



REPUBLIC OF KENYA



**KENYA LAW**  
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**Namema v Republic (Criminal Appeal E032 of 2025)  
[2026] KEHC 5971 (KLR) (5 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 5971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E032 OF 2025**

**AC BETT, J**

**MAY 5, 2026**

**BETWEEN**

**RODNEY MWIMBI NAMEMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(eing an appeal against the Judgment and conviction of Hon. R.S. Kipng'eno (PM) in Butali PM's Sexual Offence Case No. E050 of 2022 delivered on 26th February 2025))*

**JUDGMENT**

1. The Appellant was charged and convicted of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the said charges are that the Appellant, on the 1<sup>st</sup> day of July and 2<sup>nd</sup> day of July 2022 at (particulars withheld) village, (particulars withheld) location, (particulars withheld) sub-county within Kakamega county, intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of MM, a girl aged 15 years.
3. The Appellant was tried and convicted, and he was sentenced to 10 years' imprisonment.
4. Being dissatisfied with the decision of Hon. R.S Kipng'eno (PM), he appealed against the entire conviction and sentence based on the following grounds:-
  - a. The learned Trial Magistrate erred in law and in fact in convicting the Appellant on charges which were not proved beyond reasonable doubt.
  - b. The learned Trial Magistrate erred in law and in fact in admission of evidence contrary to section 124 of the *Evidence Act* and section 19 of the *Oaths and Statutory Declarations Act* (Cap 15)



- c. The learned Trial Magistrate erred in law and fact in convicting the Appellant on evidence which was not unequivocal.
  - d. The learned trial magistrate erred in law and fact when he relied on hearsay evidence to convict the Appellant.
  - e. The learned Trial Magistrate erred in law by failing to appreciate that the Appellant was not accorded a right to a fair trial contrary to Article 50 (1) and (2) of *the Constitution*.
  - f. The Learned Magistrate erred in law and fact in imposing an excessive sentence on the Appellant.
5. He prays that the conviction and the sentence be quashed and or set aside.

### **Evidence in Brief**

6. PW1 MM, aged 16 years, was the Complainant. He stated that the Appellant was her teacher at Mukavale Primary School. She stated that on 1/7/2022, on Friday at 2 pm, she was on her way to visit her grandmother when the Appellant asked her to visit him at his place at Stendikisa, who took her to his house, locked her inside and went to buy them supper and that he insisted on having sex with her without protection at around 5 pm. She claims that she picked up her clothes and left for her grandmother's place at 11.00 am.
7. She claimed that her grandmother questioned her about spending the entire night outside and asked her to go back home. she stated that her father beat her and that the next day when asked by the principal of her where about and why she had disappeared avers that she had slept at her friend's Esther's home however the teachers beat her up f and she opened up and the police came that is when she was taken to hospital for examination and the Appellant taken to Lumakanda police station. She identified the P3 form as PMF1-1, treatment notes as PMF1-2, P3 form Appellant PMF1-4, PRC form Complainant- PMF1-5 and Birth certificate as PMF1-6 which were later produced. Her evidence was corroborated by the other prosecution witnesses.
8. In his defence, the Appellant denied committing the offence and called one witness. He relied on an alibi and claimed that he was not present when the offence was committed.
9. He states that they went to the police station to record statements, and he was a suspect, and later they were escorted to the hospital, and later he was charged for the offence.
10. He maintains that he never committed the offence and only rescued the girl in the evening.
11. When cross-examined by the prosecution, he claimed that he never called the girl's parents, as he had assumed that she had already gone home.
12. The appeal was canvassed by way of written submissions which the court has duly considered.

### **Analysis and Determination**

13. Being the first appellate court, this court has analysed and re-evaluated the evidence on record afresh, keeping in mind that it neither saw nor heard the witnesses testify, as expressed in *Boru & Anor V*



Republic Cr. App No. 19 of 2001 [2005] 1 KLR, in which the learned Judges of the Court of Appeal held inter alia that:-

“ A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised on the appeal.”

14. The Appellant was charged with defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006 which states that:-

“ A person who commits an offence of defilement with a child between the age of 12 and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

15. The first issue for determination is whether Appellant was not accorded a fair trial as provided under Article 50 (1) and (2) of *the Constitution*; the right to fair trial being absolute and non-derogable right. The other issue is whether the essential elements of the offence of defilement were proved.

16. The right to a fair hearing as embedded in Article 50 of *the Constitution* obligates the court to ensure that an accused person is protected from an arbitrary trial and that his case is heard expeditiously, without bias, influence or external pressure with strict adherence to the constitutional and statutory provisions regarding a fair trial. This entails the accused being presumed innocent until proved guilty, the right to be informed of the charge with sufficient details to answer it, the right to adequate time and facilities to prepare the defence, the right to choose, and be represented, by an Advocate, and to be informed of this right promptly, and the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. These protections align with Article 7 of the African Charter on Human and People’s Rights (ACHPR).

17. Article 50 (2) (g) of *the Constitution* provides:-

“(2)Every accused person has the right to a fair trial, which includes the right—  
(g)to choose, and be represented by, an advocate, and to be informed of this right promptly”

18. In the case of *S. K. v. Republic*, Migori Criminal Appeal No. 36 of 2019 [2019] eKLR, Mrima J. considered the consequences of failure to comply with Article 50 (2) (g) of *the Constitution* and was of the considered view that non-compliance with the aforesaid provision is a constitutional breach that invalidates the trial notwithstanding the apparent absence of prejudice.

19. The critical nature of the right to a fair trial was considered by the Supreme Court in the case of *Republic v. Karisa Chengo & 2 others* [2017] KESC 15 (KLR) when it held that:-

“...the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more...”

20. That it is the duty of the trial court to inform an accused person of this right is laid out in Section 43 (1) (a) of the *Legal Aid Act* No. 6 of 2016 which provides:-

“(1)A court before which an unrepresented accused person is presented shall—  
(a)promptly inform the accused of his or her right to legal representation.”



21 Pursuant to the aforesaid statutory safeguards, it follows that a trial court is enjoined, at the point of taking plea, or shortly thereafter and well before the commencement of the trial to inform the accused of this right to enable him consider his options and decide as to whether he would wish to retain the services of an Advocate and to indicate on the record that the accused has been duly been informed of this right. In *Joseph Kiema Philip v. Republic* [2019] KEHC 7989 (KLR), Nyakundi J held that:-

“...it is paramount that the record of the trial court should demonstrate that the rights enshrined under Article 50 of *the constitution* where accorded to the accused person were they are applicable. For instance, the record of the trial court must demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It must show that the court did take the profile of the accused person before the trial commenced ...”

22. Finally, in *FOO v. Republic* [2020] KEHC 5543 (KLR), Mrima J rendered himself thus:-

“ 37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of *the Constitution* then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of *the Constitution* will be tantamount to amending *the Constitution* through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce *the Constitution* as it is the intentions of the People of Kenya as expressed in *the Constitution* will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.”

23. Having said that, I am fully persuaded by the proposition that a breach of Article 50 (2) (g) of *the Constitution* is a breach of a fundamental right that vitiates a trial as it goes to the heart of a fair trial more so where an accused person faces serious charges with heavy penalties as the Appellant faced in this case.

24. From the proceedings, the Appellant took plea on 8<sup>th</sup> July 2022. On that date, he pleaded not guilty and the court record shows that statements were supplied. Presumably, the statements being alluded to in the record are witness statements. It is not clear whether the P3 and PRC form as well as the victim’s treatment records were also supplied, considering this was a sexual offences matter.

25. Be that as it may, the Appellant proceeded to cross-examine the witnesses and may have not suffered any prejudice. However, it is evident that at no point did the trial court inform the Appellant of his right to legal representation. This was crucial in view of the nature of the charges facing the Appellant which may have needed a more careful strategy for the Appellant to mount an effective defence. The need for legal representation by an Accused person was considered fundamentally important in criminal proceedings in *Pett v. Greyhound Racing Association* [1968] 2 All ER 545 quoted by the Court of Appeal in the case of *Duncan Owuor v. Republic* [2022] KECA 18 (KLR). Lording Denning at Page 549 of the aforesaid case stated that:-

“It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; ‘you can ask any questions you like;’ whereupon the



man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?”

26. It is my considered view that the failure by the trial court to comply with Article 50 (2) (g) rendered the trial a nullity and the conviction of the Appellant can therefore not stand and must be quashed.
27. Since the error in the record was the fault of the trial court and the incident leading to this case occurred in 2022, the court has to decide whether to order a retrial.
28. In deciding whether to order a retrial, the court must take into account the following factors:-
  - a. The gravity of the charge.
  - b. That the Appellant first appeared in court on 8<sup>th</sup> July 2022 and his case was determined on 10<sup>th</sup> March 2025.
  - c. That the Appellant has served one (1) year and one (1) month imprisonment.
  - d. That the victim was aged 15 years at the time of the alleged offence.
  - e. That the Appellant was the victim’s teacher at the time of the alleged offence.
29. Considering all the factors, I am of the considered view that it would be in the interest of justice that the case be heard and determined on merit.
30. Consequently, without delving into the other grounds of appeal, I allow the appeal, quash the conviction and set aside the sentence.
31. The Appellant will be released into police custody at Lumakanda from where he shall be presented before Butali Law Courts for fresh plea taking on 11/5/2026. The matter shall be heard by any other Magistrate with competent jurisdiction other than Hon. R. S. Kipng’eno.
32. Those are the Orders of the court.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 5<sup>TH</sup> DAY OF MAY 2026.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Khalwale for the Appellant

Ms. Chala for the Respondent/State

Court Assistant: Polycap

