatment. He identified the appellant as his brother, noting that they shared the same mother but had different fathers. He added that the appellant escaped after committing the offence but was later arrested at about 10.00pm at a place known as Lupus. 9. PW5 N.L, a minor aged 13 years and a resident of Songa, testified that she was a pupil at Songa Comprehensive School. She recalled that on 16th February 2025, at around 5.00 p.m., she was at the farm together with PW1 and the appellant. While there, the appellant sent PW1 to a thicket to pick a mango, and shortly thereafter, he followed her while she remained behind. When PW1 returned, she noticed that her clothes were stained with blood especially behind her towards the buttocks. Upon inquiry, PW1 told her that the appellant had done bad manners to her. She identified the appellant as her elder brother. 10. PW6 PC Jane Refa, attached to the Gender desk at Marsabit Central Police Station, testified that on 16th February 2025, at about 5.00 p.m., she received a call from the area chief informing her that a child had been defiled. She proceeded to the hospital where she found PW1 and later met the appellant, who had been apprehended by KPR officers. Upon inquiry, she was informed that the appellant

had met PW1 at the manyatta, and asked her to go fetch mangoes. He later followed her in the bush, threaten her with a knife and proceeded to defile her. This evidence too was confirmed by PW5. She requested that age assessment test be undertaken, which confirmed that the minor was 8 years old and after completing her investigations she filed the charges preferred against the appellant. She produced the age assessment report as P. Exhibit 1, and identified the appellant in court as the person arrested for the offence of defilement. 11. PW7 Mohamed Ali, a Clinical Officer based at Marsabit County Referral Hospital, testified that he examined PW1 on 16 th February 2025. She appeared anxious but alert and observed that both her inner and outer clothing were soiled with blood. On physical examination, he found no injuries on the head, thorax, nose, or oral system. Her abdomen was mildly tender on palpation and painful. Upon genital examination, he noted that the labia majora had dried blood, and the clitoris and peri-area had both dry and wet blood. PW6 further testified that PW1's hymen was broken with two tears inside the vaginal orifice and blood around the area between the vagina and anus. He found no other injuries on the rest of her body. A urine test revealed proteins and red blood cells, while the blood test was normal. 12. He administered medication to prevent HIV and STIs and provided analgesics. He prepared the P3 form and laboratory report dated 17 th February 2025, which were produced as Exhibits P2(a) and 2(b) respectively. According to PW7, the nature of the injury was consistent with defilement because the hymen was broken and the patient had tears. C. Defense Case 13. The appellant was placed on his defence and gave a sworn statement. He stated that he was a resident of Songa and had always been a herder, but after drought killed all their animals, he resorted to undertaking casual labor, mostly as a mason. He testified that on 15 th February 2025, he went to a place called Lupus in search of work but did not succeed. He slept there and, on 16 th February 2025, found work at Lupus Primary School digging trenches for water pipes, where he worked until 6.00 p.m. 14. He stated that at 7.00 p.m., one Ndungu Kiogora called and asked where he was, and at 8.00 p.m., they arrested him, beat him up, and escorted him to the police camp. He said police officers from Marsabit later came to his rescue. He maintained that he was not at Songa where the incident occurred but was at Lupus the whole day. He further insisted that the evidence of the complainant and other witnesses were not truthful, adding that the complainant was not of sound mind, as she disturbed people at home, could not reason on her own, and simply went along with whatever she was told. 15. He further stated that his mother was also insane, stayed at home and would talk to herself. He added that the complainant's sister, Doris, resided at PW2's house together with PW4, who fed and educated them, and therefore they did not get along. He also explained that he and PW2 had differed because PW2 had given his mother Kshs 11,000 to occupy their land, but he chased him away, and as such they did not see eye to eye. He insisted that the charge preferred against him were fabricated, as he had no means to travel from Songa to Lupus within a short time, given the distance between the two shopping centers was approximately three hours. 16. The learned trial magistrate considered all the evidence adduced, found the appellant guilty of the offence of defilement, and accordingly convicted him under Section 215 of the Criminal Procedure Code. Upon mitigation, the trial court sentenced the appellant to serve life imprisonment. D. The Appeal 17. Dissatisfied with both the conviction and the sentence imposed, the appellant filed his petition of appeal where he raised the following grounds: a. That the learned trial magistrate

erred in matters of law and fact by failing to note that the prosecution did not prove its case beyond reasonable doubt. b. That the learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances of the case. c. That the learned trial magistrate failed to consider the appellant's mitigation. 18. The appellant prayed that his appeal be allowed, the conviction and sentence set aside, and that he be set at liberty. E. Analysis and Determination 19. Being a first appeal, this court is, as a matter of law, is duty-bound to analyze and re-evaluate afresh all the evidence adduced before the trial court and to draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32, *Pandya v. Republic* [1957] EA 336, and *Shantital M. Ruwala v. Republic* [1957] EA 570. 20. I have examined the record of appeal and the grounds advanced therein, and given due consideration to the submissions made by the appellant and by counsel for the respondent. I find that the following issues arise for determination: a. Whether the essential elements of the offence of defilement were established. b. Whether the sentence-imposed warrants interference by this court.

- a. Whether the Essential Elements of the Offence of Defilement were Established 21. Section 8 (1) and (2) of the Sexual Offence Act No 3 of 2006 provides as follows; 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. 22. The offence of defilement is anchored on three essential elements: the age of the victim (who must be a minor), proof of penetration, and the proper identification of the perpetrator. See *Dominic Kibet Mwareng v. Republic* [2013] eKLR.
- i. Age 23. On the question of proof of age, the Court of Appeal in *Kaingu Kasomo v. Republic*, Criminal Appeal No. 504 of 2010 (UR), emphasized that; "Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim." 24. On how age can be proven in such a case, the Court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR held as follows; "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." 25. Additionally, in *P.M.M vs Republic* [2018] eKLR, it was held that: "... whilst the best evidence of Age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant..." 26. In the matter before this court, the complainant's age was established through the age assessment report produced by PW6, the investigating officer and it established that PW1 was eight (8) years old at the material time. Taken together, the

age assessment report and the testimonies of the complainant, PW6 and PW7 provided sufficient proof of the complainant's approximate age, which squarely falls within the ambit of Section 8(2) of the Sexual Offences Act No. 3 of 2006. Accordingly, the complainant's age was proved beyond reasonable doubt. ii. Penetration 27. Penetration has been defined in Section 2 of the Sexual Offences Act as; "the partial or complete insertion of the genital organs of a person into the genital organs of another person" 28. The above position was interpreted by the Court of Appeal in *Mark Oiruri Moses V R* [2013]eKLR where it stated that; "Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of 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." 29. The Court of Appeal in *Erick Onyango Ondeng v Republic* [2014] eKLR further held that "In sexual offences, the slightest penetration of female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is ruptured." 30. PW1 testified that while in the forest, the appellant pushed her down, pulled up her dress, lowered his trousers, and "did bad manners" to her, whilst threatening to cut her with a knife if she shouted. PW5 corroborated PW1's account by confirming that they were together, when the appellant sent PW1 to the thicket to go pick mangoes and thereafter followed her. When PW1 returned from the thicket, she observed blood on PW1's clothes and behind her towards the buttocks. On inquiry, PW1 told her that the appellant had defiled her 31. PW2, PW3 and PW4 also confirmed that indeed they went to the Manyatta and found PW1 in dire need of help given that she had been defiled and was bleeding from her private part. PW7 examined PW1 and found her clothing soiled with blood. Genital examination revealed dried and wet blood on the labia majora, clitoris, and peri area, with the hymen broken and two tears inside the vaginal orifice. Blood was also noted between the vagina and anus. He concluded that the injuries were consistent with defilement and produced the P3 form and laboratory report as P. Exhibits 2(a) and 2(b). Taken together, PW1's testimony, corroborated by the evidence of PW2 to PW6, and PW7's medical findings provide cogent and credible evidence of penetration. iii. Identification 32. PW1 testified that the appellant was her real brother. She narrated how he lured her to the forest under the pretext of collecting mangoes, followed her, and committed the offence. In court, she positively identified the appellant as the person who did "bad manners" to her. PW5 corroborated PW1's account. She stated that she was with PW1 and the appellant in the farm, and that it was the appellant who sent PW1 to the thicket. Shortly thereafter, he followed her. When PW1 returned, PW5 observed blood on her clothes and buttocks. The consistent testimonies of PW1 and PW5 establish beyond doubt that the appellant was properly identified as the perpetrator. The fact that he was PW1's brother and lived in the same manyatta eliminated any possibility of mistaken identity. Importantly, the appellant himself admitted that the child he is said to have defiled was their own, further reinforcing the identification and relationship evidence. 33. In his defence, the appellant gave a sworn statement asserting that he was not at Songa on the day of the incident but at Lupus, where he claimed to have been engaged in casual labour. He raised an alibi, insisting that he could not have travelled

the three-hour distance between the two towns within the short time alleged. He further alleged that the complainant was not of sound mind, that his mother was insane, and that he did not see eye to eye with PW2 due to a land dispute involving Kshs 11,000. He suggested that the charge was fabricated by relatives with whom he had strained relations. However, during cross-examination, the appellant conceded that he had not availed any independent evidence to cement his alibi. The testimonies of PW2, PW3, and PW4 were nonetheless important, as they described the appellant's bad character, his strained family relations, and his disappearance after the incident, which aligned with the complainant's account. 34. PW2 testified that the appellant was of bad reputation, a petty thief in the manyatta, and had previously defiled PW1's sister Doris, though the matter was covered up by their mother. PW3, the area chief, corroborated this by confirming that he had received reports of the appellant's misconduct, including indulgence in illicit brew. Significantly, the minor PW5, who had no admitted quarrel with the appellant, testified against him and corroborated PW1's account, thereby providing independent corroborative evidence of the said incident. Taken together, these testimonies discount the appellant's claim of being framed and render his alibi defence unconvincing.

- b. Whether the Sentence-Imposed Warrants Interference by this Court. 35. Section 8(2) of the Sexual Offences Act , No. 3 of 2006 stipulates that where the victim of defilement is a child aged eleven years or below, the prescribed punishment upon conviction is imprisonment for life. In this matter, the complainant age was established through the age assessment report and corroborating testimony to have been eight (8) years old at the time of the offence. The trial court, being bound by statute, imposed a sentence of life imprisonment on the appellant in respect of the count of defilement. 36. In *Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR), the Supreme Court reaffirmed its pronouncement in *Muruatetu II* that the sentences prescribed under the Sexual Offences Act are lawful and constitutional. The Court emphasized that the statutory minimums must be respected and went further to set aside a reduction of sentence by the Court of Appeal, thereby underscoring that courts are bound to apply the penalties as enacted by Parliament. 37. The sentence imposed by the trial court was in full compliance with the provisions of the law. The appellant has not shown that the life imprisonment term was unlawful, disproportionately harsh, or the product of any misdirection by the trial court in reaching its decision. D. Disposition 38. The upshot, having considered the entire record of appeal and parties' submissions, I do find that the Appeal as against conviction and sentence fails and is hereby dismissed. 39. Right of Appeal 14 days. 40. It is so ordered. JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 16 TH DAY OF SPTEMBER, 2026. FRANCIS RAYOLA OLEL JUDGE In the presence of:- Appellant For O.D.P.P Court Assistant

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Prepared on 27 October 2026 · Esheria