



**Nyongesa v Republic (Criminal Appeal E024 of 2021)  
[2026] KECA 182 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 182 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E024 OF 2021  
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
JANUARY 30, 2026**

**BETWEEN**

**SYLVESTER SIMIYU NYONGESA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at  
Bungoma, (Wendoh, J.) dated 23rd November, 2018 in HCRA No. 09 of 2018)*

**JUDGMENT**

1. Sylvester Simiyu Nyongesa, the Appellant herein was charged in count 1 with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences. The particulars were that on 8<sup>th</sup> September, 2014 at [Particulars Withheld] village in Bungoma North within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of NLW<sup>1</sup> a child aged 4 years old. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The appellant pleaded not guilty to all counts. Upon trial, he was convicted of defilement and sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*.
3. Dissatisfied with the trial court's judgment, the appellant appealed to the High Court challenging both the conviction and the sentence. The High Court dismissed the appeal against the conviction but set aside the life imprisonment sentence, substituting it with a finding of guilty but insane.
4. Aggrieved by the decision of the trial court, the appellant lodged the present appeal against both his conviction and sentence.
5. Briefly, the prosecution's case as presented at the trial through the evidence of N.M.W., the complainant, testifying as PW1; and who was unable to state her age, underwent a voire dire



- examination, and the court was satisfied that she understood the <sup>1</sup> Initials used to protect the identity of the minor nature of an oath and admitted her sworn testimony. She identified the appellant as the person who took her to his house, gave her a guava and mandazi, led her to his bed, lay on her, and inserted his penis into her vagina, which she indicated by pointing. She further stated that the appellant was a person who regularly visited their home.
6. PW2, JW<sup>2</sup>, the complainant's mother, testified regarding the events of 8<sup>th</sup> September 2014. She stated that she had separated from her husband and returned to live at her parents' home with all her children. On that day, she went to work, leaving PW1 at home, and returned at about 4.00 p.m. only to find the children missing. Her daughter, Sylvia later arrived from school and informed her that her other daughter, Rita, was at the appellant's house. Sylvia went to fetch the other children and reported back that the complainant was in the appellant's house. PW2 stated that PW1 told her that the appellant had given her a guava and mandazi and slept on her. She noticed what appeared to be semen on PW1's thigh and reported the matter at Brigadier Police <sup>2</sup> Initials used to avoid tracing the identity of the minor Post. She further testified that her house and the appellant's were about 100 metres apart and that he frequently came to their home. PW2 produced in court a copy of the birth certificate showing that PW1 was born on 25<sup>th</sup> May 2009.
  7. PW3, PC George Bahati of Brigadier Police Patrol Base, testified that he received a report from the complainant's mother, PW2, that her four-year-old child had been defiled by "Silvester alias Boy." He visited the scene that same evening and observed a one- roomed mud house with a bed, which PW1 identified at the scene. He escorted the child for medical treatment and examination, and subsequently arrested the appellant at Brigadier Market after he was identified by PW2.
  8. PW4 Ignatius Okumu, a Clinical Officer at Mt. Elgon Sub-County Hospital examined the complainant on 15<sup>th</sup> September 2014. He found that the hymen was ruptured, swelling and bruises on the private parts which were an indication of force and hence evidence of penetration.
  9. Placed on his defence, the appellant gave unsworn defence and admitted knowing the complainant as a neighbour. He denied being with her on the date in question, claiming that he was at work at Brigadier Market. He further stated that the reason for his arrest was that PW2 had borrowed money from him to purchase a motorcycle, and when he sought repayment, she allegedly framed him.
  10. The learned judge of the 1<sup>st</sup> appellate court considered this evidence on appeal, upheld the conviction stating that the minor's age was proved by the birth certificate and age assessment; there was overwhelming evidence of penetration corroborated with the medical evidence; the appellant was positively identified; but set aside the life imprisonment sentence, substituting it with a finding of guilty but insane.
  11. In contesting the outcome from the High Court, the appellant set out the following grounds of appeal stating that the trial court and the 1<sup>st</sup> appellate court erred both in law and fact by convicting the appellant on a defective charge sheet and non- existing charge; that his constitutional rights to information disclose prior to plea taking was violated contrary to provisions on the right to a fair hearing provided in Article 50(2)(g)(c) and (j) of *the Constitution*; that his right to legal representation under Article 50(2)(g)(h) of *the Constitution* was also violated; age of the complainant was not proved; penetration was not proved; he was convicted on uncorroborated evidence; his identification was doubtful; he was not mentally examined after plea taking; he was not accorded a fair trial, as it was not proved if the appellant was stable or mental fit to stand for trial; and the sentence meted upon the appellant is inconsistent with Article 27(1)(2)(4) and 50(2)(e) of *the Constitution*; and that due consideration be given to section 333(2) of the Criminal Procedure Code by considering the period he spent in custody since arrest.



12. At the hearing of the appeal, the appellant appeared in person.  
In support of the appeal, he contends that the charge of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* was defective and non-existent, arguing that it ought to have been framed as section 8(1) as read with section 8(2). He further alleged violation of his fair trial rights under Article 50 of *the Constitution*, including lack of disclosure of witness statements, denial of legal representation, and proceeding with trial despite concerns over his mental fitness.
13. The appellant also challenged the prosecution's proof of the essential ingredients of defilement, namely the age of the complainant, penetration, and identification. He argued that the evidence on age was contradictory, penetration was not proved due to inconsistent medical findings and lack of corroboration, and identification was unsafe. In support of this line of reasoning, the appellant relied on the decisions in *Alfayo Gombe Okello vs. Republic* [2010] eKLR, and *Fredrick Ajode Ajode vs. Republic* [2004] eKLR among others.
14. Lastly, the appellant submitted that the alleged procedural and evidentiary deficiencies rendered the trial unfair and the conviction unsafe, and challenged the legality of the sentence imposed.
15. In response, the respondent through learned counsel Ms. Mwaniki argued that all the elements of the offence had been established. With respect to the complainant's age, it is argued that the prosecution presented clear documentary evidence. PW2 produced the complainant's birth certificate, which indicated that she was born on 25th May 2009, meaning she was five years old at the time the offence was committed. That the importance of strict proof of age was underscored by this Court in *Mwarome Munga Janj vs. Republic* [2021] and *Hudson Ali Mwachongo vs. Republic* [2016] eKLR, where it was held that age is a critical ingredient of the offence of defilement as the prescribed sentence is dependent on it.
16. Regarding identification, it is submitted that the complainant recognised the appellant as her neighbour who was well known to her before the incident; the offence was committed during the day; the complainant was found in the appellant's house; and the appellant did not dispute that the complainant was known to him. It is contended that under those circumstances, the possibility of mistaken identity was eliminated, and the element of identification was sufficiently proved.
17. With regard to penetration, the respondent submitted that section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of the genital organs of one person into those of another. It is argued that the complainant gave a clear and consistent account of how the appellant defiled her; that her testimony was corroborated by PW4, the clinical officer, who examined her and found that her hymen was broken and the genitalia swollen; and the medical evidence therefore, corroborated the complainant's account and proved penetration beyond a reasonable doubt.
18. Regarding the complaint of the charge sheet being defective, the respondent contends that section 134 of the Criminal Procedure Code requires a charge to disclose the offence and sufficient particulars to inform an accused person of the case he is required to meet. In this regard, the respondent draws from the case of *Bernard Ombuna vs. Republic* [2019] eKLR, where this Court held that the test is whether the alleged defect prejudiced the accused or occasioned a miscarriage of justice. That in the present case, the appellant actively participated in the trial, cross-examined witnesses, and tendered a defence, demonstrating that he understood the charge. It is further contended that no objection was raised at the trial regarding the charge sheet, and no prejudice was shown to have been suffered.



19. This is a second appeal and the Court's duty as provided for under Section 361(1) of the Criminal Procedure Code is to consider only matters of law. In the case of *Karani vs. Republic* [2010] 1 KLR 73 the court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

20. Having carefully considered the record of appeal, the submissions by both parties, the authorities cited, the law, and the Court's mandate, the main issue for determination is whether the trial court erred in law by proceeding with the trial without first determining whether the appellant was fit to stand trial, despite clear indications of mental incapacity.
21. From the record, when the appellant was presented to court for plea taking, the magistrate who took the plea ordered a medical report to be prepared by a psychiatrist; it was prepared, and it said that he was mentally unfit to stand trial. The record shows that later on the trial court was waiting for a second report to see whether the appellant was fit to stand trial. Unfortunately, the second report was not forthcoming, and another magistrate started the trial without a second report to determine whether the appellant was mentally fit to stand trial.
22. From the sequence of events, it cannot be conclusively determined whether the appellant was mentally unstable at the time of the offence. The presumption of sanity is rebuttable. The record shows that the appellant underwent a mental examination; and the examining doctor reported that he was not fit to plead. This concern was reinforced when the trial magistrate, prior to the commencement of the trial, ordered a further mental assessment. In the initial report, the doctor candidly noted that the appellant suffered from a psychotic disorder. Consequently, the court directed that the appellant be admitted to Mathare Hospital for treatment and further evaluation.
23. The record reveals that concerns were raised at various stages of the proceedings regarding the appellant's mental status. Indeed, this concern culminated in the High Court, on first appeal, setting aside the sentence of life imprisonment and substituting it with a finding of guilty but insane.
24. That finding by the High Court is critical as it acknowledges that the appellant suffered from mental incapacity sufficient to affect criminal responsibility. However, what is troubling and legally untenable is that neither the trial court nor the High Court addressed the anterior and fundamental question of whether the appellant was fit to stand trial at the time the proceedings were conducted.
25. Section 12 of the Penal Code provides that:

“A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”



26. It is a universal rule of criminal responsibility that a man cannot be condemned if it can be proved that at the time of the perpetration of the criminal act he was not in charge of his mental faculties. Indeed, the law presumes that every person is sane and responsible for his actions at all times, including when he is alleged to have committed an offense, as sanity is the normal and usual state of man unless the contrary is proved. Section 11 of the Penal Code embodies this in the words that:
- “Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”
27. Section 9 of the Penal Code cements the principle set out in Section 12 by stipulating that:
- “(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”
28. The question in this case remains whether the appellant was labouring under the burden of mental illness at the time he committed the offence. Notably, he was found fit to plead after treatment.
29. The Court of Appeal at Mombasa in *Julius Wariomba Githua vs. Republic* [2008] eKLR observed that in addition to the provisions of Sections 162 and 166 of the Criminal Procedure Code, it is the duty of the trial court to ensure that the accused person’s mental status at the time he is alleged to have committed the offence is established, if that question becomes relevant.
30. In the present case, the appellant’s mental status at the time of the commission of the offence was not known. It was found that the appellant was mentally unwell from the psychiatric report and from the admission of the appellant into Mathari Mental Hospital for treatment. Although the offence was established by the evidence adduced, it cannot be ruled out that the appellant was labouring under a disease of the mind when he committed the offence.
31. The distinction between fitness to stand trial and criminal responsibility is firmly established in law. Fitness concerns an accused person’s present ability to understand proceedings and participate meaningfully in their defence, while criminal responsibility relates to the mental state at the time of the offence. An accused person may therefore be guilty but insane yet unfit to stand trial, or conversely, fit to stand trial while legally insane at the time of commission of the offence. An inquiry into fitness is thus a mandatory jurisdictional prerequisite to a valid trial. See *Wambua Musili vs. Republic* [2020] KECA 702 (KLR).
32. The Court of Appeal has consistently held that once doubt is raised as to an accused person’s mental fitness, the trial court is under a duty to order a mental assessment, consider the medical evidence, and make an express finding on fitness before proceeding. Failure to do so renders the proceedings unsafe. In *Festus Mbuthia Mwangi vs. Republic* [2006] eKLR, the Court of Appeal faulted the trial court for proceeding without proper compliance with section 162 of the Criminal Procedure Code after concerns arose regarding the appellant’s mental condition.
33. Similarly, in *WC vs. Republic* [2023] KECA 597 (KLR), the Court of Appeal emphasized that where medical reports raise questions about an accused person’s mental capacity, the trial court must expressly address and resolve the issue of fitness before continuing with the trial, as this is integral to the right to a fair trial.



- 34. The right to a fair trial under Article 50 of *the Constitution* presupposes that an accused person can understand the charge, follow the proceedings, challenge the prosecution’s evidence, and present a defence. An accused person who is mentally unfit cannot meaningfully exercise these rights. As the Court of Appeal has observed, a trial conducted without a prior determination of fitness is fundamentally flawed and amounts to a nullity.
- 35. Accordingly, where a trial court proceeds to hear and determine a case without first establishing the accused person’s fitness to stand trial particularly where mental incapacity is apparent or later judicially acknowledged, the resulting conviction cannot stand. A subsequent first appellate court’s finding of guilty but insane only reinforces the seriousness of the omission and underscores the illegality of the original proceedings.
- 36. In the circumstances, the trial court erred in law by proceeding with the trial without first determining the appellant’s fitness to stand trial. The High Court, in turn, erred in failing to address this fundamental defect; and we thus find that the appeal has merit and is allowed. The resulting conviction is therefore unsafe and cannot be allowed to stand.
- 37. We have anxiously considered whether it would serve the interest of justice if we were to order for the retrial of the appellant, of course after a determination of his mental fitness to stand trial is made. After due consideration of the period that the appellant has been in lawful custody (a period of more than 10 years), we formed the considered opinion that it would not serve the ends of justice to order for a retrial. Consequently, the conviction is quashed; and the sentence be and is hereby set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

