

KENYA / JUDGMENT

Republic v Muyonga

[2026] KEMC 860 (KLR)

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COURT

Magistrate's Court

BEFORE

AZ Ogange

CASE / FILE NUMBER

Sexual Offence E010 of 2025

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Republic v Muyonga (Sexual Offence E010 of 2025) [2026] KEMC 860 (KLR) (3 September 2026)
(Judgment) Neutral citation:

[2026] KEMC 860 (KLR) Republic of Kenya In the Malaba Law Courts Sexual Offence E010 of 2025
AZ Ogange, RM September 3, 2026 Between Republic Prosecutor and Augustine Okumu
Muyonga Accused

Judgment

1. The accused person took plea on 25 th February 2025 on the charge of attempted defilement contrary to section 9(1) of the Sexual Offences Act No. 3 of 2006. 2. The accused person pleaded guilty to the charges and the matter was set down for mention for facts on 18 th March 2025 . The accused person was equally warned on the nature and seriousness of the offence. 3. The matter was mentioned on 18 th March 2025 when charges were read afresh to the accused person and a plea of not guilty was entered. The charge sheet was subsequently amended on 5 th May 2025 and the accused person was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act . 4. The particulars are that the accused person on the 23 rd day of February 2025 at 2100hours at [Particulars Withheld]kwangamor location in Teso Central Sub-County within Busia County unlawfully caused his penis to penetrate the vagina of F.S.N a child aged four years old. 5. The accused person was charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act 2006. 6. The particulars are that the accused person alias jombi on the 23 rd day of February 2025 at 2100 hours at [Particulars Withheld]kwangamor location Teso Central Sub-County within Busia County caused his penis to touch the vagina of F.S.N a child aged four years old. 7. The accused person pleaded not guilty to both the main charge and the alternative count and the matter was ultimately set down for hearing with the prosecution calling a total of four witnesses. 8. PW1 was one V.N who testified that on the night of 23 rd February 2025 at 2100hours she was

in her room when she heard the accused person call the complainant. She went outside and saw someone walking behind the house. She saw the accused person carrying the complainant and she asked the accused person what he was doing behind the house with the child and he denied doing anything to her. She took a cane and beat the complainant. She then removed her underwear which had a smell. She went to the Assistant Chief and officers were called to the scene. The accused person was however not there despite having locked him inside the house from the outside. That the minor was taken to mission hospital the following day and later on to Kocholia Hospital. She was informed that the girl had a lot of discharge which appeared to be what she described as whitish male fluid. She told the court that the accused person is her nephew and the complainant was four years. That she did not know her date of birth and her mother was absent on the material date of the incident. 9. On cross-examination she testified that the accused person is her nephew and the incident occurred on the night of 23 rd February 2025. That the case in court was over defilement of the complainant. That there was no blood but the girl had discharge which she referred to as spermatozoa of the accused person. That the accused person took the girl behind the house and she examined her shortly after. 10. In re-examination she testified that she did not see any blood but only saw discharge. That there was no one else behind the house other than the accused person and the complainant. 11. PW2 pursuant to an application by the prosecution testified through an intermediary her mother S.N. She testified that the accused person did something bad. That he did bad manners to her and they were with her grandmother. She testified that she was one year old and she recognized the accused person as “jombi”. 12. On cross-examination she testified that she knew the accused person as “jombi” and no one else was with them at the time of the incident. 13. There was no re-examination for this witness. 14. PW3 was the clinical officer one Winnie Nabalayo of Amukura Level 4 Hospital who examined the minor on 25 th February 2025 aged 3years 5 months. The minor was in the company of her mother and grandmother and told her that someone known to the minor had done bad manners to her. On examination she had laceration on her private parts which was hyperemic and foul smelling. The hymen was absent and according to her mother this was the second incident of defilement. She approximated the age of injuries to be two days and concluded that there was defilement. That a hyperemic vagina was as a result of friction to access the private parts. Upon conducting urinalysis, there was an infection and which according to her explained the foul smell from her vagina. 15. On cross-examination she testified that she received the patient on 25 th February 2025 and the incident was on 23 rd February 2025. That a child could be presented anytime after the incident but it was upon a parent to present that child to the hospital at the earliest. That the child was first received at Amukura Mission Hospital. That a 3-year-old could walk depending on the severity of injuries and injuries could not disappear after such a short time. 16. There was no re-examination for this witness. 17. PW4 was the investigating officer one PC Moses Mangeni who testified that a case of defilement was reported at the police station by a child protection volunteer of a four-year-old child by a person well known to her. He advised them to go to hospital where she was examined and a P3 form filled. They went back to the police station and recorded statements. That the

accused person ran away after the incident and was arrested the following day and he was taken to Kotur Police Post. That the complainant was living with her grandmother and she was defiled behind the house. That the accused person was the uncle to the victim. 18. On cross-examination he confirmed that the accused person had run away and he was not taken to the hospital with the minor. That he was however taken to the hospital after arrest. 19. There was no re-examination for this witness. 20. This marked close of the prosecutions case and pursuant to a ruling delivered on 8 th January 2026, the accused person was placed on his defense under Section 211 of the Criminal Procedure Code. He elected to give unsworn evidence without calling any witnesses. 21. He testified that on 24 th February 2026 he left work and met his neighbor who is a nyumba kumi and who told him that they were looking for him. They boarded a motor cycle and proceeded to the police station where he was told that he had defiled a four-year-old girl. That prior to that he and PW1 were staying together and they had a disagreement as she wanted to sell his father's land. That the instant case was as a result of his refusal. He asked the court to acquit him. 22. This marked close of the defense case and the accused person sought leave to file submissions. The matter was mention on 16 th July 2026 and upon confirmation of filing of submissions the court reserved the matter for judgment on 3 rd September 2026.

Analysis and Determination

23. As a preliminary issue, I note that the accused person in his written submissions submitted that his right to an expeditious hearing had been violated for not having been heard within the requisite 6 months. It is my considered view that that contention is misconceived. Neither the Constitution , the Criminal Procedure Code nor the Sexual Offences Act prescribes a six-month timeline for the hearing or determination. 24. While courts are constitutionally obligated to ensure that criminal trials are conducted without unreasonable delay, that guarantee is one of reasonableness rather than a rigid statutory deadline. In any event, the record does not support a finding of unreasonable delay in the present case. The accused person was arraigned in court on 25 th February 2025. The intervening period must be considered in the context in which the matter proceeded. At one stage, the accused person declined to proceed with the hearing virtually. The court also encountered logistical challenges in securing the production of remandees from Busia GKPrison to Malaba Law Courts, including on 24 th June 2025 when the matter was set to proceed for hearing. Such circumstances cannot fairly be characterized as delay attributable to the prosecution or the court. 25. The hearing was ultimately concluded on 8 th January 2026. When the matter came up for defense hearing on 9 th February 2026, the accused person sought time to be furnished with the proceedings in order to prepare his defense. The matter was consequently adjourned. The proceedings were ready by 25 th June 2026 when the accused person proceeded to conduct his defence on the same day. 26. The accused person once again sought time to file submissions. The matter was mentioned on 16 th July 2026 to confirm filing of submissions and the court reserved the matter for judgment on 3 rd September 2026. 27. This chronology is important. It demonstrates that the trial progressed

to conclusion within a reasonable period, while some of the intervening time results from logistical constraints and in part from the accused persons requests and choices. The submission that the proceedings were rendered defective or unlawful merely because six months had lapsed is without merit and is accordingly rejected. 28. On the merit of the case, the offence with which the accused was charged is defined by section 8(1) of the Sexual Offences Act No. 3 of 2006, as follows: - Defilement (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Three ingredients must be established for one to be convicted of defilement, which are: 1. Age of the Complainant 2. Proof of penetration 3. Proof that the perpetrator of the offence was the Accused person. See *Charles Wamukoya Karani v Republic* Criminal Appeal No.72 of 2013. On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. (See *Moses Nato Rapheal v Republic* (2015) eKLR.) 29. It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In *Thomas Mwambu Wenyi v Republic* [2017] KECA 756 (KLR) cited with approval *Francis Omuromi v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 which held that: “ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.” 30. The importance of proving the age of the complainant in sexual offences was emphasized in *Alfayo Gombe Okello v Republic* [2010] KECA 319 (KLR) where the Court stated that: “ In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act . It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.” 31. In the case of *JOA v Republic* [2019] eKLR the court expressed itself as follows regarding the issue of age, “ whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.” 32. In this case the complainant during voir dire told the court that she was two years old. Her grandmother who testified as PW1 told the court that the minor was four years old. The Clinical Officer told the court that she conducted examination of a minor aged 3 years 5 months and the investigating officer told the court that he established the age of the victim

using a birth notification which shows that the minor was born on 12 th September 2021. The accused person contended that the age of the minor was not proven owing to the various accounts from the prosecution witnesses. 33. I do not find merit in that contention. First there was no dispute whatsoever that the complainant was a child. Indeed the evidence of all the witnesses was consistent on the material point that she was a child of very tender years. The variance between two years, four years and approximately three years and five months is not in the circumstances of this case a material contradiction going to the essential element of age. Rather it is a difference in the estimation of the age of a child of exceptionally tender years. 34. More importantly, the authenticity or contents of the birth notification produced in evidence were not challenged. It placed the complainant's date of birth as 12 th September 2021. The court is also entitled, as recognized in the line of authorities considered earlier in this judgment to take into account its own observation of the complainant in determining her apparent age. In the present case, the complainant was plainly a child of very tender years. Her demeanor and physical appearance were entirely consistent with the evidence placing her age in the range of two to four years. The court therefore has no difficulty in concluding that she was a minor and placing her within the youngest statutory age category contemplated under Section 8 of the Sexual Offences Act . It is therefore the finding of the court that age of the complainant has been proven by the prosecution. 35. On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as: " the partial or complete insertion of the genital organs of a person into the genital organs of another person." 36. The accused person submitted that penetration was not proved as no spermatozoa was found, the fact that the complainant was taken to hospital the following day and that this was allegedly the second incident involving the child with the first perpetrator being unknown. 37. I have considered those submissions. The complainant was a child of very tender years and cannot reasonably be expected to describe a sexual act using anatomical or legally precise terminology. Her evidence must therefore be considered together with the surrounding circumstances and more significantly the medical evidence. 38. PW1 found the accused and the complainant at the back of the house and observed a white discharge when she examined the child. I do not treat PW1's description of the discharge as proof of semen, she being a lay witness. More compelling is the evidence of PW3, the Clinical Officer, who found vaginal lacerations, a hyperemic and foul-smelling vagina and an absent hymen. Significantly, the medical evidence identified penile tissue as the probable type of weapon, while the injuries were assessed as approximately two days old as at 25 February 2025. PW3 explained that the hyperemia was attributable to the force used in gaining access to the vagina. 39. The accused also submitted that no spermatozoa were detected. That submission does not avail to him. The ingredient which the prosecution is required to prove is penetration, not ejaculation. The absence of spermatozoa, and indeed proof of ejaculation, is therefore not a prerequisite to establishing penetration. Penetration may occur without ejaculation, and the law does not require the prosecution to prove that semen was deposited in order to establish the offence. 40. I have also considered the submission concerning the delay in taking the child to hospital. The child was first received at Amukura Mission Hospital before being attended to at Amukura Level 4 Hospital. PW3

explained that a child of such tender years may still walk without assistance after such an incident depending on the extent of the injuries. The following-day examination is therefore not fatal, particularly where the medical evidence nevertheless disclosed injuries proximate to the alleged incident. 41. As regards the evidence of an earlier incident by an unknown perpetrator, I accept that the absent hymen cannot, standing alone, be attributed to the accused. That evidence, however, does not preclude penetration during the incident now before the Court. The finding of penetration does not rest on the absent hymen but on the totality of the evidence, particularly the recent vaginal injuries and the medical indication that penile tissue was the probable weapon. 42. When the evidence is considered cumulatively, the complainant's account, the circumstances in which she was found, the genital injuries documented by PW3, their approximate age, and the identification of penile tissue as the probable weapon provide sufficient corroboration of penetration. I accordingly find that the prosecution has proved the element of penetration beyond reasonable doubt, and the accused's submissions to the contrary are rejected. 43. This court is therefore satisfied that the ingredient of penetration was proven by the prosecution. 44. On identification, where identification is based on recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The Court of Appeal in *Francis Muchiri Joseph v Republic* [2014] KECA 199 (KLR) held that: “In *LESARAU v R*, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name”. 45. The accused did not dispute that he knew the complainant. Neither did he deny that he was known by the alias “Jombi”, or that he was the complainant's uncle. The evidence of the prosecution witnesses was also consistent on the identity of the person involved. The complainant identified the accused as the person who had done the “bad manners”. PW1, the grandmother, found the accused and the complainant together at the back of the house, in circumstances which provided immediate and compelling evidence connecting him to the incident. Her evidence was not based merely on information received after the event; she personally encountered the accused and the complainant in the relevant circumstances. 46. The accused person neither challenged the evidence on identification or the fact that he was found by the victim's grandmother behind their house. 47. Having carefully analyzed the totality of the evidence, the court is satisfied that the complainant positively identified the accused person as the perpetrator. Her evidence on identification was detailed, consistent and materially corroborated by independent evidence regarding the accused person's residence, living arrangements and occupation. 48. The accused person in defense attributed the charge to an alleged inheritance dispute between himself and PW1. His case was that PW1 intended to sell land which had allegedly been left to him and that the present case was therefore a product of personal vendetta. 49. I have considered that defence against the totality of the evidence. I am not persuaded by it. In particular, the alleged land or inheritance dispute was not put to PW1 in cross examination, nor was it suggested to any of the other prosecution witnesses that the complaint had been fabricated or procured by PW1 on account of such a dispute. The defence therefore emerges for the first time at the stage of the accused's defence and is in the circumstances, properly

regarded as an afterthought. 50. I therefore find that the defence was not plausible, was unsupported by evidence and does not raise any reasonable doubt. I am satisfied that the prosecution proved its case to the required threshold of beyond reasonable doubt and the evidence of the prosecution witnesses was credible, consistent and uncontroverted. Accordingly, the accused person is convicted under Section 215 of the Criminal Procedure Code on the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALABA SENIOR PRINCIPAL MAGISTRATES COURT THIS 3 RD DAY OF SEPTEMBER, 2026. In the Presence of Augustine Okumu Muyonga the Accused Person Mr. T. Rotich Prosecution Counsel Court Assistant: Paul Otieno A.Z. OGANGE RESIDENT MAGISTRATE PARA 03. 09.2026 Judgment SOA No. E010 of 2025 Hon. A.Z Ogange-R.M pg. 8

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