KENYA LAW
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Wango v Republic (Criminal Appeal E088 of 2021) [2025] KEHC 6085 (KLR) (Crim) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E088 OF 2021

CJ KENDAGOR, J

MAY 9, 2025

BETWEEN

FREDRICK MWANGI WANGO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(eing an appeal against conviction and sentence in judgment delivered on 30th September, 2021 by Hon. D.M. Ndungi (PM), in Chief Magistrates Court Milimani Criminal Case No. 1611 of 2016)

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charges are that, on or before the month of March, 2016 at Mathare Estate in Nairobi within Nairobi County, caused his penis to penetrate the vagina of CMM, a child aged 13 years. He faced an alternative charge of committing an indecent act with a Child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the alternative charge were that on or before the month of March, 2016 at Mathare Estate in Nairobi within Nairobi County, intentionally touched the vagina of CMM, a child aged 13 years with his penis.
2. The case proceeded to hearing when the Appellant was out on bail and the prosecution called 5 witnesses. The Court delivered a judgment on 30th September, 2021 wherein it found the Appellant guilty of the main charge on the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* and convicted him under Section 215 of the *Criminal Procedure Code*. He was sentenced to 20 years imprisonment.

3. The Appellant was dissatisfied with the conviction and the sentence and appealed to this court vide a Petition of Appeal dated 7th October, 2021. He listed the following Grounds of Appeal;

   1. That the learned trial magistrate erred in law and fact by finding that there was sufficient evidence to support the charge of defilement against the Appellant whereas the prosecution failed to prove the element of penetration beyond reasonable doubt hence it was unsafe to convict the Appellant on the evidence on record.

   2. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution had not established its case beyond reasonable doubt.

   3. That the learned trial magistrate erred in law and fact in failing to appreciate that he had neither seen nor heard the witnesses on whose testimony he convicted the Appellant by arbitrarily believing the testimony.

   4. That the learned trial magistrate erred in purporting to impose a burden on the Appellant to render an explanation of the alleged defilement or explain his whereabouts on the material dates.

   5. That the learned trial magistrate erred in law and fact by relying on his own speculation.

   6. That the learned trial magistrate erred in holding that sexual penetration of the complainant were proved whereas the medical evidence on record was not categorical on the cause of the alleged penetration nor was it linked to the Appellant.

   7. That the learned trial magistrate erred in law and fact in failing to appreciate that the evidence of alleged incidents of defilement was scanty and unreliable.

   8. That the learned trial magistrate erred in failing to take into account that no exhibit was produced in court to prove the age of the complainant to warrant the conviction of the Appellant under section 8 (3) of the *Sexual Offences Act*.

   9. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding this case particularly noting that the report of defilement was made 7 months later hence the need for corroboration of the complainant's evidence pursuant to Section 124 of the *Evidence Act*.

   10. That the learned trial magistrate erred in law and fact in dealing with the matters before him arbitrarily, casually, and on whims rather than on analysis of evidence as required by law.

   11. That the learned trial magistrate erred in law and fact in refusing to allow the Appellant's application for the recall of witnesses, particularly the complainant.

   12. That the learned trial magistrate erred in law and fact in failing to appreciate that the evidence adduced by the various witnesses did not support the charge against the Appellant.

   13. That the learned trial magistrate erred in law and fact in failing to discern that first prosecution witness (PW1), the complainant, was most likely couched because of the relationship with PW3 his uncle and who is a police constable who was stationed where the alleged incident was reported.

   14. That the learned trial magistrate erred in law and fact in failing to realize that the Appellant was arrested and consequently prosecuted on suspicion merely because he was previously residing with the minor.

15. That the conviction is dangerous and against the weight of the evidence.

4. He asked the Court to set aside the conviction and the sentence and acquit him. In the alternative, he asked this Court to order a retrial before the subordinate court. The Appeal was canvassed by way of written submissions. The Respondent did not file submissions despite being given the opportunity to.

Appellant's written Submissions

5. The Appellant submitted that the conviction and sentence should be set aside. He argued that the elements of age, penetration, and identification of the perpetrator were not proved beyond reasonable doubt. He also argued that the trial Court should not have dismissed his defense as a mere denial.

6. He argued that penetration was not proved because PW2 and PW5 gave contradictory testimonies on the nature of injuries found upon Complainant's medical examination. He also argued that the prosecution did not comply with Section 77 of the *Evidence Act* with regard to PW's testimony, who testified on behalf of her colleague. He also argued that there was a difference of 8 months from when the alleged offence was committed and when the Complainant was examined. He argued that there was no PRC medical evidence to attach the commission of the offence to any particular date, and thus it was possible that anything could have happened to the Complainant between March and October, 2016.

7. In addition, the Appellant submitted that the element of penetration was not proved because the complainant did not mention the Appellant's penis in her testimony. He argued that the Complainant merely said the 'He removed his "thing" and put it in mine.' The Appellant argued that the prosecution failed to let the complainant demonstrate to the court and shed light as to what she meant with those words. He submitted that this was not done and the court was wrong to speculate and proceed on assumptions.

8. Further, the Appellant submitted that the Complainant's age was not proved. He argued that it was left to being left to speculation that the Complainant was 13 years. He argued that the whole set of prosecution witnesses' evidence, none of them testified about age of the Complainant. He argued that the Complainant's own testimony that she was 13 years was no sufficient proof of her age.

Issues for Determination

9. Having looked at the Grounds of Appeal and the submissions of the Appellant, I find that the following are the issues for determination;

    a. Whether the elements of the offence of defilement were proved;

    b. Whether the conviction was safe.

The Duty of the Cout

10. The role of this court as the first appellate Court is well settled. In Okeno vs. Republic (1972) EA 32, the East Africa Court of Appeal gave an authoritative observation on the duty of the first Appellate Court. It stated as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own

findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. Based on this authority, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion.

12. PW1 was the complainant. The Court confirmed that she understood the solemnity of an oath. She testified that she was 13 years old, and that one day in 2015, the Appellant took her and put her on the bed. He unzipped his trouser, removed his 'thing,' and put it in hers. The Appellant threatened to beat her if she told anyone. That day she did not confide in anyone. In 2016, the incident happened again. She testified that she could not recall what transpired on that day in 2016. She later went to stay with her uncle and aunt at Central Police Station. She was feeling pain in her vagina but she did not tell anyone. She later went to the Appellant's house in Mathare after which he was arrested.

13. A female police officer asked her if the Appellant had done anything to her and she denied. She testified that the first time the Appellant defiled her was in 2015, but she said she could not remember how many times he did it in 2015. She stated that the Appellant defiled her once in 2016. She stated that he would defile her at 10.00 a.m. in all those occasions. She testified that she went to the Appellant's house so that if she was questioned, she would reveal what he did. In her statement with the police she recorded that she was going to visit her mother in Mathare. She said she was in a state of fear when she recorded the statement at the police station. She stated that she told the doctor about it and that she had not previously told anyone about the incident before her talk with the doctor.

14. PW2 was a clinical officer at Medicine Sans Frontiers (MSF). She testified on behalf of her colleague who had examined the complainant and whom she said was on leave. The complainant was examined on 15th October, 2016. She stated that the Complainant gave a history that she had been a victim of sexual violence around March in Mathare by one know person. Upon examination, the outer genitalia was normal, her vagina was moist, and had a brownish discharge. They also noted that her hymen had an old tear at 6 and 3 O'clock position. She stated that no tests were done and no treatment was given but they booked her for counseling.

15. PW2 stated that the last sexual assault was said to be in March, 2016, and that due to the lapse in period, that was a long time to have substantial evidence. She stated that she was not able to tell the age of the tear, and that hymenal tears heal within one week. On cross-examination, she testified that she could not tell whether the complainant was sexually assaulted. She testified that it was not easy to tell the cause of hymenal tears.

16. PW3 was a police officer stationed at Central Police Station. He stated he is an uncle to the Complainant. He suspected the Appellant because the Complainant would run away from the mother to stay with the Appellant. He told the Court that he had to investigate why the Complainant wanted to stay with Mwangi yet he was not her relative. He testified that on 14th October, 2016 the Appellant and his wife brought the complainant to Central Police Station, whereupon she disclosed to him that the Appellant had previously defiled her. He stated that it was after this revelation that they took the complainant to the hospital to be examined by the doctor.

17. PW4 was a police officer stationed at Central Police Station, Nairobi and was the arresting and investigating officer. He testified that on 14th October, 2016 a missing person report was made concerning the Complainant. He testified that the Appellant and his wife brought the Complainant to the station later that day and told them that she had spent the night at their house in Mathare. He

stated that he re-arrested the Appellant from the members of the public. He issued a P3 form to the Complainant which was duly filled by Dr. S.

18. PW5 was a medical doctor based at the police surgery, Nairobi area. She stated that she examined the complainant on 7th November, 2016. She testified that on her examination, the Complainant had a normal anatomy of the external genitalia and the hymen was normal as per her age. She also found old tears of hymen at 4, 6, and 9 o'clock positions, which according to her suggested blunt trauma to the genital region previously. She testified that, however, she could not tell what object caused the aforesaid injuries to the Complainant's hymen. She filled the P3 form on 7th November, 2016.

19. The Appellant was DW1 and he gave sworn testimony. He informed the Court that he and his family had hosted the Complainant and her father after they were evicted from their rental house due to unpaid rent in 2015. In May 2016, she left his house for Nakuru and did not return until 13th October, 2016, when she unexpectedly reappeared. According to the Appellant, PW3 contacted him to inquire about PW1's whereabouts. The following day, he and his wife accompanied her to the police station where PW3 worked. He stated that PW1 and he were placed in cells, and subsequently, he was brought before the Court.

20. He also called two other witnesses, DW2 and DW3. I have carefully considered their respective testimonies.

Analysis of the Evidence

21. The Court in George Opondo Olunga vs. Republic [2016] eKLR established that the ingredients of the offence of defilement are: the age of the victim, penetration and proper identification of the perpetrator.

Whether the age of the complainant was proved

22. Concerning the age of the Complainant, the Prosecution alleged that the minor was 13 years at the time of the offence. It did not produce any documentary evidence to prove this fact. Courts have held that the age of the victim need not be proved by way of documentary evidence and that Courts can accept other ways of proving age. The Court in Gilbert Muriti Kanampius vs Republic [2013] eKLR, while relying on the case of Fappyton Mutuku Ngui vs Republic, HC Machakos Cr. Appeal No. 296 of 2010 noted as follows:

> " Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J in Machakos HC Criminal Appeal No. 296 of 2010 Fappyton Mutuku Ngui vs Republic... "that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

23. Similarly, in Joseph Kieti Seet vs Republic [2014] eKLR, the held as follows:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni vs Uganda, Court of Appeal Cr. Appeal No. 2 of 2000, it was held thus:
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> > "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...."

24. PW1, Complainant testified that she was 13 years old. In addition, I have also seen the medical report produced in court by PW2, who is a medical doctor. It indicated that the complainant was 13 years. I have also seen the P3 form filed by PW5 in which she indicated that the minor was 13 years old. In my view, this was sufficient corroboration to establish the age of the minor. I thus agree with the prosecution and find that the minor was 13 years old at the time when she is said to have been abused.

25. The Appellant was charged under Section 8 (3) of the *Sexual Offences Act* 2006 which provides as follows;

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

26. I therefore find that the element of the age of the Complainant was satisfied.

Whether the elements of penetration and identity of the perpetrator were proved

27. The Appellant submitted that the element of penetration was not proved. The prosecution tendered the Complainant's oral testimony and medical reports to prove that there was penetration. This Court is being invited to relook at the evidence and make a determination whether the penetration element was established. In answering this question, my first port of call is the medical reports produced before the lower Court. I have carefully analyzed the medical reports as well as the testimonies of PW2 and PW5 who are both medical practitioners.

28. The alleged defilement is said to have taken place in March, 2016. The first medical examination was conducted in 15th October, 2016, while the second examination was conducted on 7th November, 2016. That means the first medical examination was conducted 6 ½ months after the alleged incident, while the second examination was conducted about 7 ½ months after the alleged assault. The two medical practitioners who examined the complainant confirmed that they found old tears on the complainant's hymen. They however made several observations on the age of the hymenal tears and the probable causes of the broken hymen.

29. PW2 told the Court that it was not easy to tell the cause of the hymenal tears. She also told the Court that she could not tell the age of the tear because hymenal tears heal within one week. She also told the Court that the period between the time of the alleged assault and the examination was a long time to have substantial evidence. She testified that she could not tell whether the Complainant was sexually assaulted. PW5 told the Court that she could not tell what object cause the aforesaid injuries to Complainant's hymen.

30. In my view, the testimonies of these medical practitioners lead to the inevitable conclusion that the medical reports have very little assistance in the current case, and particularly with respect to proving the penetration element. This is probably so due to the time lapse between the date of the alleged sexual assault in March, 2016 and the date of examination in October, 2016. It would be unsafe for the Court to rely on the medical reports. With the medical reports out of the picture, the only remaining testimony on the issue of penetration is the testimony of the complainant. I shall now turn to the testimony of the Complainant.

31. Courts have established that there is no requirement in law for the evidence in sexual offences to be corroborated by medical evidence before a conviction can be reached. In Mohamed Boru Guyo v Republic [2022] eKLR, the Court held;

> " 13. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel against the evidence adduced at the trial court. The appellant argued that he was convicted on evidence that was uncorroborated by medical evidence. However, there is no requirement in law for the evidence in sexual offences to be corroborated by medical evidence before a conviction can be reached. In Kassim Ali v Republic (2006) eKLR the Court of Appeal held that examination to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence.
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> In J.W.A v. Republic 2014 (supra) the court held that corroboration in sexual offences is not mandatory. It is therefore clear from these authorities that medical evidence to connect an accused person to the offence of rape is not necessary for a conviction to be entered. The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused."

32. The rule that the Court can rely on the uncorroborated testimony of the Complainant to arrive at a conviction was earlier established by the Court of Appeal in Chila v. Republic (1967) E.A 722, where the Court held as follows;

> " The Judge should warn … himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

33. The above cited authorities require the Court to assure and satisfy itself that the single witness, in this case the Complainant, was truthful. The Court will only convict on the basis of the evidence of the Complainant if it believed that the evidence was trustworthy. I shall relook at the totality of the Complainant's testimony to ascertain whether she was truthful.

34. I have analyzed the testimony of the Complainant with a view to ascertaining whether it can support the fact of penetration. At the onset, I note that the Complainant told the Court that she was in a state of fear when she recorded her statement at the police station. This court notes the circumstances under which the Complainant recorded her statement at the police station. She told the Court that she was placed in the cells after leaving the hospital in Mathare. She said she spent a night in the cells and stayed in the cells for 2 days. This Court noted with much concern that the prosecution did not explain to the lower Court why the minor was detained in the cells after her examination at the hospital.

35. The charge before the Court relates to a sexual assault alleged to have taken place in March, 2016. That is what is recorded as per the Charge sheet. In her testimony, the Complainant testified that the Appellant defiled her once in 2016. She testified that the Appellant last sexually assaulted her in March, 2016. That is what she told the medical doctors when she went for examination. However, the

Complainant did not tell the court how the said sexual assault happened on that day. She said that she could not recall what happened that day. She said "In 2016, the incident happened again. I can't recall what transpired on that day."

36. In my view, I find it very curious that the Complainant could not recall or remember the last incident. It is also curious that while she is able to remember that it happened once in 2016, she cannot recall what transpired in that one incident she so remembers. If she is truthful and can remember that the 2016 incident was the last, she should also be in a position to recall the events of that one previous incident. I have re-examined the Court record, and the Court ascertained that she is an intelligent child at the voire dire examination. In my view, with that assessment, PW1 understood what was happening around her and should be in a position to explain how penetration occurred.

37. In the Court record, she described how the Appellant defiled her on a certain day in 2015. She gave a detailed account of how the Appellant unzipped his trouser, removed his 'thing,' and put it in hers. The account related to a certain day in 2015. She testified that the Appellant defiled her severally in 2015, but she could not remember how many times he did it to her. In my view, the testimony of the Complainant is doubtful and I have no reasons to believe that she was telling the truth. If she could remember and describe how the Appellant defiled her on a certain day in 2015, there is no reason why she was unable to remember a much later incident, and the only incident that happened in 2016.

38. The defence presented compelling arguments that cast significant doubt on the prosecution's case. The Appellant provided a detailed account of how PW1 came to be at his home, explaining that she and her father were in a distressed state and he felt compelled to offer assistance. This account was corroborated by independent witnesses.

39. He stated that he escorted her to the place of work of PW3, her uncle, who had called the previous day to ask on her whereabouts and he had hoped she would receive the support she needed. He was instead detained and locked up with the Complainant. The series of events recounted by the Complainant, along with the testimonies of PW2, PW3, and the defence witnesses, casts considerable doubt on the authenticity of the complaint. Furthermore, the integrity of the statements provided by the Complainant appears to be called into question; the statement may have been obtained under coercive conditions while she was in police custody, raising significant concerns about the overall credibility of the claims made.

40. Courts have established that an accused person is entitled to the benefit of doubt where there is a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused. This rule was stated in Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR, the court held as follows

> "To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.
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> Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt

in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

41. I have considered the circumstances of this case and I am not persuaded that the conviction was justifiable. There were doubts on whether the Complainant was sexually assaulted by the Appellant in March, 2016, or at any other time. The prosecution did not prove the element of penetration.

42. In my view, this is a case where the Appellant ought to have been given the benefit of doubt. There was no sufficient evidence adduced before the trial Court to sustain a conviction against the Appellant.

43. The appeal is successful. Consequently, I quash the conviction against and set aside the sentence of 20 years' imprisonment. I order that the Appellant be set at liberty forthwith unless lawfully held.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 9TH DAY OF MAY, 2025.

....

C. KENDAGOR

JUDGE

Court Assistant: Amin

Appellant present

Mr. Chebii, ODPP for Respondent

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