



**REPUBLIC OF KENYA**  
**IN THE PRINCIPAL MAGISTRATE’S COURT AT LAMU**  
**CRIMINAL SO. NO. E002 OF 2025.**

**REPUBLIC.....**  
**.....PROSECUTOR**

**-VERSUS-**

**STEPHEN KINYUA NYAMBARI..... ACCUSED**  
**PERSON**

**JUDGEMENT.**

**A. FACTS.**

- 1) Stephen Kinyua Nyambari a 47year old male is charged with the offence of rape contrary to section 7 of the Sexual Offences Act No. 3 of 2006. The particulars in support of the charge are that on diverse dates between 1<sup>st</sup> to 30<sup>th</sup> October 2024 in [particulars withheld] in Lamu county the accused intentionally and unlawfully caused his penis to penetrate the vagina of MMM a person with mental disability without her consent.
- 2) In the alternative he is charged with committing an indecent act with an adult contrary to Section 11(a) of the Sexual offences Act. To this end it is stated that at the material date and time he intentionally and unlawfully touched the breasts and vagina of MMM using his hands and penis.
- 3) The prosecution called a total of 4 witnesses and after their testimonies, the accused was found to have a case to answer and placed on his defence where he gave sworn testimony but did not call any witness and closed his case. Midway the proceedings and based on the testimony of the victim, the accused applied for DNA which application was granted and DNA exercise conducted.

- 4) In this judgment I have considered the testimonies of both sides, the law and the exhibits produced including the DNA report which forms part of the record of this court.

**The Prosecution's case.**

- 5) It is the prosecution's case through the victim pw 2 that she remembers one day she had a severe stomach ache and difficulties in passing urine and she was taken to hospital and at the hospital she was told that she was pregnant.
- 6) It was her testimony that the accused to whom he referred to as "jirani" grabbed her hand and took her to his house and took his penis and inserted in her vagina after he removed her clothes and that it was painful that she cried and also that the accused touched her breasts. After the incident she did not tell anyone as the accused told her not to tell anyone.
- 7) She asserted that it is only the accused who has had sexual intercourse with her and that she knows him as jirani. She pointed to the court that the said Kinyua jirani was the accused in the dock.
- 8) In cross examination she stated that she did not tell anyone because he had been warned by the accused and that it is the accused who pulled her into his house and caused pain to her and that he is the one who did the act with her.
- 9) Pw 1 the victim's mother stated that on 1/2/2025 early morning the victim complained to her about having a stomach ache and upon examining her she realized she had a swollen abdomen and she called one Veronica in order to examine her and advise and upon examination, the victim then disclosed to Veronica that jirani had had sexual intercourse with her and she advised that the victim be taken to hospital.
- 10) She was rushed to hospital and upon scans being done, it was discovered that she was heavily pregnant and also the doctors informed her that she had infections to her vagina and was admitted for 5 days.

- 11) She confirmed that from time immemorial the accused was referred to as jirani and that is the name the victim used to refer to the accused. She further stated that one evening her husband and one elder called the accused after he was named by the victim and when questioned about the incident and he stated that he wouldn't deny or admit liability and the same evening the accused visited them at hospital and assured them of his support during their stay in hospital and until the victim delivers and she sent Kshs.800/= via mpesa. That while the accused visited them in hospital and the victim identified the accused as the one who was responsible. She identified the disability certificate as well as the victim's identity card.
- 12) Pw 3 Dr. Mohamed Said Mohamed confirmed that when the victim was examined she had a bleeding vagina and urinary tract infection and that she was pregnant. A scan was also conducted and indicated that at the moment she was 14 weeks old with twins and from the report it was also indicated that she had her last period sometimes on 15/10/2024 and that meant that she got pregnant early October and her expected date of delivery (EDD) was sometimes in July 2025.
- 13) He produced the radiology report, the discharge summary and the P3 as exhibits. The victim's disability certificate and national ID were produced as exhibits by the investigation officer.

**Defence case.**

- 14) The accused in his sworn testimony while denying the charges and/or any wrong doing on his part stated that he knew the victim very well and they were neighbours and that he had romantic relationship with the victim's mother but later brought it to an end after realizing that he was forgetting his family and Pw1 was not amused by this decision and even asked him to relocate to another area but he didn't and continued with his life.
- 15) On 2/2/2025 at around 1815 hours he received a call from one Njiraine who was the complainant's step father and summoned him to his house to discuss an important issue and when he went to the house he found the said Njiraine and one Gitari a nyumba kumi elder from Mkondoni. In that meeting he was informed that he is responsible for

the victim's pregnancy but he denied stating that he had not met the said victim.

- 16) Mr. Njiraine then told him that he was not financially stable to settle the victim's bill and the accused suggested that he would mobilize the neighbours to fundraise and pay for the bills upon her discharge.
- 17) The accused confirmed that indeed he visited the victim in hospital and sought to know from Pw 1 whether she was actualizing her threat but Pw 1 did not respond and he left and went back home. He insisted that the case has been framed on him at the instigation of Pw 1.

## **B. ISSUE FOR DETERMINATION.**

- 18) The following issue is in my view for determination in this matter;
- a) Whether the offence of rape under Section 7 of the Sexual offences Act has been proved to the required standard.**

## **C. ANALYSIS AND DETERMINATION.**

- a) Whether the offence of rape under Section 7 of the Sexual offences Act has been proved to the required standard.**
- 19) At the onset, I note a mistake in the charge and indeed the charge sheet. The same was amended but the amendment was limited to the issue of dates. The accused was thus erroneously charged under Section 7 of the [Sexual Offences Act](#), with an alternative charge under Section 11(a) of the same Act. It is important to note that the offence of indecent act is covered under both the [Sexual Offences Act](#) and the [Penal Code](#).
- 20) Section 7 of the SOA does not address indecent acts or rape with persons with mental disabilities, which is specifically criminalized under Section 146 of the [Penal Code](#). Section 7 of the [Sexual Offences Act](#) applies where a person with mental disabilities, a child, or a family member is a witness to the act, whereas Section 146 of the [Penal Code](#) criminalizes the indecent acts with a person with mental disabilities,

referred to in the provision as an "idiot or imbecile." This distinction means that the accused was charged under an incorrect legal provision, as the appropriate statute for the offence falls under the [Penal Code](#) rather than the [Sexual Offences Act](#).

- 21) What then should the court do? A similar issue arose in **Musa Kiprotich Kitilit v. Republic [2012] eKLR**, where the appellant was charged under Section 7 of the [Sexual Offences Act](#), with an alternative charge under Section 11(1) of the same Act. However, since the victim had a mental disability, the correct provision should have been Section 146 of the [Penal Code](#). The court found that the charge was fundamentally defective as its particulars did not align with Section 7 of the [Sexual Offences Act](#).
- 22) In the present case, the accused was charged with raping a person with a mental disability without her consent under an incorrect provision of the law. This in my view rendered the charge defective. However, the accused understood the charge against him, and the particulars of the charge thereto and participated in the hearing by cross-examining the witnesses to the extent of even remarking in his defence that the victim does not have any mental disability and even called for a DNA report in a bid to exonerate himself from paternity even though it did not go as he expected. He did not raise any complaint before this court and in the circumstance, I find that there was no miscarriage of justice. This court has considered it a curable defect under the law and as such I shall proceed to determine the case on its merits.
- 23) Section 3(1) of the Sexual Offences Act sets out the ingredients of rape which the prosecution must prove:-A person commits the offence termed rape if-
- a) He or she intentionally or unlawfully commits an act which causes penetration with his or her genital organs.**
  - b) The other person does not consent to the penetration;**
  - c) The consent is obtained by force or by means of threats or intimidation of any kind.**
- 24) The 3 ingredients have to be proved beyond reasonable doubt for the accused person to be found guilty of the offence termed as rape.
- 25) As to whether the accused intentionally and/or unlawfully committed an act that caused penetration with his genital organs, it was the evidence of Pw 2 the complaint that the accused grabbed her

into his house and after undressing her he inserted his penis into her vagina and also touched her breasts. She was clear that it was painful that she cried but the accused told her not to tell anyone. She was emphatic that it is only the accused person who had sexual intercourse with and she had not previously engaged in sexual intercourse.

- 26) By the mere fact that he grabbed the victim into his house and had sex with her, the accused by his actions he committed an unlawful act and he had all the intention and purpose to commit the crime and ensured that the same was not heard outside the walls of his house by telling the victim not to tell anyone about it. This evidence in my view was not challenged in cross examination.
- 27) Penetration has been defined to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. I am thus satisfied that the prosecution through the testimony of the both the doctor and the victim proved that indeed the accused penetrated into the vagina of the victim and he did so intentionally.
- 28) The act of penetration and complete sexual act is further proved by the DNA report dated 27/11/2025 which was procured at the request and application by the accused person after the victim testified and confirmed that he had only had sexual intercourse with the accused only.
- 29) From the report the analyst in her conclusion, observes that there are 99.99% more chances that Stephen Kinyua Nyambari is the biological father of baby RW the daughter of MMM (victim). A quick calculation of the estimated date when the incident is said to have occurred and the month of delivery accounts for the 9 months gestation period.
- 30) The DNA report therefore corroborates the element of penetration as stated by the victim. The accused was at pains to explain how this was possible that he was the biological father of the victim's daughter all he kept saying was that he did not agree with the report because he was expecting twins. The issue of twins arose when before the birth of the victim's daughter, there was indication from the scan that it was a twin pregnancy at 15weeks and 4days.
- 31) In my view, that remained a suggestion and the true fact was what was born. The accused cannot therefore rubbish the report on account of the fact that the scan showed twins and only one child was

born. It should be clear to the accused person that the scan is usually an estimation and not necessarily what will happen at birth.

- 32) In my view therefore, I find and hold that the act of penetration was intentional and unlawful and the same was done by the accused.
- 33) On the element of consent to the penetration and whether the consent was obtained by force or by means of threats or intimidation of any kind, it is the evidence of Pw 2 that she was grabbed into the accused's house. There is no evidence that the victim went willingly into his house. The evidence by the victim was not challenged by the accused. Infact in cross examination she asserted that she was pulled into the house of the accused. This by all means was not by consent. Furthermore, the victim is a person with mental intellectual and autism-spectrum and as such not capable of giving consent given her status. The disability registration certificate was produced in support.
- 34) After the sexual intercourse, the accused is said to have threatened the victim not to tell anyone what had happened. All these acts by the accused were marred by threats and intimidation.
- 35) I therefore hold and find that Pw 2 did not consent to the penetration and secondly that the consent was obtained by force and by means of threats or intimidation that resulted to actual violence and injuries sustained by the victim owing to the fact that she complained of being injured in her waist and stomach. I should add that as already stated she is not capable to giving consent given her mental disability. The twin elements are in my view proved to the required standard.
- 36) The accused in his defence admitted to be part of a meeting held by Njiraine and Gitari. A fact spoken to by Pw 1. He was willing to take care of the issue once she was born and even paid part of the bills for the victim. The said evidence was not controverted by the accused. The accused finds himself in an awkward situation that he lacked evidence to controvert the evidence by the state. He decided to clutch on straws stating that he is being framed by Pw 1 because of their past romantic relationship. It is instructive to note that the accused only raised this issue in defence and never put questions on the same to Pw1 during cross examination.
- 37) Secondly, the accused poured cold water on the DNA report that proved that the accused was the biological father of the victim's daughter and in my view these 2 key elements form the bigger part of his defence. In my view none of those in addition to other elements of his defence have not controverted the case by the prosecution. I do

find his defence lame, mischievous and of no probative value. It contains mere denials in a desperate attempt to avoid criminal liability. I thus dismiss the same.

- 38) There is no doubt as to the identity of the accused. The accused is well known to the victim and she refers to him as jirani by virtue of being her neighbour and the accused does not deny this fact. He was also positively identified in court. Undoubtedly, evidence of identification requires scrutiny to ensure that it is free from possibility of error, or mistake as pronounced by the court in [Wamunga v Republic \[1989\] KLR 424](#) and the case of [Ogeto v Republic \[2004\] KLR 19](#), where the court stated:

**“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”**

- 39) It is true the evidence of identification of the accused was from a single witness and this is so because of the nature of the offence that is rarely witnessed when it happens unless it's the victim and the accused. With this in mind, I have no doubt in my mind that the accused was properly identified because other than being her neighbour, the conditions favoring identification were as easy as it can be. The victim did not at any point confuse the accused with any person.
- 40) Having scrutinized the evidence of the complainant the sole eye witness, and the circumstances of the offence, the proximity at which the complainant saw the accused, and the length of time the complainant was with the accused I am convinced beyond any measure of doubt that the identification was safe.
- 41) Having taken into consideration the prosecution evidence in toto as well as the accused person's defence, I find that the accused person committed the offence for which he is charged with.
- 42) Section 179 of the [Criminal Procedure Code](#) empowers a court, in some particular special circumstances such as this, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the

trial court or the appellate court. The question is whether the special circumstances contemplated by section 179 were in existence to enable this court to convict the accused of an offence with which he was not charged. The special circumstances in this case in my view is the fact that the accused is the biological father the victim's daughter and the times tally between the time of the incident and the time of delivery of the issue.

- 43) In this case, the proper charge should have been section 146 of the [Penal Code](#). In my view, this is a special circumstance within which this court can convict the accused person. In the premises, the conviction for the offence of charge of committing an indecent Act with a person with mental disability contrary to section 7 of the [Sexual Offences Act](#) is substituted with the offence of defilement of idiots and imbeciles under section 146 of the [Penal Code](#). This position is supported by the case of [Haggai v Republic \[2025\] KEHC 1968 \(KLR\)](#)

#### **D. CONCLUSION AND DISPOSITION.**

- 44) To this end therefore the charge of rape contrary to section 7 of the Sexual Offences Act No. 3 of 2006 is substituted with the offence of defilement of idiots and imbeciles under section 146 of the [Penal Code](#) and further hold that the offence has been proved to the required standards.
- 45) As the glove fits, I must, as I hereby do, convict the accused person accordingly in that count. Having convicted the accused person on the main count, I make no finding on the alternative charge of committing an indecent act with an adult contrary to section 11(A) of the [Sexual Offences Act](#).
- 46) It is so decreed.

**DATED, SIGNED AND DELIVERED AT LAMU LAW COURTS THIS...2<sup>nd</sup> ...  
DAY OF ...March...2026.**

**F.M. MULAMA  
RESIDENT MAGISTRATE**

**In the presence of:**

Idris Tomno for DPP.

Court Assistant:- Daniel Damise.

Stepken Kinyua Nyambari.