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Wanyonyi v Republic (Criminal Appeal E017 of 2024) [2025] KEHC 11123 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E017 OF 2024

RPV WENDOH, J

JULY 29, 2025

BETWEEN

FRED SIMIYU WANYONYI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence of 25 years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act, 2006 in a judgment delivered by Hon. N. Rop – Resident Magistrate on 7th of March, 2024 in Kitale Criminal Case No. E002 of 2023)

JUDGMENT

1. The Appellant Fred Simiyu Wanyonyi was convicted of the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* by the Resident Magistrate Kitale.
2. The particulars of the charge are that on diverse dates between 26th and 29th December, 2022 at [Particulars withheld] area, in Mubere Location in Trans Nzoia County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ (vagina) of RNS, a child aged 13 years.
3. In the alternative, the Appellant faced a charge of committing Indecent Act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. It was alleged that he caused his genital organ to penetrate the genital organ of RMS.
4. The Appellant denied the offence and the case proceeded to full trial with the prosecutor calling a total of five witnesses. When called upon to defend himself, the Appellant testified on oath but did not call any witnesses. The court found him guilty on the main charge of defilement and he was sentenced to serve 25 years imprisonment.

5. The Appellant dissatisfied with both the conviction and sentence and preferred this appeal based on the following amended grounds:-

   a. That the recognition was not sufficient to sustain a conviction.

   b. That the offence was not proved beyond reasonable doubt.

   c. That the court failed to comply with Section 200 of the CPC.

   d. That his rights to legal representation were not complied with.

   e. That the sentence is harsh and excessive.

6. The Appellant prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

7. This being a first appeal, it behoves this court to re-examine all the evidence tendered in the trial court, analyse and evaluate it and arrives at this court's own conclusions. This court should however bear in mind that it neither saw nor heard the witnesses testify. The court is guided by the decision of *Okeno - v- Republic* [1972] EA 32 where the court said:-

> " It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"

The Prosecution Case

8. PW1 RN aka K aged 12 years recalled that on 26/12/2022, about 7.00 p.m. she went to the aunt's house at [Particulars withheld]. She was sent to buy sugar at Fred's shop. She had known Fred for long, she gave Fred the Kshs 50/= for sugar but he held her hand and asked her to go with him but she refused. He pulled her by force into the shop to a rear room in which he pushed her. He undressed her, removed his clothes. He put her on the bed, parted her legs and put his 'dudu' into her vagina and did bad manners to her. He threatened her with death if she left the room. He went back to the shop and she remained there till next day. After he closed the shop, he did bad manners to her again and they slept. Next morning, her mother came looking for her but Fred denied that she was there. Her uncle came and removed PW1 from the shop and they went to report at Endebess police station and went to hospital. She went back to Fred's house next day to pick her panty and while there, he grabbed her again and did bad manners to her. PW1 went to tell her mother and the next day, Fred was arrested. PW1 said she knew the Appellant as Fred Simiyu.

9. PW2 GN who lives at [Particulars withheld] recalled that on 26/12/2022, she sent a minor to buy sugar but she did not return next day, she went to find out if the minor went back home, but she was told that she had slept at a neighbour's house and was told to report to police. While at the police station; her brother DS came with the minor and BN. PW2 took the minor to hospital at Endebess and then she disappeared that evening. PW2 called the police and started looking for her and arrested her at Ayub's place, pointing at the Appellant.

10. PW3 Dr. Sammy Osore of Kitale county hospital that did an age assessment of PW1 and found that she was 13 years old.

11. PW4 PC Salim Mwachiga of Kimondo police station is the investigating officer in this case which was assigned to him on 29/12/2022. He found that a report had been filed by one GN who reported that the child RN had gone missing on 26/12/2022 till 30/12/2022; that by the time of the report the child had been found and was taken to hospital, was issued with a P3 form. They went in search of

the suspect at Chesita trading centre where the child pointed to Fred Simiyu and he was arrested. PW3 clarified that he first saw the minor on 29/12/2022 when the request was made and she was sent to hospital but escaped till 30/12/2022.

12. PW5 Dr. Musa Chekiyeng of Endebess Sub-County Hospital produced in court the P3 form treatment book and laboratory request form in respect of the minor. He examined RN a child aged 10 years on 26/12/2022 in a case of defilement. He found the vulva had a discharge and there were some injuries and it was swollen; the hymen was freshly broken. The laboratory results showed that she was not pregnant or infected. He concluded that the laceration to the vagina, torn hymen and injuries to the vagina were proof of penetration.

13. In his sworn defence, the Appellant stated that in 2015, he separated with his wife and met G, PW2 whom he married but they separated. He went back to his first wife for whom he opened a business. They stayed till 2022, when the January his friend Ken called to inform him that G had come back. Ken had been sent by G to ask the Appellant to get back with her but he refused; that Ken asked him again in March 2022 or that G would take legal action against him. In May, 2022 he was attacked by some people when walking home about 7.00 p.m. to 8.00 p.m. and found himself admitted at Endebess hospital.

14. In July, 2022, Ken warned him that what happened to him was not enough and he made a report of the threats at Kimondo police station; that G was called and warned; that on 22/12/2022 when on his land G went there with intention of buying vegetables. She told him that she needed help of 20 kgs of sugar but he declined; that G left her bag behind and at 10.00a.m. he went back home to prepare to go to hospital at Moi teaching referral hospital. He travelled to Eldoret on 23/12/2022 where he stayed for a week and retuned on 30/12/2022. About 6.00 p.m. he was told he had visitors and he found the investigating officer who claimed to have come to buy beans. He was taken to station and told that some beans were lost. He was taken to Kiptogot in Mt. Elgon into a forest. He was later taken to Endebess police station and charged for this offence.

Appellants Submissions

15. The Appellant submitted that the case was presided over by three magistrates and the Hon. N. Rop did not comply with Section 200 CPC when she took over the hearing of the case. He relied on the case of *Simiyu - v- Republic* CRA E050/2022; Ireri - v- Republic [2008] eKLR and Mark Limo Chesire - v- Republic [2019] eKLR where courts held that failure to comply with provisions of Section 200 CPC leads to a mistrial.

16. The second point was that when he was arraigned in court, the court did not inform the Appellant of his right to legal representation at state expense hence his right to fair trial under Article 50 (2) (g) (h) of *the Constitution* was breached; that the Appellant was not informed of the right promptly so as to make a decision whether or not to get legal counsel to represent him. He also submitted that Section 43 of the *Legal Aid Act* requires that the court comply with Article 50(2) (g) (h). The Appellant relied on the decision of *JOO - v- Republic* [2021] eKLR; K.O. - v- Republic CRA E020/2021 where he declared the proceedings a nullity where Article 50 (2) (g) and (h) were not complied with.

17. On ground 3 (sentence), the Appellant submitted that the court was supposed to take into account the Judiciary Sentencing Policy Guidelines i.e., retribution, deterrence, rehabilitation, restorative, community protection and denunciation, that the sentence was harsh in the circumstances and hence prejudicial to the Appellant.

Respondents Submissions: -

18. The Respondent opposed the appeal and identified three issues for determination; -

    1. Whether Section 200 CPC was complied with;

    2. Whether the Appellant's rights to fair trial were violated;

    3. Whether the sentence was excessive.

19. Counsel submitted that the court held in Dominic Kibet Mwareng - v- Republic [2013] eKLR that the ingredients to be proved in a case of defilement are of theage of the complainant, whether there was penetration and proof of identity of the perpetrator.

20. As regards age, counsel argued that an age assessment report was produced by PW3 and that was not challenged. On positive identification of the Appellant, counsel submitted that the Appellant was not a stranger to PW1 and 2. PW2 even knew him the alias name Ayub; that PW1 was with the Appellant for a long time and even spent the night with him, therefore identity was not in question. On penetration, counsel submitted that PW5 examined the complainant and found that she had lacerations to the genitals and broken hymen and swelling with tears on the private parts which was proof of penetration.

21. On compliance with Section 200 CPC, it was submitted that the 2nd Magistrate Hon. Rop – RM, before she took over the proceedings, asked the Appellant whether he wanted the matter to start afresh or proceed from where the previous magistrate has stopped and then the Appellant answered that they proceed and that the court therefore complied with Section 200 CPC.

22. On the right to fair trial under Article 50 (2) of *the Constitution*, Counsel submitted that in Republic - v- Karisa Chengo & 2 Other [2017] eKLR the Supreme Court gave guidelines and circumstances to be considered in determining whether injustice had resulted from lack of legal representation and that whether substantial injustice had occurred is a matter for determination on a case to case basis. Counsel also relied on the Court of Appeal decision in William Oongo - v- Republic [2022] KECA23 (KLR) where the court considered the issue of right to representation and that the inference from the above cases is that the mere failure to inform an accused of his right to legal representative or to assign Counsel to him at State expense does not automatically vitiate the trial; that in this case, the Appellant cross examined the witnesses extensively and cannot be said to have suffered substantial injustice and that he did not ask for legal representation and was denied.

23. On the complaint that the sentence is excessive, counsel submitted that Section 8(3) of the Sexual Offence Act provides that a person convicted for an offence of defilement of a girl aged between 12-16 years is liable to imprisonment for a term of not less than 20 years; that the minimum sentence under the said Section is 20 years and the court has the right to exercise its discretion and give a higher sentence where the circumstances necessitate it. He further submitted that sentence being an exercise of discretion the court will only interfere where the trial court took into account irrelevant factors or applied wrong principles resulting in an excessive sentence. Counsel submitted that the Appellant detained the minor for 3 days and defiled her repeatedly and has not offered any apology for his actions. Counsel relied on the decisions of Shadrack Kipkoech Kogo - v- Republic Eldoret CRA 253/2003 and Benard Kimani Gacheri - v- Republic [2002] eKLR counsel prayed that the appeal be dismissed.

Determination

24. I have considered the grounds of appeal, the evidence tendered in the lower court, and submissions of both Counsel. I will first deal with the ground alleging that the appellant's right under Article 50 (2)

(g) & (h) of *the Constitution* were violated. Article 50 of *the Constitution* guarantees an accused person the right to fair trial. Article 50(2) (g) & (h) provide as follows: -

(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;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

25. Both provisions require that the court promptly inform an accused person of the said right. In *Joseph Kiema Philip -V- Republic* 2018 eKLR, the court held that 'promptly' means before plea is taken or soon thereafter and before the trial commences. This is to enable an accused make up his mind whether or not to seek counsel or if he cannot afford, apply under the *Legal Aid Act* for Counsel to be provided to him if he qualifies. Ordinarily, the court record should indicate that the said rights were explained to the Accused.

26. I have perused the court record and nowhere did the court record that the said rights had been explained to the appellant.

In Joseph Kiema case, the court had this to say on legal representation "the right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. The fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus, legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under Article 50 of *the Constitution* of Kenya 2010..... it is paramount that the Record of the Trial Court should demonstrate that the accused was informed of his right to legal representation..... in the instance the Appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the Trial Court, the Appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."

In Karisa Chengo & 2 others -V- Republic (2015) eKLR, the Supreme court said,

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absent of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at the state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charge with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

27. In Mphukwa - v- S (CA&R 360/2004) [2012] the Supreme Court of South Africa stated;

> " ….a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place."

28. In the case of JOO – V – Republic (2001) eKLR, this court held that such violation by the trial court renders the proceedings in the trial court a nullity. The same view was held by Judge Musyoka in K.O -V- Republic (2021) eKLR and Judge Mrima in Chacha Mwita -v- Republic CRA.33/2019 (Migori) and several other decisions.

29. . However, the Court of Appeal has now taken a different view. In William Odongo Oongo -V- Republic (2022) KECA 23, the Court of Appeal stated thus

> " It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. *The constitution* demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court. From the way the appellant cross examined the prosecution witnesses and form his general conduct during the trial, it s not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2)(g) and 50(2) (h) of *the Constitution*. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we are satisfied that the conviction is well founded, and we have no basis for interfering with the same.

30. The same views have been adopted by the Court of Appeal in Herman Mwero Mwavughanga -V- Republic CRA 111/2022 and several other decisions. The Court of Appeal said that the operative circumstances that trigger the necessity for legal representation in criminal cases is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused and the incapacity and inability of the accused to participate in the trial. It means that the court has to look at whether the appellant herein was able to ably take part in the proceedings or was his capacity to understand and take part in the proceedings impeded by the complexity of the case. The Court of Appeal being of supervisory jurisdiction to the High Court, this court is bound by their decision in Oongo case.

31. I have now looked at the proceedings in the lower court and do confirm that the appellant actively participated in the proceedings, cross examined witnesses at length and after he was called upon to defend himself, he gave a very long and detailed defence. No where did he demonstrate difficulty in presenting his case and this court finds that he has not suffered any substantial injustice for failure by the trial court to inform him of his right under Article 50(2) and (g) (h) of *the Constitution*.

32. Breach of Section 200 of the *Criminal Procedure Code* (CPC):

    The appellant complained that the Magistrate did not comply with Section 200 of the CPC. The said section provides as follows:-

    200. Conviction on evidence partly recorded by one magistrate and partly by another

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial. [*Act No. 13 of 1982*, First Sch., *Act No. 11 of 1983*, Sch.]

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

33. The court has the duty to inform an accused of his rights to recall witnesses, to be heard afresh or for cross examination or to proceed from where the former magistrate stopped. I have seen the record of the trial Court on 25/10/2023 when Hon. Rop took over the matter. The court recorded 'Accused asked whether he wants the matter to start afresh or proceed.

Accused: the matter to proceed.

Court- Matter to proceed from where it had reached.'

I find that the court complied with section 200 CPC. If the appellant wished the matter to start afresh or recall a witness he would have said so. The above ground is not tenable.

34. Whether the offence of defilement was proved: -

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."

35. Proof of the complainant's age: -

> In the case of Joseph Kiet Seet -V- Republic (2014) eKLR the court held that "it is trite law that age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -V- Uganda; CRA 2/2000, the Court of Appeal in Uganda held thus "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."

See also Mwalongo Chichoro Mwajembe -V- Republic 24/2015 and Edwin Masara Onsongo -V- Republic (2016) eKLR.

36. PW1 and her guardian (PW2) did not know the complainant's age. However, PW3 Dr. Osore examined the complainant on 3/8/2023 and established that she was a minor aged thirteen years and produced his report in court (P.Exh.2).

36. In addition, the court had noted that PW1 was a minor and took her through voire dire examination. The complainant was therefore a minor.

37. Penetration: -

> Penetration is defined in section 2 of the *Sexual Offences Act* to mean, "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

38. In the case of 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".

39. 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 raptured".

40. In this case PW1 graphically narrated how she went to the appellants shop, he pulled her to a room behind the shop, undressed her, removed his clothes, placed her on the bed and slept on her by placing his 'dudu' in her vagina (pointed) and did bad manners to her. (Children will usually refer to genital organs as' dudu'). He left her in the room and did not let her go but repeated the same act at night. Even after she had been found in the appellants shop and taken to police station, PW1 said she went back to the shop for her pant which had been left behind and the appellant again engaged in bad manners with her. PW5 Dr. Musa examined the complainant on 29/12/2020 and found that the outer part of the vagina had no injuries but the vulva had some injuries and was swollen and the hymen was freshly broken. In the P3 form, he indicated that there were lacerations, bruises, swelling, tears and broken hymen. He found these injuries to be evidence of penetration. The medical evidence corroborated PW1's testimony on what happened between her and the appellant. Penetration was proved.

41. Proof of identity of the perpetrator;

> According to PW1, she had known the appellant as Fred Simiyu for about six months. PW2 also knew the appellant for a long time as Ayub. PW1 was not defiled once but was detained

in the appellant's shop overnight. After PW1 was rescued from the appellants house, PW1 went back there and the sexual acts continued. In his defence, the appellant claimed to have married PW2 (G) sometime in 2015, but they separated and she had threatened him because he refused to accept her back. However, he did not link PW1to their said sour relationship. Both PW1 and 2 testified and the appellant never made any such allegations against PW1 and 2 when he cross examined them. The defence was an afterthought and can only be dismissed as such. The appellant was properly identified as the perpetrator and was arrested when he tried to flee. I find that the offence of defilement was proved beyond reasonable doubt. The conviction is sound and is affirmed.

42. Whether the sentence is excessive: -

The appellant was charged under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. Under Section 8(3) of the *Sexual Offences Act* where the victim is aged between twelve and fifteen years, upon conviction, one is liable to imprisonment for a period of not less than twenty (20) years imprisonment. The complainant was thirteen years old. The appellant was sentenced to twenty-five (25) years imprisonment. The appellant took advantage of the complainant, detained her and defiled her repeatedly knowing very well she was a child. In my view, the sentence is not excessive but should have been much more severe to deter would be such offenders who prey on innocent young girls. He must be punished for this heinous crime. The sentence is lenient and the court will not interfere.

In the end, I find that the appeal lacks merit and is hereby dismissed in its entirety.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 29TH DAY OF JULY,2025.

R. WENDOH

JUDGE

In the Presence of:-

Appellant – in person

Mr. Majale for Respondent

Juma/ Hellen Court Assistants