

KENYA / JUDGMENT

Republic v Masake [2026] KEMC 863 (KLR)

[2026] KEMC 863 (KLR)**COURT**

Magistrate's Court

BEFORE

AZ Ogange

CASE / FILE NUMBER

Sexual Offence E055 of 2025

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Republic v Masake (Sexual Offence E055 of 2025) [2026] KEMC 863 (KLR) (3 September 2026)
(Judgment) Neutral citation:

[2026] KEMC 863 (KLR) Republic of Kenya In the Malaba Law Courts Sexual Offence E055 of 2025
AZ Ogange, RM September 3, 2026 Between Republic Prosecution and Peter Masake
Accused

Judgment

Introduction and Evidence 1. The accused person was presented before this Honorable Court for Plea taking on 8 th December 2025 on the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 2 of 2006. 2. The particulars are that the accused person on the 4 th day of December 2025 at Teso North Sub-County within Busia County, intentionally caused his penis to penetrate the vagina of AI a child aged 15 years. 3. 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 No. 2 of 2006. 4. The particulars are that the accused person on 4 th day of December 2025 at [Particulars Withheld] village, Okuleu Location, Teso North Sub-County within Busia County intentionally touched the buttocks, breasts and vagina of AI a child aged 15 years with his penis. 5. The accused person pleaded not guilty to the charges and was admitted to Bond terms of Kshs. 200,000/= with surety of similar amount and the matter was set down for hearing. The prosecution called a total of five witnesses. 6. PW1 was the minor AI who testified that on 4 th December 2025 she had gone to the mill when she met the accused person by the road side who asked to send her. He managed to lure her to a forest road pushed her to the ground and told her that he would give her money. That he then pulled his underwear to the side and inserted his penis inside her vagina. She felt pain on her sides and managed to push him away. She managed to run away and saw two boys standing by the road side. Her mother arrived and beat her and they went to see her uncle one G. They later proceeded to Amagoro Patrol Base and reported the incident. She was also taken to hospital. She told the court that she is 15 years old having been born on 6 th August 2010. She told the court that she had told the truth. 7. On cross-examination she testified that two boys saw the accused person and she did

not know if the accused person was taken to hospital for examination. 8. In re-examination she testified that the two boys were by the road side. They did not see him defiling her. 9. PW2 was one GA and mother to the victim who testified that on 4 th December 2025 she was at home and had sent her daughter to the mill. She noticed that she was getting late. She later saw one woman who said that she had seen an incident where a man had raped a child and had been beaten by boys. That the girl was from the mill and she had a bucket. She found a crowd and saw the child coming. That the accused person had been surrounded by the crowd. That she interrogated the child why she was not using the main road. That they reported the incident at Amagoro Patrol Base and she took the minor to hospital. That the accused person is referred to as “bombom” at home and he was a neighbor. 10. On cross-examination he testified that he did not see the accused person but some boys beat him. 11. There was no re-examination for this witness. 12. PW3 was one Moses Magwa the Assistant Chief Okuleu Location and who testified that on 4 th December 2025 at 1930hours he was at home when he heard a knock at the door and he was informed by a lady that there was child who had been raped by one Bombom. He called members of community policing and informed them of the incident. They did not find the accused person at his home and about midnight he received a call that the accused person was at a bar at Amagoro. That he was further informed that the accused person would ordinarily make noise when he was drunk upon his arrival at home. He was able to arrest the accused person and took him to Amagoro Patrol Base. 13. On cross-examination he testified that he found the accused person at home alone and he had already committed the offence. That the accused was not arrested without reason. 14. There was no re-examination for this witness. 15. PW4 was the Clinical Officer one Protus Okhonga Wafula from Kocholia Sub-County Hospital who testified that the victim visited their facility on 4 th December 2025 with allegations of having been defiled by a person well known to her. That on vaginal examination hymen was freshly torn with whitish discharge seen on underwear, there was presence of epithelial cells and pus cells upon conducting a high vaginal swab. There was also presence of epithelial cells on conducting a urinalysis together with pus cells and leucocytes. He filled a PRC form and P3 form with similar information and approximated the age of injuries to be 22hours. He arrived at a conclusion that penetration had occurred. He produced treatment notes, P3 form and PRC form as PEXH 1, 3 and 4 respectively. 16. On cross-examination he testified that he did not examine the accused person and he did not know whether the case before court was true or false. 17. There was no re-examination for this witness. 18. PW5 was the Investigating Officer one Pasiliza Nasongo of Amagoro Patrol Base who testified that on 5 th December 2025 a case of defilement was minuted to her for investigations. That the case had been reported at 0800hours and that the suspect had been arrested the previous night at 1030hours. She called the mother to complainant and issued a P3 form which was filled at the hospital. She recorded statements and visited the scene. That the complainant was defiled when she was leaving the posho mill and her mother got wind of the fact that her daughter had been defiled. They reported at Amagoro Patrol Base and the accused person was arrested with the assistance of community policing. That she ascertained age of the complainant using a birth certificate and she was born on 6 th August 2010. 19. On cross-examination she testified that the girl was taken to hospital but advised to go back on 5 th December 2025 as some tests had not been done. That she was not present on the date of the

report. That the case of defilement was confirmed by the doctor. 20. There was no re-examination for this witness and this marked close of the prosecution's case. 21. Pursuant to a ruling delivered on 18 th June 2026 the accused person was placed on his defense under Section 211 of the Criminal Procedure Code. He elected to give sworn evidence without calling any witnesses. 22. He testified that he usually leaves for work in the morning and comes back in the evening. That the evidence that was tendered in court was false. That he did not know the victim or her mother and has never met them. 23. On cross-examination he confirmed that he did not know the child and his mother. He however agreed that he went by the alias Bombom. 24. This marked close of the defense case and the court reserved the matter for judgment on 3 rd September 2026.

Analysis and Determination

25. 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.) 26. 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." 27. 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." 28. 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.” 29. In this case the complainant told the court that she was 15 years old having been born on 6 th August 2010. Her evidence was corroborated by her mother who testified as PW2 and who told the court that her daughter was born on 6 th August 2010. This evidence was further corroborated by the investigating officer who testified that in the course of her investigations she acquired a copy of birth certificate of the victim evidencing the fact that she was born on 6 th August 2010 and which she produced as PEXH2. The evidence on age was not challenged by the defense. Based on the evidence of the mother to the victim, the copy of the birth certificate and guided by the authorities hereinabove, it is the finding of the court that the age of the victim was proven by the prosecution. 30. 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.” 31. The complainant in this case told the court that she was on her way to the mill when the accused person called her to what she referred to as a forest road on the guise that he wanted to send her. He then pushed her to the ground, slid her underwear to the side and inserted his penis inside her vagina. That she felt pain on the side, managed to push the accused person away and ran away. 32. Evidence of penetration was corroborated by the clinical officer who testified as PW4 and who told the court that on examining the minor and on vaginal examination hymen was freshly torn with whitish discharge seen on underwear, there was presence of epithelial cells and pus cells upon conducting a high vaginal swab. There was also presence of epithelial cells on conducting a urinalysis together with pus cells and leucocytes. He filled a PRC form and P3 form with similar information and approximated the age of injuries to be 22hours. He arrived at a conclusion that penetration had occurred. 33. This evidence was not challenged by the accused person and it is the finding of the court that the ingredient of penetration was proven by the prosecution. 34. 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”. 35. It is not in dispute that the accused person was known by, or went by, the alias “Bombom.” That fact, however, does not resolve the question before the Court. The issue is whether the prosecution positively identified the accused as the person who committed the offence alleged. 36. PW1 testified that the accused pulled her towards a forest road where the alleged defilement occurred. She further stated that she managed to escape and, in the course of doing so, encountered two boys. During cross-examination, she stated that the two boys had seen the accused person. Yet, upon re-examination, she clarified that the boys had not seen the accused defiling her. This evidence raises an important unanswered question.

If, as PW1's evidence suggests, the alleged defilement occurred at a concealed location and she thereafter escaped from the accused, at what point did the two boys see the accused? Did the accused follow PW1 from the concealed location? Did the boys encounter him while he was pursuing her? Or did they see him at some other point? 37. The evidence of PW2 introduces further difficulties. PW2 alleged that the accused was beaten by two boys and that one woman witnessed an incident. Yet the identity of this woman, and more importantly what incident she allegedly witnessed, was not satisfactorily established. If she witnessed the beating, why was her presence not mentioned by PW1, the primary victim? Equally, why did PW1 not mention that the accused had been beaten by two boys if that was a significant event occurring immediately after the alleged incident? 38. PW2's own evidence is also troubling. She testified that upon arriving at the scene, she started beating PW1 and asked her why she had not used the main road. This raises the obvious question: how did PW2 know which road PW1 had used before asking her why she had not used the main road? 39. There is also the evidence of PW3. PW3 went to the accused person's home, did not find him, and appears to have inferred from his absence that he had fled because he had committed the offence. That inference is unsupported by any demonstrated fact. More significantly, PW3 subsequently arrested the accused at his home, allegedly at midnight. If the accused had indeed been beaten by two boys as alleged by PW2, where were the injuries or marks of that beating? Did PW3 observe any injuries? Did anybody else see them? The question becomes even more significant because PW2, who allegedly arrived at the scene, did not find the accused there. 40. PW5 is said to have visited the scene. However, the evidence does not sufficiently disclose what PW5 actually observed at the scene. The Court was not presented with a sufficiently clear evidential picture from which it could independently appreciate the physical setting, the alleged forest road, the concealed location, the route of escape, and the circumstances in which the two boys could have seen the accused. 41. These are not minor discrepancies. They concern the very chain by which the accused is said to have been identified as the perpetrator. The Court must distinguish between proof that the accused was known as "Bombom" and proof that the person known by that alias was the person who committed the offence. The former may be undisputed; it does not, without more, establish the latter. 42. The burden remained upon the prosecution to prove, beyond reasonable doubt, that the accused person was positively identified as the perpetrator. That burden was not discharged. The evidence on identification therefore falls short of the required standard and raises a reasonable doubt as to whether the accused was the person who committed the offence. 43. With regard to the alternative charge of committing an indecent act with a child, for the reasons at paragraphs 35 to 42 of this judgment, it is the finding of the court that the offence was not proved against the accused person. In any event no evidence was led to the effect that the accused person touched the buttocks, breasts and vagina of the complainant with his penis as stated in the particulars of the charge sheet. 44. In the present case, and upon careful evaluation of the entire evidence on record, the court is not satisfied that the prosecution has proved its case to the required threshold of beyond reasonable doubt and the accused person is acquitted on the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act 2006

and the alternative charge of committing an indecent act with child contrary to section 11(1) of the Sexual Offences Act under Section 215 of the Criminal Procedure Code. JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALABA SENIOR PRINCIPAL MAGISTRATES COURT THIS 3 RD DAY OF SEPTEMBER, 2026. A.Z. OGANGE RESIDENT MAGISTRATE 03.09.2026 In the Presence of Peter Masake the Accused Person Mr. T. Rotich Prosecution Counsel Court Assistant: Paul Otieno

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