



**Republic v Matheka (Sexual Offence E049 of 2024)
[2025] KEMC 238 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEMC 238 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
SEXUAL OFFENCE E049 OF 2024
YA SHIKANDA, SPM
SEPTEMBER 25, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

GABRIEL MUO MATHEKA ACCUSED

JUDGMENT

The Charge

1. Gabriel Muuo Matheka (hereinafter referred to as the accused person) is charged with the offence of defilement as well as an alternative charge of committing an indecent act with a child. In the main count, the accused person is charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars of the offence are that on 29/6/2024 at [Particulars withheld] village in Kibwezi Sub-county within Makueni County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of ANM (name withheld), a child aged 17 years. The accused person is alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that within the same date and at the same area, the accused person intentionally and unlawfully touched the vagina of ANM aged 17 years using his penis. When the plea was taken, the accused person pleaded not guilty to both counts. The matter was then set down for hearing.

The Evidence

The Prosecution Case

2. The prosecution called a total of six (6) witnesses in a bid to prove its case against the accused person. PW 1 ANM (hereinafter referred to as the complainant) testified that on 29/6/2024 at about 10:00 pm she was asleep together with her younger siblings when she was woken up by the sound of the



door being opened. She looked and saw a person in the house although it was dark. That there was moonlight from the window and she was able to see a person standing at the door. The complainant started shouting but the person covered her mouth with his hand and threatened to strangle her if she shouted. The intruder lifted the complainant's skirt and lowered her biker and panty and also lowered his trouser. It was the evidence of the complainant that the intruder inserted his penis into her vagina and after a short while, she asked for permission to go out and pee.

3. When the complainant managed to get out of the house, she locked the door from the outside then called out her mother who was in a neighbouring room. The intruder broke out of the house. The complainant got hold of him and was able to identify the person by the light from the moon. The complainant's mother got out of the house and also grabbed the intruder. The intruder bit the complainant's left thumb and swept her mother's feet then ran away. The complainant and her family members went to a neighbour's house. The neighbour called the area Assistant Chief who advised them to report to the village elder. The matter was reported to the village elder who later called other village elders. The complainant was advised to go to hospital. She reported the matter to the police before proceeding to hospital. The complainant identified the accused person as the one who had forcefully had sexual intercourse with her.
4. PW 2 CKM testified that the complainant was her daughter. That on 29/6/2024 she was asleep in her house when she heard the complainant calling her from outside. The witness got out of the house and found the complainant in a struggle with a young man. She also grabbed the young man and they started dragging him back to the house. PW 2 called out her neighbours. She was able to recognize the young man. The young man bit the complainant's finger and swept PW 2's feet then escaped. The complainant then revealed what the intruder had done. The matter was reported to the village elder, the Assistant Chief and the police. PW 3 Florence Ng'ata testified that she was the acting Chief of Kikumbulyu location. That she was called on phone at night by a Nyumba Kumi elder and informed of the incident. Later, the elder called and informed her that the suspect had been found. The witness rushed to the home of the suspect and took him to Kisayani police post.
5. PW 4 Nicholas Wambua Musavu testified that on the material night, he was asleep in his house when he heard neighbours calling out for him. He got out of the house and found four people who included the complainant, her mother and other neighbours. PW 4 was informed that the complainant had been sexually abused and injured. The witness called PW 3 and informed her. He then took the child to the police post and hospital. PW 5 Doctor Kakundi Mbithi produced in evidence P3 and PRC forms filled in respect of the complainant. The findings were that there was penetration of the complainant's vagina. PW 6 Police constable Anthony Gitonga testified that he was the investigating officer in respect of the matter. That he was the one who received the report from the complainant. He referred the complainant to hospital. Later, the suspect was taken to the police post where after he was charged upon completion of investigations.

The Defence Case

6. When the accused person was placed on his defence, he opted to give a sworn testimony without calling any other witness. The accused person testified that on 29/6/2024 at about 9:00 pm he was on his way home when he met three people who asked him where he was coming from. That at about 9:30 pm while he was at home, he heard a knock at the door. Four people who included the three he had met earlier and one Wambua were at his door. They asked him who he had been with when they met him. The people then had a conversation with the accused person's mother. At about 10:20 pm, the accused person was called by his mother. He went to his mother's house and was informed that the people who had been at his house earlier wanted to talk to him. The people asked him whether he knew the



complainant herein or her home. The accused person denied. The Assistant Chief was called. She went to the accused person's home and asked him about the complainant herein. The accused person stated that he did not know the complainant. He was then taken to Kisayani Police post and later charged.

Main Issues for Determination

7. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:
 - a. Whether the complainant was defiled on the night of 29/6/2024;
 - b. If so, whether it was the accused person who defiled the complainant;
 - c. If not, whether an indecent act was committed against the complainant on the material night;
 - d. If so, whether such indecent act was committed by the accused person;
 - e. Whether the prosecution has proven its case against the accused person to the required standard.

Analysis and Determination

8. I have carefully considered the evidence on record as well as the law applicable. Section 8 (1) of the *Sexual Offences Act* provides as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

9. Section 2 of the *Sexual Offences Act* defines the term “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The same section refers to the definition of a child as provided for under the *Children Act*. Section 2 of the *Children Act* defines a child as an individual who has not attained the age of eighteen years. From the above provisions, I gather that the key ingredients of the offence of defilement are as follows:

1. The accused person must have committed an act which causes the partial or complete insertion of his or another person's genital organ into the genital organ of another person or the accused person's genital organ. My understanding of the law is that it does not matter who inserts, what matters is who causes the insertion. For instance, a woman who causes a male child to insert his penis into her vagina may be guilty of defilement if all the key ingredients are satisfied. In a nutshell, the prosecution must prove penetration;
 2. The alleged victim must be below the age of eighteen years. The prosecution must prove that the alleged victim was below the age of eighteen years at the time of incident, that is, proof of age;
 3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the child.
10. My view is buttressed by the authority of *Dominic Kibet Mwareng v Republic* [2013] eKLR where the High Court observed thus:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant”.



11. Similarly, in the case of *CWK v Republic* [2015] eKLR, Kimaru J (as he then was) held that for the prosecution to sustain the charge of defilement, the prosecution must establish penetration, the perpetrator of the offence and the age of the victim.

Age

12. The particulars of the offence indicate that the complainant was seventeen (17) years old at the time of incident. In the case of *Moses Nato Raphael v Republic* [2015] eKLR, the Court of Appeal pronounced itself thus:

"On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanyanya v. R*, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability".

13. In *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, it was held that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

14. In view of the foregoing, it cannot be said that age for purposes of sexual offences can only be proved by documentary or medical evidence. Nonetheless, the prosecution produced in evidence a copy of the complainant's certificate of birth which indicates that the complainant was born on 19/7/2007. This implies that as at 29/6/2024 when the offence is said to have been committed, the complainant was approaching 17 years of age. In cases of defilement, as far as age is concerned, all that the prosecution needs to prove is that the alleged victim was below the age of eighteen years at the time of offence. However, proof of age must be beyond reasonable doubt since age is a key ingredient of the offence. In the case of *Kaingu Elias Kasono v Republic* Criminal Appeal No. 54 of 2010, the Court of Appeal sitting at Malindi held as follows

"Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"

15. I have no doubt that the complainant was a minor at the material time.

Penetration

16. The only direct evidence in respect of the offence is that of the complainant herself. The complainant testified that the accused person undressed her then inserted his penis into her vagina. As already indicated, the only eye-witness who was called to testify was the complainant. Indeed, majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness



apart from the alleged victim. Whether the testimony of the alleged victim is given on oath or not, the court must of necessity exercise great caution before convicting an accused person. The question as to whether there is corroborative evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt.

17. In view of the foregoing, I hereby warn myself that despite the fact that the complainant gave a sworn testimony, it would be unsafe to convict the accused person in the absence of corroborative evidence. I will seek to be satisfied that indeed, the complainant told the truth. In *Bassita Hussein v Uganda*, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:

“The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim’s evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

18. In most cases, penetration is proved by testimony which may be corroborated by medical evidence. However, absence of medical evidence does not ipso facto mean that there was no penetration-See the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR. The medical evidence on record indicates that the complainant was first examined on 30/6/2024. The hymen was found to have been broken. The genitalia was normal. There was a whitish discharge from the vagina and a wet prep microscopy of the high vaginal swab revealed presence of epithelial cells. The doctor (PW 5) testified that the presence of epithelial cells was an indication of penetration into the vagina. When he was cross-examined by the accused person, the doctor stated that the epithelial cells indicated that the vagina was recovering from an act of penetration.
19. However, my research into the medical field counters the theory advanced by the good doctor. The research reveals that epithelial cells are a normal component of the vaginal lining but their presence alongside other findings like “clue cells,” reduced lactobacilli, or a pH of over 4.5 can indicate bacterial vaginosis (BV). A few epithelial cells can also appear with yeast or trichomoniasis, and their numbers can vary depending on the menstrual cycle. The mere presence of epithelial cells does not indicate vaginal penetration, as these cells naturally line the vagina and are found in normal vaginal discharge. Epithelial cells are constantly shed as part of the body’s normal processes. To determine if penetration has occurred, especially with digital contact, a more sophisticated analysis is required to differentiate the source of the cells, rather than relying solely on their presence.
20. The doctor stated in evidence that the hymen was not freshly broken. That being the case, the breakage of the hymen cannot be attributed to the alleged sexual activity herein. As already indicated, medical evidence is merely corroborative and not conclusive of the fact that there was penetration or lack of it. The primary evidence is that of the alleged victim. For the court to make a finding that there was penetration of the complainant’s vagina on the material night, the court must be satisfied that the complainant told the truth. The complainant explained how the alleged offence was committed against her. She narrated the sequence of events that unfolded on the material night.
21. The complainant’s version remained the same when she narrated what had happened to her mother, the village elder, the police, the medical practitioner and the court. Her testimony on the issue of penetration was not successfully challenged on cross-examination. I have no reason to doubt the complainant’s testimony on the fact that a penis was inserted into her vagina on the material night. It is thus my finding that there is sufficient evidence to prove the act of penetration.



Identification of the assailant

22. The complainant was candid enough to reveal that she could not tell who broke into the house and had sexual intercourse with her until after the act. The incident occurred at night and in the dark. In the case of *Anzaya v Republic* [1986] KLR 236, the Court of Appeal sitting at Kisumu held that there is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night. In *Mwenda v Republic* [1989] KLR 464, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.
23. The Court of Appeal in the case of *Marube & Another v Republic* [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistakable about their identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 424 where the court held as follows:
- "Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction".
24. In the English case of *R v Turnbull & Others*, [1976] 3 ALL ER 549, it was held that the factors for consideration by the court on the question of identification are as follows:
- i. The distance between the witness and the suspect when he had him under observation;
 - ii. The length of time the witness saw the suspect; and
 - iii. The lapse of time between the date of the offence and the time the witness identified the suspect to the police.
25. Further in the case of *Simiyu & Another v Republic* [2005] I KLR 192 at page 195 the Court of Appeal observed:-
- "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity."
26. Similarly, in the case of *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, the same court held:
- "The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors



the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity.” (Emphasis mine)

27. The complainant identified the accused person as the person who had violated her. She alleged that the accused person was a neighbour and that in the month of April, 2024 the accused person had made sexual advances to her. The complainant’s evidence was that she was able to recognize the accused person when she grabbed him outside the house. That there was moonlight and that is how she was able to see his face. The complainant’s mother who went to the complainant’s rescue also stated that she was able to recognize the accused person as they dragged him back to the house. The witness also stated that there was moonlight and that is how she was able to identify the accused person.
28. The prosecution evidence reveals that the complainant and her mother gave the accused person’s name to the village elder and the police before the accused person was arrested. PW 3 and PW 4 confirmed that the complainant and her mother had mentioned the accused person to them prior to the accused person’s arrest. PW 6 also confirmed that the accused person’s name was mentioned at the time of booking the report. This was also before the accused person was arrested. The accused person was arrested in the absence of the complainant and her mother. This lends credence to the fact that his name had been mentioned before his arrest and to people who knew him.
29. The accused person did not dispute the fact that he was a neighbour to the complainant. The complainant and her mother stated at what point they were able to recognize the accused person. Given the circumstances, there was an opportunity for the complainant and her mother to identify the assailant. The complainant and her mother were categorical that they used to see the accused person prior to the incident. I am satisfied that the circumstances were conducive for a proper identification and that the accused person was positively identified as the assailant.

Whether the Prosecution has discharged its burden.

30. I have considered the accused person’s defence bearing in mind that he shoulders no duty to prove his innocence. The gist of the accused person’s defence is that he was framed up. It is the word of the complainant against that of the accused person, bearing in mind that the burden is on the prosecution to prove the allegation against the accused person beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, [2013] eKLR.”

31. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible,



but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

32. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis mine)

33. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); *Rex v. Summers*, (1952) 36 Cr App R 14; *Rex v. Kritz*, (1949) 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.

34. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. The evidence of the prosecution witnesses and in particular the complainant, PW 2, PW3 and PW 4 was consistent and corroborative in the material particulars. The evidence remained unchallenged on cross-examination. I am convinced that the complainant was defiled on the material night.

35. I am struggling to understand why the complainant and her mother would frame up the accused person. There is no evidence or even an allegation of an existing grudge or bad blood between the complainant or her family and the accused person or his family. My opinion is that the prosecution was able to place the accused person at the scene of crime on the material night. The accused person's defence does not create any reasonable doubt in my mind. In view of the foregoing, I am satisfied that the complainant told the truth. I have no difficulties in dismissing the accused person's defence.

Disposition

36. In view of the foregoing, I find that the prosecution has proven its case against the accused person beyond reasonable doubt. Consequently, I make the following final orders:
- a. I hereby find the accused person guilty of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, pursuant to the provisions of section 215 of the Criminal Procedure Code;



- b. The accused person is hereby convicted of the charge accordingly;
- c. Having convicted the accused person on the main count of defilement, I make no finding on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 25TH DAY OF SEPTEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

