



REPUBLIC OF KENYA



KENYA LAW
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**Wanyama v Republic (Criminal Appeal E005 of 2025)
[2025] KEHC 11170 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E005 OF 2025**

RPV WENDOH, J

JULY 29, 2025

BETWEEN

AUGUSTINE SIMIYU WANYAMA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Augustine Simiyu Wanyama, the appellant herein, was charged with the offence of defilement contrary to section. 8(1) as read with section 8(3) of the *Sexual Offences Act*.
2. The particulars of the charge were that between 14th June, 2024 and 15th June, 2024 at Kiminini sub-county intentionally caused his penis to penetrate the vagina of D.N.W. a child aged eleven (11) years.
3. In the alternative, the appellant faced a charge of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act* in that between 14th and 15th June, 2024, at Kiminini Sub-county intentionally touched the vagina of D.N.W. a child aged eleven (11) years.
4. The case proceeded to full trial with the prosecution calling a total of four (4) witnesses. When called upon to defend himself, the appellant testified on oath and called four (4) witnesses.
5. The appellant was convicted and sentenced to twenty (20) years imprisonment. Dissatisfied with the conviction and sentence, the appellant filed this appeal based on grounds found in the amended grounds of appeal.

The grounds of appeal are as follows: -

1. That the charge was defective;
2. That the offence of defilement was not proved to the required standard;
3. That the appellant's defence was not considered;



4. That the prosecution failed to call crucial witnesses;
6. The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.
7. This being a first appeal, this court is expected to exhaustively examine the evidence tendered in the trial court, analyse it and draw its own conclusions. The court will however bear in mind that this court neither saw nor heard the witnesses testify. This court is guided by the decision of Okeno -V- Republic (1972) EA 32.

The Prosecution Case: -

8. PW1 D.N.W, after undergoing a voire dire examination, testified on oath that on 14/6/2024 about 5.00p.m. her mother asked her to go and fetch water at Mama P's. She fetched the water and met the appellant who got hold of her hand, closed her mouth and took her to his house in the bedroom, removed her clothes, removed his trouser and defiled her. He threatened to kill her if she told her mother about the incident; that he was armed with a knife and let her go home. The next day, the appellant again defiled her when she went to fetch water and told her to go away. She later told her mother and her teacher what had happened to her. The mother reported to police and she was taken to hospital. She knew the appellant as Paul.
9. PW2 SNW, the mother of the complainant told the court that the complainant was born on 9/10/2014. She recalled on 10/6/2024, she left home about 2.00p.m. and told the complainant to go home and cook for her young siblings. When she arrived home at 8.00p.m. she did not get PW1. Next day, PW2 went to PW1's school but she was not there. At noon, one M called PW2 to inform her that she had found PW1 crying. PW2 found PW1 who told her that she had been defiled by Paul. She reported to Big Tree Police Station, they were referred to hospital.
10. PW3 Nelson Lusiola is a Clinical Officer. He examined the complainant on 18/6/2024 with a history of defilement between 14th and 15th June, 2024. On examination, the complainant's hymen had an old tear but the labia had bruises and was inflamed (redness) which showed signs of penetration.
11. PW4 Cpl. Irene Lagat of Matunda police base was the Investigating Officer in this case. The matter was reported to her by PW2 on 18/6/2024. She referred them to hospital. She said that appellant was arrested at the scene after PW1 pointed him out.

The Defence Case: -

12. In his sworn defence, the appellant recalled that on 14/6/2024 he went to Tulwet Stage and went to Lolkeringet, and Big Tree to attend Secondary School games contest where he stayed till 7.00p.m. He went back there on 15/6/2024 and returned home at 7.00p.m. He was arrested on 18/06/2024 for an offence he knows nothing about. He said he was accompanied to the games by WS and M. He denied knowing the complainant or having any differences with PW1 or 2, but claimed to have been framed.
13. DW2 MT, recalled that on 14/6/2024 he was with the appellant at Lolkeringet watching secondary school games from 9.00a.m. to 7.00p.m. DW1 went back on 15/6/2024 to watch finals. He admitted knowing the complainant as a neighbour just like the appellant.
14. DW3 MKO knew the appellant as a neighbour. She knows the complainant as A; that on 14/6/2024, she was at Tulwet farm, morning till evening and same to 15/6/2024 and never saw the appellant on the two days. She claimed to have seen the complainant at home on 14th and 15th but did not know what happened on 14/6/2024 at 5.00p.m.



15. DW5 EWS a younger brother to the appellant said on 14th and 15th June 2024 he went to school upto 6.00p.m. and could not tell if the complainant was defiled.

Appellants submissions: -

16. The appellant submitted that since the charge did not include the word ‘unlawfully’ in its particulars, the charge is fatally defective. He relied on the decision of David Odhiambo -V- Republic APP 5/2005 which was a rape case, and the accused therein was acquitted. The second ground was that penetration was not conclusively proved; that PW3 did not prove that he is a Clinical Officer; that the hymen had an old tear meaning it had happened long time ago.
17. The appellant also argued that his defence was not considered that he called witnesses who proved that he was not at the scene on the said date, and which evidence was not challenged and that the court did not give reasons for rejecting the said defence as required.
18. Relying on the decision of Bukenya & Another -V- Uganda (1972) EA 549, the appellant submitted that the prosecution failed to call three crucial witnesses namely Joy, M and the teacher, to come and tell court what they knew about the complainant. Reliance was also made on John Kenga -V- Republic CRA 1126 of 1984 KCA where the accused ws acquitted because some witnesses were not called.

The Respondent’s submissions: -

19. The Prosecution identified four (4) issues for determination.
- i. Whether the charge sheet was defective;
 - ii. whether the charge was proved beyond reasonable doubt;
 - iii. whether evidence was riddled with contradictions and lastly;
 - iv. whether the medical evidence as proper and sufficient to prove the offence.
20. On proof of the offence: - Counsel urged that the ingredients needed to be established beyond reasonable doubt in a case of defilement are age of the complainant, proof of penetration and positive identification of the perpetrator.
21. As regards age, Counsel argued that a birth certificate was produced as an exhibit indicating that the complainant was born on 9/10/2014 and hence was ten (10) years as of June 2024; As regards penetration, Counsel submitted that the Clinical Officer found that the complainant had injuries to her genitalia which proved penetration.
22. As to positive identification of the assailant, Counsel submitted that PW1,2 knew the appellant as Paul or Paulo and a neighbour and it was a case of recognition. As to the defective charge, Counsel relied on the case of J.M.A -V- Republic (2009) eKLR where the Court of Appeal held that not all defects render a conviction invalid because it can be amended by Section 382 CPC; that in any event the appellant never raised the issue in the trial court.

Determination: -

23. This court has now considered the grounds of appeal, the evidence tendered in the trial court, and the rival submissions.



24. The appellant faced a charge of defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). In the case of Dominic Kibet Mwareng – V- Republic (2013) eKLR the court stated. “The critical ingredients forming the offence of defilement are: -

- the age of the complainant;
- proof of penetration and;
- positive identification of the assailant”

Proof of complainant’s age: -

25. In the case of Joseph Kiet Seet -V- Republic (2014) eKLR, the court held “It is trite law that age of a victim can be determined by medical evidence and other cogent evidence”.

26. In the case of Francis Omuroni -V- Uganda CRA 2/2000, the Court of Appeal of Uganda held that “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 victims parents or guardian and by observation and common sense”.

See also Mwalongo Chichoro Mwajembe -V- Republic CR.A 24 of 2015.

27. In the instant case, PW2 the mother of PW1 testified that she was eleven years and presented to court the birth certificate which indicates that she was born 19/10/2014. By June 2024, she was actually ten (10) years not eleven (11) years as stated in the charge sheet. The complainant was a minor aged ten (10) years.

Proof of Penetration:-

28. Penetration is defined in section 2 of [Sexual Offences Act](#) to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person”

29. In Mark Oiruri Mose -V- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration as follows: - “so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ”.

30. In Eric Onyango Ondeng -V- Republic (2014) eKLR, the court held; “In sexual offences, the slightest penetration of the female sex organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be ruptured”.

31. In the instant case, the court record indicates that the complainant testified that after the appellant undressed her and removed his trouser, he ‘defiled’ her. Defilement is a technical term which needs to be explained in more plain terms as to what exactly the appellant did. If the Prosecutor did not guide the witness in explaining what actually happened, then the Magistrate had a duty to seek clarification from the witness what she meant, if she indeed used the word ‘defiled’; she could have demonstrated it to court; Or did the court fail to record exactly what PW1 explained in her own words and instead used the term ‘defiled’. I doubt that a child of eleven (11) years could not have used the term “defiled”.

32. The complainant never told the court that the appellant inserted his male organ into hers or that the organ ever came into contact with hers. She did not describe the full encounter with the appellant. Injuries to PW1’s genitalia are not proof that they were caused by a male organ. It could have been from anything else a finger, a stick etc. For the above reasons, this court finds that penetration being a critical ingredient of the offence of defilement, was not proved.



33. Having so found, I find it unnecessary to go into considering the other grounds of appeal. I find this to be a sad case if indeed the offence was committed and both the prosecution and the court were negligent in taking the evidence of a child.

34. In the end, I find that the conviction was not well founded. It is hereby quashed and sentence set aside, and the appellant is set at liberty forthwith unless otherwise lawfully held.

Delivered, Dated and signed at Kapenguria this 29th day of July, 2025

R. WENDOH.

JUDGE.

Judgment delivered in open court Virtually in the presence of:

Mr. Majale for the State

Appellant -

Juma/ Hellen - Court Assistant.

