

KENYA / JUDGMENT

Republic v Nyongea

[2026] KEMC 862 (KLR)

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COURT

Magistrate's Court

BEFORE

AZ Ogange

CASE / FILE NUMBER

Sexual Offence E051 of 2025

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Republic v Nyongea (Sexual Offence E051 of 2025) [2026] KEMC 862 (KLR) (3 September 2026)
(Judgment) Neutral citation:

[2026] KEMC 862 (KLR) Republic of Kenya In the Malaba Law Courts Sexual Offence E051 of 2025
AZ Ogange, RM September 3, 2026 Between Republic Prosecutor and Simon Nyongea
Accused

Judgment

Introduction and Evidence 1. The accused person was presented before this Honorable Court for Plea taking on 12 th November 2025 on the charge of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 2 of 2006. 2. The particulars are that the accused person on the 10 th day of November 2025 at Kotur Sub-Location in Teso Central Sub-County within Busia County intentionally and unlawfully cause his penis to penetrate the vagina of E.A a child aged 16 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 the 10 th day of November 2025 at Kotur Sub-location in Teso Central Sub-County within Busia County intentionally and unlawfully caused his penis to penetrate the vagina of E.A a child aged 16 years. 5. The accused person pleaded not guilty to the charges and was admitted to bond terms of Kshs. 150,000/= with surety of similar amount. The matter was set down for hearing and the prosecution called a total of four witnesses. 6. PW1 was the minor E.A who testified that she knew the accused person and they were both arrested in the month of December. That the accused person went to her home and found her with her younger brother. He asked her to go to this home and her sister found them and threatened to report to her grandmother. She refused to go with the accused person since her sister had seen them but the accused person forced her to go to his home. They sat until 200hours and the accused person forced her to remove her clothes. That she was in a dress and underwear only. He removed her underwear and had sex with her. That the accused person did

not touch her anywhere else. She told the court that sex meant sleeping with a boy. That the accused person also removed his clothes at the bottom. It was her first time to engage in sex and she felt pain. That when the accused person finished, someone knocked the door and when he went to open the door he saw her grandmother and attempted to escape through the window. He ultimately came back in using the window and opened for her grandmother who called village elder and the issue was reported at Amukura Police Station. That she was examined at the hospital and she was 17 years old having been born on 10 th September 2009. 7. On cross-examination she testified that she cried as she felt pain and she did not tell anyone about the incident. That the accused person came for her and took her to his house. 8. There was no re-examination for this witness. 9. PW2 was the clinical officer one Winnie Nabalayo who examined the minor on 10 th November 2025 and who told her that she had been defiled by a person well known to her. That on vaginal examination, the hymen was absent and there was a whitish discharge. That upon conducting a High Vaginal Swab, there was evidence of an infection and she administered contraceptives, PEP and Antibiotics. She filled a P3 form with similar information and at the time of examination she had not changed or bathed. That she also estimated the approximate age of injuries to be two days. There was a foul smelling discharge and she arrived at the conclusion that penetration had occurred. 10. On cross-examination she testified that she did not find out if the accused person had any infection, she only examined the complainant. 11. There was no re-examination for this witness. 12. PW3 was one A.E and grandmother to the complainant who testified that on 10 th November 2025 she had gone to church and on getting home, the elder child was not there. The other children informed her that Simon had picked the elder child and she went to Simon's house where she found her. She knocked on the door and the other child went to call the village elder. She saw the accused person attempt to get out of the house through the window. The accused person later opened the door and went to call the complainant from the bedroom. Officers were called and the accused person was arrested. That the accused person told her that he intended to marry the complainant who was 16 years old and not of marriageable age. 13. On cross-examination she testified that she first went to the house without the village elder and they were with the accused person and complainant only. That the complainant did not tell her that they were in a relationship and were planning to get married. That she had never seen the accused person with the complainant before. That she had not advised her grandchild to get married. 14. In re-examination she testified that she had not informed the complainant to get married. 15. PW4 was the investigating officer one PC Samwel Mauti who testified that on 10 th November 2025 at 0700 hours he was assigned a case of defilement to investigate and two suspects had been brought to the police station the previous night by members of the public; the complainant and the accused person. He recorded statements of witnesses and the minor proceeded to the hospital for examination. He established that the grandmother to the minor went to church on the material day and on coming back the complainant was not there. That with the help of the village elder and other members of the public the complainant was found in the house of the accused person and they were both arrested. He established that the complainant and the accused person were involved for a duration of eight months. That he established that the accused person was 22 years and the victim was 16 years as per the birth certificates. He produced a copy of birth certificate of the

victim as exhibit 1. 16. On cross-examination he testified that he only got to know the accused person on the day of arrest and that the accused person was found with the girl in the house. 17. There was no re-examination for this witness and this marked the close of the prosecution's case. 18. Pursuant to a ruling delivered on 11 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 witness. 19. He testified that on 9 th September 2025 he had been called by his sister who had a dispute with A.E over land and a wall which had collapsed. That he wanted to tell her (PW3) what had transpired but they did not agree. She came with village elders and he later saw a police vehicle wherein he was arrested. 20. On cross-examination she testified that she knew E.A and they had known each other for 2 months. That he was not in a relationship with the complainant and he was 24 years old. He is not married and he lives with his sisters who are not witnesses in court. 21. This marked close of the defence case and the court reserved the matter for judgment on 3 rd September 2026.

Analysis and Determination

22. 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.) 23. 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." 24. 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.” 25. 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.” 26. In this case the complainant told the court that she was 17 years old and that at the time of the incident she was 16 years old. She testified that she was born on 10 th September 2009. This evidence was corroborated by PW3 her grandmother who told the court that even though she did not know the complainant’s exact date of birth, she was aged 16 years and not of marriageable age. This evidence was further corroborated by the Investigating Officer who in the course of his investigations acquired a copy of birth certificate of the victim evidencing the fact that she was born on 10 th September 2009 and which he produced as PEXH1. The evidence on age was not challenged by the defense. The incident is alleged to have occurred on 10 th November 2025 and simple arithmetic would show that the complainant was 16 years old at the time of committal of the offence. Based on the foregoing it is the finding of the court that the age of the victim was proven by the prosecution. 27. 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.” 28. The complainant in this case told the court that on the material date, the accused person took her from their home and took him to his house where he forced her to have sex with her. She vividly described how she was in a dress and underwear and how the accused person removed her underwear before having sex with her. That sex to her meant sleeping with a boy. That she felt pain after the incident. She was examined at the hospital the same day. She had not changed clothes. Her evidence was materially corroborated by the Clinical Officer who testified as PW2 and who told the court that on vaginal examination, the hymen was absent and there was a whitish discharge. That upon conducting a High Vaginal Swab, there was evidence of an infection and she administered contraceptives, PEP and Antibiotics. That at the time of filling the P3 form she estimated the approximate age of injuries to be two days. There was a foul-smelling discharge and she arrived at the conclusion that penetration had occurred. 29. The evidence of the complainant and clinical officer was not assailed in cross-examination and it is the finding of the court that the ingredient of penetration was proven by the prosecution. 30. 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”. 31. It is not in dispute that the accused person and the complainant are neighbors and known to each other. The evidence on record is that the accused person and

complainant were found together in the accused person's house after the incident. The evidence that he attempted to flee through the window when PW3 went looking for her granddaughter was not challenged. There is no doubt that the accused person was positively identified. It is therefore the finding of the court that the ingredient of identification has been proven by the prosecution. 32. The accused person in defense attributed the charge to an alleged land dispute between his family and PW3. His case was that PW3 had a dispute with his sister and upon trying to resolve the dispute, PW3 called the village elder and he was arrested. 33. 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 PW3 in cross examination, nor was it suggested to any of the other prosecution witnesses that the complaint had been fabricated or procured by PW3 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. 34. 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. 35. The Court has, nevertheless, considered the discrepancies and other circumstances raised in the evidence. 36. First, the discrepancy as to the date of the offence is not fatal. The prosecution evidence places the incident on the 9 th November 2025 whereas the charge sheet gives the 10 th November 2025. The variance concerns the time of commission and did not occasion any prejudice to the accused or occasion a miscarriage of justice. Section 214(2) of the Criminal Procedure Code expressly provides that a variance between the charge and the evidence as to the time when an offence was committed is not material in the circumstances contemplated therein. In *Andrew Mutua Kinja v Republic* [2018] KEHC 1642 (KLR), the High Court held that a variance in the date of commission of an offence is not material and upheld a conviction for defilement. 37. Secondly, the reference by the Investigating Officer to an alleged relationship between the accused and the complainant does not, in itself, exonerate the accused. The existence of a relationship is not a defence to defilement where the complainant is a child within the meaning of the Sexual Offences Act . The Court must determine whether the statutory ingredients of the offence were proved, rather than whether the parties may have been acquainted or romantically involved. 38. Thirdly, the Court notes the varying accounts concerning the accused person's age. The Investigating Officer placed his age at 22 years; the accused himself stated in his evidence that he was 24 years, while the pre-bail assessment report recorded him as 27 years. Although these discrepancies are notable, none of them creates a reasonable doubt as to his status as an adult. On every account, the accused was an adult while the complainant was 16 years old. 39. The circumstances are therefore materially different from those in which the courts have considered a possible Romeo-and-Juliet relationship. In *Tuva v Republic* [2024] KEHC 1070 (KLR), the Court considered the circumstances of a young adult of about 21 years and a complainant aged between 16 and 18 years, and observed that the circumstances were capable of constituting a Romeo-and-Juliet relationship. That is not the situation presented before this Court. On the evidence before me, the complainant was 16

years whereas the accused, even on his own account, was 24 years old, and on the pre-bail assessment report he was 27 years. The age disparity is therefore substantial and the circumstances cannot reasonably be equated with the narrow factual setting contemplated in such cases. 40. In the final analysis, the discrepancies identified above are peripheral and do not displace the cogent evidence establishing the essential ingredients of the offence. The complainant was a child aged 16 years; penetration was proved; and, upon evaluation of the evidence on identification and the surrounding circumstances, I am satisfied that it was the accused person who committed the act. The prosecution has consequently proved the charge beyond reasonable doubt. 41. 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(4) of the Sexual Offences Act No. 3 of 2006 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 Simon Nyongesa the Accused Person Mr. T. Rotich Prosecution Counsel Court Assistant: Paul Otieno

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