

KENYA / JUDGMENT

WA v Republic [2026] KEHC 3942 (KLR)

[2026] KEHC 3942 (KLR)**COURT**

High Court

BEFORE

J Wakiaga

CASE / FILE NUMBER

Criminal Appeal E068 of 2025

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WA v Republic (Criminal Appeal E068 of 2025) [2026] KEHC 3942 (KLR) (19 March 2026)
(Judgment) Neutral citation:

[2026] KEHC 3942 (KLR) Republic of Kenya In the High Court at Makadara Criminal Appeal E068 of 2025 J Wakiaga, J March 19, 2026 Between WA Appellant and Republic Respondent (Being an Appeal from the original Conviction and Sentence in Criminal Case SO No. 100 of 2021 of the Chief Magistrates Court at Makadara)

Judgment

1. This appeal arises from the judgement of Hon. Onkwani in which she found the appellant guilty of the of defilement contrary to section 8(1) as read with 8(2) the victim thereof aged 3 years and sentenced the appellant to serve imprisonment for life. 2. Bering aggrieved by the said conviction and sentence, the appellant filed this appeal initially at the Criminal Registry at Milimani initially as Criminal Appeal No E045 of 2024 and raised the following grounds of appeal: a. The court erred in not conducting voir dire on both the victim PW 2 and her sister PW 3 thereby compromising on the truthfulness of their testimony. b. The court erred in not allowing the appellant to cross-examine the victim in contravention to the fair trial of the appellant c. The appellant was not positively identified by the prosecution witnesses. d. The prosecution case was full of inconsistencies e. That whereas the victim's testimony was that she was defiled in her vagina, the particulars of the offence were that she was defiled in the anus f. That the appellant was arrested before any investigation was conducted g. The charge was preferred by the investigating officer contrary to the provisions of Article 157 of the Constitution . h. The burden of proof was shifted to the appellant and the standard of proof thereof lowered in favour of the prosecution i. The sentence mated was harsh, indeterminate and indefinite thereby infringing on the inherent dignity of a person. j. The court erred by failing to consider the Pre-sentencing Report.

Submissions

3. Directions were given on the hearing of the appeal by way of written submissions and on behalf of the appellant it was submitted that the evidence by the prosecution was inconsistent contradictory and without compelling facts. It was submitted that there was contradiction on the date of the offence and as to whether the victim was penetrated in the anus or vagina and that the stated never proved whether or not penetration occurred as was stated in the case of *Mark Oiruri Mose v R* [2013] KECA 67 (KLR) and that they did not eliminate the fact that the abrasions and bleeding were not caused by passing a hard stool and that the degenerated spermatozoa must have come from the condom used by PW 1 and her husband for the purposes of framing the appellant. 4. It was submitted that there was no direct evidence of any penetration and that the case was solely based on the circumstantial evidence and the unsworn and hearsay evidence of the victim which was taken without voir dire in support of which the case of *May v Republic Criminal Appeal No 24 of 1979* (sic) was submitted to the effect that its potential value was persuasive and must be supported by evidence recorded in the case. It was contended that the victim stated that the incident occurred on 26 th April 2021 while the medical evidence stated that it occurred on 25 th and that PW 7 the investigating officer did nlot carry out any investigation and that the chain of custody of the evidence obtained on 25 th was only submitted to the government chemist on the 29 th of April 2021. 5. It was submitted that the trial court failed to record the demeanour of the victim , her sister and mother as was stated in the case of *Ndegwa v Republic* [1985] KLR
535. It was contended that PW 3s voir dire did not meet the objective of finding out whether the same understood the nature of oath and the duty to tell the truth in support of which reliance was placed on *Mohamed v Republic*
- [2008] 1 KLR (G&F) 1175 , *Patrick Kathurima v Republic and Mwangi Muriithi v Republic* [2016] eKLR . 6. On the identification of the appellant it was submitted that whereas the charge sheet indicated the appellants name as WA the majority of the witnesses referred to Ismael or Ishmael mkubwa , yet the charge sheet was not amended. It was submitted that the court allowed an application for recall of witnesses for purposes of identification of the appellant which was not properly done in support of which reference was made to the case of *Francis Kariuki Njiru & others v Republic* [2001] eKLR . 7. On sentence, it was submitted that at the time of the trial, the appellant was a minor aged 17 years old and was sentenced to life imprisonment and that under article 50(2) of the Constitution , the same was entitled to the least prescribed punishment and in support the cases of *S v Malgaa* 2001(2) SA 1222 SCA 1235 to the effect that courts are free to depart from prescribed sentence , *O v Republic* {2023} KEHC 7460 (KLR) to the effect that there are exceptional circumstances where the court can depart from the prescribed minimum sentence and *Republic v Mwangi* [2024] KESC 34 (KLR) where the supreme court stated that it is parliament which sets perimeters for sentence. 8. These submissions where highlighted by Mr. Mwaniki who stated that the appellant was aged 17 years at the time of the alleged

offence and therefore the sentence was harsh in support of which the case of David Murunga & another v R Eldoret E188 of 2019 was referred to. 9. Ait was contended further by way of emphasis that in the defence hearing it was noted that there were three male persons in the house where the victim was allegedly defiled and that no investigations were done to show who was close to the minor and that there might have been an issue of a jilted lover seeking revenge , with an element of coaching . It was contended by way of emphasis that the appellant was convicted on the strength of the evidence of PW 2 which was un-sworn thereby not giving the appellant an opportunity to cross examine the same . 10. Ms Kariuki for the prosecution highlighted the submissions and stated that the appellant and the complainant were living in the same compound and that the first compliant was that Ismail aged ten years had touched the victim in a bad way, which issue was resolved and that the appellant who had just moved in with his aunt was known to the victim as Ismail “ mkubwa “ since they did not know his name and to differentiate him from the other young boy in the house. It was contended that identification of the appellant was proper since Ismail the young boy was not present and that the only people in the house at that time was the appellant and his uncle (DW

- 2) . 11. It was contended that the court considered the issue of three male persons in the house and that the issue of the other male person in the house was introduced at the defence stage. 12. This being a first appeal, the appellant is entitled to re-evaluation of the evidence tendered at the trial court while giving allowance of the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses. 13. PW 1 the mother of the minor testified that she left the victim at home with her twin sisters aged eleven and when she returned to the house the victim started to talk and told her who she went to the house of Ismail and he took her to bed and defiled her. She was touching her anus as she spoke and when she checked her, she found her bleeding from the anus while the vagina was ok even though she was complaining of pain when urinating. She identified the appellant as Ismail big. It was her evidence that at some stage the victim's older sisters could not see him around and when they checked, they saw her books at the appellants house and later saw the appellants father pushing her out of the house. 14. It was her evidence that when he inquired from the appellants father , he told her that the appellant could not defile the child , she proceeded to the police station where she made a report and the victim referred for medical examination. In cross examination she stated that she was not present at the material time and that since her children did not know the appellant name , they referred to him as big Ismail , though his name was W. 15. PW 2 the victim who was found to be too young to understand the meaning of oath testified that the appellant did him pain(sic) while pointing at her vagina and that both the appellants mother and father were present. PW 3 GK the victim's sister aged 12 stated that they looked for the victim and went to the house of the appellant where his father opened the window and stated that she was not there. They went away but a friend of theirs told them that she was at the appellants house as she had been called there by the appellants mother, when they went back to the same house and called her out , the father of the appellant opened the door and the PW 1 came

out and told them that Ismail mkubwa had undressed her and did bad manners to her anus in the bed room. They then went back to the appellant's house and asked the father who stated that he had left the victim with the appellant . 16. She stated further that there were two Ismail in the said house and that the victim used to go to the said house. In cross examination she stated that the victim was playing with other younger children and when she went missing they started looking for her and that the appellant whom they knew as Ismail mkubwa was at the plot when she came back from school. PW 4 PC Anthony Gitonga received the information on the defilement from the complainant's father on phone and proceeded to arrest the appellant from their house where he was together with his mother and father. 17. PW 5 Manuela Kalala Okello received the vulva and anal swab of the victim and buccal swabs of the victim and the appellant for DNA analysis but were unable to cross match the origin due to degeneration. PW 6 Milka Mwikali John confirmed the date of birth of the victim as 9 th February 2018 she attended to her on 25 th April 2021, on examination her external genitalia were normal with no injuries , her hymen was pink and normal. Anal examination had fresh abrasions with bleeding. Both anal and vulva swab showed degenerated spermatozoa . in cross examination she stated that she spoke to the minor through her mother and that she saw injuries and spermatozoa in her anal area confirming defilement . 18. PW 7 Corp . Robatina Muthusi was assigned the investigation of the case and noted that the appellant aged 17 years was already in custody. He recorded the statement of the victim and assisted in the taking of the swabs from both the victim and the appellant. It was his evidence that both the victim and the appellant knew each other since they lived in the same plot. In cross examination he stated that the appellant and his uncle were in the house at the time of the alleged offence. 19. When put on his defence , the appellant stated that he was in the house with his aunt and uncle and at 900 his aunt and son went to Eastleigh leaving him and his uncle. Later the victim came to the house and watched cartoon on the television, later the sisters of the victim came and stated that he had defiled her. In cross examination he stated that he was not Ismail and that though he was with the child in the house he did not defile her as he was at some point with her and his cousin Otieno. It was his further evidence that he had stayed in the area for one year. 20. DW 2 Moses Ochieng Anyango the uncle of the appellant testified that he was in the house when a small girl came holding her vagina and they asked what Ismail had done to the child after forty minutes they came back and stated that Ismail mkubwa had defiled the child and he told them that it could not have happen and that it was not the first time that happened since the mother had at some stage alleged that his son had defiled her child and they took his child and beat him so he thought it was just a joke as the previous one only for the appellant to be arrested the following day. 21. In cross examination he stated that the appellant was in the house with him throughout the day and that when the children came knocking at the door , he was at the balcony. It was his evidence that previously the mother of the victim had lied that his son Ismail had defiled the victim and that the issue was resolved as neighbours without him making a report to the police. It was his evidence that he did not leave the house that day and that as the case was proceeding the mother of the victim came to his house with a hammer and destroyed the house. 22. DW 3 Jackline Tabitha stated that they

took the appellant in after his form. On the material day her husband called her and told her that the appellant was accused of defiling the victim and they went to the house of the victim and found her father who refused to talk to them and that they previously had a dispute when the victim's brother had assaulted Ismail Mdogo on accusation that he had defiled the victim.

Determination

23. This is yet another defilement case involving the boy child, who at the time of the alleged offence was aged 17 years and had just completed his form four level of education. The victim on the other hand was aged three (3) years. In this cause the victim being a minor was provided with legal representation, the issue as to whether that representation was adequate is best left to those who will critique this judgement as having looked at the appellants defence, I am of the considered view that there are issues raised which should not have been raised only at the defence stage but should have been put to the prosecution witnesses. 24. To my mind this is what led the trial court to reach the sad conclusion that the issue of a previous allegation of defilement of the same victim by the appellants cousin was a non-issue and not related to the case of defilement of the victim who was aged three years at the time, without analysing the same noting that burden of proof is always with the prosecution and never shift to the appellant. The court should not have condemned the appellant for introducing a third person in the house by the name otoyoy, for if in doubt the court should have utilized the provision of section 150 of CPC to call the said witness. 25. It was for the Advocate appointed for the appellant to guide the same on the conduct of the proceedings. I will say no more thereon. 26. In this matter, the age of the victim was not disputed and was adequately proved by documentary evidence. Penetration was also proved through the evidence of PW 1 who checked the victim's anus and found it bleeding and PW 6 who confirmed that the anal had fresh abrasion at 6 and 12 o'clock position with the presence of spermatozoa. 27. The only issue in doubt in this appeal is whether the appellant was positively identified as the perpetrator. The evidence on record is that the appellant was known to the victim and her sisters as Ismail mkubwa to distinguish him from his cousin who was the Ismael in the house, however the evidence by the defence is that the appellant had been in the area for one year long enough for the victim and her sisters to know his name. There was no evidence tendered by the prosecution to support the trial courts finding that they did not know the appellants name and whether he was generally known as Ismail mkubwa. 28. That the victim was in the house with the appellant has not been denied, the only doubt is whether the appellant would have defiled her in the presence of his uncle in the said house as the evidence of the prosecution witnesses is that when the sisters knocked the door, it is the appellants uncle DW 2 whom the sisters called the appellants father, who opened the door and told them that the victim was not present in the said house. The said witness offered a probable explanation based on the previous experience with the same victim and his son. 29. The trial court did not take into account the time when the victim was alleged to be in the appellants uncles house, so as to eliminate the possibility of

the same having been defiled elsewhere and also the time if and when DW 2 left the house and that whereas we live in evil times, the trial court did not interrogate the possibility or otherwise of the appellant defiling the victim in the same house in the presence of his uncle and thereafter the uncle pushing the victim out of the door as unless it was the said uncle who defiled her !. As rightly submitted by the appellant there were three males in the house with the victim at some stage , the two who were not eliminated . 30. I have therefore come to the conclusion that the appellant's identification was not free from error and that the court did not give adequate consideration to the appellant's defence noting that they had been an allegation of the appellant's cousin defiling the same victim which was allegedly resolved without stating how it was resolved. Which raised doubt in the prosecution case the benefit of which should have been accorded to the appellant. 31. I would therefore allow the appeal on conviction based on the issues stated herein above and set aside the same. 32. On sentence , the same remains at the sole discretion of the sentencing court and would only be interfered with on appeal if the same was to excessive so as to amount to erroneous sentence. In passing the sentence herein the court considered the age of the victim and the fact that the appellant when interviewed still denied committing the offence , which is an accused person right and which should not be used against him. 33. Whereas the appellant was a minor as at the time of the commission of the offence, he had attained the age of majority and the jurisprudence prevailing in Kenya is that the same to be treated as such as at the time of passing the sentence. In view of the Supreme Courts latest decision on the maximum and minimum sentences in relation to sexual offence, which I might not agree with, based on the hierarchy of the court system in in this country and wanting not to be in trouble, I would not have interfered with the decision on the trial court on the basis that the discretionary hand which had been untied has now once again been tied by the said jurisprudence. 34. The appeal having succeeded , it follows that the sentence now has no leg to stand on and is quashed. 35. The appellant should be set free forth with unless otherwise lawfully held and it is ordered. DATED SIGNED AND DELIVERED AT MAKADARA THIS 19 TH DAY OF MARCH, 2026. J WAKIAGA JUDGE

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