



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuku v Republic (Criminal Appeal E049 of 2025)  
[2026] KEHC 2681 (KLR) (Crim) (4 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 2681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E049 OF 2025  
KW KIARIE, J  
MARCH 4, 2026**

**BETWEEN**

**BONIFACE NYORO THUKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E055 of 2021 of Senior Principal Magistrate's Court at Engineer by Hon. D.N. Sure–Senior Resident Magistrate)*

**JUDGMENT**

1. Boniface Nyoro Thuku, the appellant, was convicted of defilement of a girl contrary to section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 18<sup>th</sup> day of July 2021 at[Particulars Withheld], in Kinangop within Nyandarua County, he intentionally caused his penis to penetrate the vagina of L.W.W., a child aged fifteen years.
3. The appellant was sentenced to serve 14 years' imprisonment. He has appealed against both conviction and sentence. He raised the following grounds of appeal:
  - a. The learned trial magistrate erred in law and fact by failing to find that the ingredients of the offence were not proved.
  - b. The learned trial magistrate erred in law and fact by failing to find that there existed a grudge between the appellant and the complainant's family.
  - c. The learned trial magistrate erred in law by convicting me, but failed to note that a crucial witness was never called to testify.



4. The respondent did not file any grounds of opposition or submissions.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, noting that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of *Okeno vs the Republic* [1972] E. A 32 to guide my decision-making process.
6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

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

An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a. That there was penetration of the complainant's genitalia;
- b. That the accused was the perpetrator, and;
- c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR when Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients that the prosecution must prove against an accused person.

7. Boniface Nyoro Thuku, the appellant, claimed an alibi and argued that he had disagreements with Elijah Nyoro Mwangi. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.
8. The complainant was examined at the Engineer County Hospital by Dr Ntwiga, and the report was produced in court on his behalf by Dr Karanja. When she was examined on the 18<sup>th</sup> day of July 2021, her genitalia were normal except that she had a broken hymen with old tags. The appellant was also examined, and his genitalia were normal.
9. The complainant was examined on the same day she reportedly was defiled. The old tags on her broken hymen indicate she was sexually active earlier and that her hymen was already broken before the complaint date.
10. Although the complainant (PW1) claimed that the appellant had sex with her, the medical evidence does not support this allegation. She may have falsely accused him of defilement to avoid the beatings she was experiencing. She testified that her uncle began beating her and questioning her about her whereabouts. While M.W. (PW3) acknowledged that she was beaten, she clarified that she was the one who inflicted the beating.



11. The proviso to section 124 of the *Evidence Act* provides:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

After perusing the evidence on record, I am doubtful if the complainant told the truth. It was unsafe to rely on her evidence to convict the appellant.

12. L.W.W. (PW1) stated she was 18 years old and in grade 7. She mentioned she did not know her birth year and explained her age by saying she had repeated several classes.
13. The prosecution, through Dr Karanja, produced an age assessment report by Wanjohi, a dental surgeon who examined the complainant and concluded that she was 15 years old.
14. Faced with these two conflicting facts about the complainant's age, the most logical step would have been to present another document in court, such as the child's immunization card. This could have helped the court accurately establish the complainant's age.
15. The issue of the complainant's age was not proven to the required standards.
16. The upshot of the foregoing analysis of the evidence on record is that the prosecution did not displace the defence of the appellant. The conviction was unsafe. It is quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

**DELIVERED AND SIGNED AT NYANDARUA, THIS 4<sup>TH</sup> DAY OF MARCH 2026**

**KIARIE WAWERU KIARIE**

**JUDGE**

