Wanjiru v Republic (Criminal Appeal E058 of 2024)
[2025] KEHC 15574 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E058 OF 2024

MA ODERO, J

OCTOBER 31, 2025

BETWEEN

BENSON KARIUKI WANJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Benson Kariuki Wanjiru has filed this appeal challenging his conviction and sentence on a charge of Defilement. The office of Director of Public Prosecutions (ODPP) opposed the appeal.

Background

2. The Appellant had been charged with the offence of Defilement Contrary To Section 8(1) (3) Of The *Sexual Offences Act* No. 3 OF 2008 in Nyeri CMCC No. E008 of 2023. The particulars of the charge were that

> " On the 24th day of December 2022 at about 1900 hrs in [Particulars Withheld] in Endarasha location, in Kieni West Sub-County within Nyeri County, intentionally and unlawfully caused your genital organ namely penis to penetrate the anus of S.M.M a boy child aged 13 years."

3. The Appellant entered a plea of 'Not Guilty' to the charge. The matter proceeded for hearing in the lower court. The complainant a boy child named 'S.M.M' told the court that he was aged fourteen (14) years and that he was a student in Grade 5 at [Particulars Withheld] School. The child testified that on the material day at about 6.00pm he had been sent to the nearby shops to buy sugar and bread. After making the purchase on his way back home the Appellant called the boy and led him towards the river. The Appellant told the boy to remove his underwear threatening to shoot him if he did not comply.

4. The child removed his underwear and was directed to lie down on the ground. That the Appellant also removed his undergarment and lay on top of the child. That the Appellant used his penis to penetrate the child's anus.

5. PW4 Douglas Muchemi Ndirangu told the court that he is a farmer who resides at Endarasha. That on the material day at about 7.00pm he had left the shopping centre when he heard cries from a child. PW4 went to investigate and found the Appellant lying on top of a boychild and both were undressed. PW4 got angry and hit the Appellant twice. He then took the child back to his home and advised the parents to take the child to hospital.

6. PW3 JWW is the grand-mother to the complainant. She told the court that on 24th December 2022 she was at home, PW4 came to the home with the complainant who was trembling. PW4 told her that he had found the child near the river being sexually assaulted by the appellant. PW4 advised that the child be taken to hospital.

7. PW2 BM was the father of the complainant. He confirms that on the material day he had sent the child to the nearby shops to buy bread and sugar. Later the child was brought back home by PW4 who informed them that he had found the Appellant sexually molesting the child. PW2 went and reported the matter at Endarasha Police Station. He then took the child to Endarasha Health Centre for examination and treatment.

8. PW6 Geoffrey Kamau was a clinical officer based at Nyeri Hospital. He filled and signed the P.R.C form dated 25th December 2025 in respect of the complainant which he produced as an exhibit Pexh 3.

9. PW5 Dr Nderitu Mawia is a doctor attached to Nyeri PGH. He produced the P3 form which had been filled by his colleague in respect of the complainant – Pexhb 2.

10. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. The Appellant opted to give a sworn defence and vehemently denied having defiled the complainant.

11. Finally on 31st July 2024 Hon. C. K. OBARA, Senior Principal Magistrate delivered a judgment in which she convicted the Appellant on the charge of Defilement. After considering the mitigation put forward by the Appellant, the trial court sentenced him to serve twenty (20) years imprisonment.

12. Being aggrieved by both his conviction and sentence the Appellant filed this memorandum of Appeal dated 11th September 2024, which appeal is premised upon the following ground:-

> " 1. That, the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.
>
> 2. That, the learned trial magistrate again erred in both law and fact in failing to appreciate that the critical elements in defilement were not proved to the required standards in law occasioning a serious miscarriage of justice.
>
> 3. That, the learned trial magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.
>
> 4. That, the learned trial magistrate further erred in law and fact in failing to consider the plausible appellant's statement in defense which was not

contested and or unproved by the prosecution hence still stands clearly demonstrating that the instant matter was a framed up one to curtail my success for envious reasons.

5. That, the instant matters proof was below the required standards of proof and therefore capable of impeaching the whole substance of the matter."

13. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 28th May 2025 whilst the respondents relied upon their written submissions dated 5th May 2025.

Analysis And Determination

14. I have carefully considered the appeal before this court, the record of the trial before the Lower Court as well as the written submissions filed by both parties.

15. This is a first appeal in which the duty of the Court is to re-examine and re-analyse the evidence adduced before the lower court and to draw its own conclusions on the same. In the case of Okeno -vs- Republic [1972] EA 32 the court set out the duties of the appellate court as follows:-

> " An appellant on a fist appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) EA 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 finding 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] EA 424." (See also Kiilu & Another v Republic [2005] KLR 174).

16. Similarly in the case of David Njuguna Wairimu -vs- Republic [2010] eKLR the Court of Appeal stated as follows:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

17. The Appellant faced in the lower a charge of Defilement. In the case of Charles Wamukoya Karani -vs- Republic [2013] eKLR the Court set out the critical ingredients of a charge of Defilement as follows:-

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

18. The age of the victim is a critical factor in a charge of defilement as the law provides for the sentence to imposed (if convicted) based on the child's age.

19. Rule 4 of the Sexual Offences Rules state that

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

20. In the case of Francis Omuroni -vs- Uganda, Criminal Appeal No. 2 of 2000, the Court of Appeal of Uganda stated as follows:-

> " 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 evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and commonsense....."

21. Similarly in Edwin Nyambogo Onsongo -vs- Republic [2016] eKLR the Court stated thus

> " .....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and valuable." [Own emphasis]

22. In his evidence the complainant told the court that he was aged fourteen (14) years. It must be remembered that the complainant testified in court in June 2023 about six (6) months after the alleged incident had occurred.

23. PW2 who was the complainant's father told the court that his son was born on 25th December 2009. He produced as proof of age a copy of the birth certificate serial Number 811365 Pexhb 1. This birth certificate provides conclusive proof of the age of the complainant. The authenticity of same has not been challenged in any way. Having been born in December 2009, the complainant was aged thirteen (13) years in December 2023 when the incident occurred and I do so find.

24. Having proved the age of the complainant the prosecution needed to tender evidence sufficient to prove that an act of 'Penetration' had occurred. Section 2(1) of the *Sexual Offences Act* 2003 defines penetration as

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

25. In this case the complainant told the court that the Appellant threatened him and ordered him to lie on the ground and remove his underwear. That the Appellant then also removed his underwear, lay on top of the child and proceeded to penetrate the child's anus using his penis.

26. Section 2(1) of the *Sexual offences Act* defines 'genital organs' thus "genital organs includes the whole or part of the male or female genital organs and for purposes of this Act includes the anus." [Own emphasis]

27. Therefore based on the above interpretation the penetration of the anus amounts to a Sexual assault under the Act.

28. The evidence of the complainant was corroborated by PW4 Douglas Muchemi who stated that he caught the Appellant lying on top of the child and both were unclothed. Why would an adult man be undressed lying on top of a child who was equally undressed?

29. Further in corroboration of the fact that defilement occurred was provided by the medical evidence. PW6 Geoffrey Kamau a clinical officer produced as evidence the PRC form dated 25th December 2022 Pexhb 3. He stated that he examined the child who complained of anal pain and burning. That upon examination he noted an anal tear at 12. O'clock position. PW6 took an anal swab and submitted the child's clothes for analysis. It was however noted that the child had bathed before going to the hospital therefore his clothes were clean.

30. PW5 Dr. Nderitu produced in Court the complainant's P3 form Pexb 2. The doctor who examined the child also noted an anal tear. The doctor opined that penile penetration had occurred and made a finding of 'sodomy'. In his evidence PW5 categorically states that:-

> "There must have been penetration"

31. The appellant submitted that there was no evidence to link him to the defilement of the complainant. By this I take it to mean that the appellant was challenging the fact that no samples were taken from him or from the child for comparison. The offence of defilement is complete once penetration however slight has taken place. It is not necessary that the sexual act be completed.

32. In the case of Mark Oiruri Most -vs- R [2013] eKLR the Court stated that:-

> " .....In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed 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 girls [child's] organ"

33. Therefore the fact that no evidence of samples linking the Appellant to the complainant was adduced does not negate the offence of defilement.

34. More importantly the evidence from an eye witness PW4 as well as medical evidence all of which corroborate the complainant's claim that he had been anally defiled. I find that the evidence on record provide ample proof that penetration had indeed occurred.

35. The final ingredient requiring proof in a case of defilement is identification of the assailant. The complainant identified the Appellant as the man who defiled him. The appellant was a person who was well known to the child. In his evidence the complainant stated as follows:-

> " I know the person who sexually assaulted me by appearance. He is a casual labourer at our village. I had known the person for three years....."

36. There is therefore clear evidence of recognition by the child as this was a person whom the child knew as a fellow villager. In the case of Anjononi & Others -vs- Republic [1980] KLR it was held that

> " .....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

37. However this by no means suggests that recognition of an assailant amounts to a 'fait accompli.' In the case of Joseph Muchangi Nyaga And Another -vs- Republic [2013] eKLR, the court of Appeal stated that before acting on evidence of visual recognition, the trial court must make enquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witness to observe the accused so as to be able to identify him subsequently.

38. In this case the incident occurred at about 6.30 pm. It was dusk and light was probably failing. However according to the child the Appellant spoke to him. They walked together to a river, some distance away. In such circumstances the child had ample opportunity to see and recognize and identify the Appellant.

39. The evidence of the complainant regarding the identity of his assailant was duly corroborated by PW4 who told the court that he was walking nearby when he heard a child crying. DW4 went to check and caught the Appellant in the very act of defiling the child. He found the Appellant lying on top of the boy.

40. PW4 told the court that although it was dark, he used his spot light to see and identify the appellant. Indeed this was one of the rare incidences where there was an eyewitness to an act of defilement.

41. PW4 told the court that he knew the appellant as a neighbour within the village and that he had known the appellant for over thirty (30) years. Once again there is clear evidence of recognition which was not in any way controverted by the appellant.

42. In his defence the appellant merely put forward a blanket denial. He claimed that he had been framed. The Appellant further claimed that the child had been coached. However the appellant did not say who would have wanted to frame him or why. No reason was advanced as to why so young a child would be interested in framing the appellant. There was no evidence of any pre-existing grudge between the child and/or his parents and the appellant.

43. I find that the complainant gave clear concise and cogent evidence. He remained unshaken under cross-examination. There was nothing to suggest that the child had been coached.

44. The Appellant also submitted that the trial magistrate had not considered his defence. This is not correct. In her judgment the trial magistrate clearly states that she did consider the defence of the accused person but found the same wanting. All in all I find that the prosecution presented a water tight case. The prosecution witnesses gave clear and consistent evidence and they all remained unshaken under cross-examination. I am satisfied that the charge of defilement was proved beyond reasonable doubt. The appellant's conviction was therefore sound.

45. Following his conviction the appellant was accorded an opportunity to make remarks in mitigation. A pre-sentence report was also filed. At the sentencing hearing which took place on 4th September the trial court noted that she had put into consideration both the appellants mitigation, the remarks made by defence counsel as well as the pre-sentence report.

46. The appellant had been charged under Section 8(1) (3) of the *Sexual Offences Act* which provides that

> "(3) A person who commits the 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 (20) years."

47. As pointed out by the trial court the law provides for a 'Mandatory Minimum' sentence under the *Sexual Offences Act*.

48. In Republic -vs- Joshua Gichuki Mwangi Petition No. 18 of 2023 the Supreme Court of Kenya upheld the constitutionality of the minimum mandatory sentences provided for under the *Sexual Offences Act*. Therefore upon conviction, the trial court has no choice but to impose the mandatory minimum sentence provided for by the law in this case being twenty (20) years. As such I find that the sentence imposed by trial court is lawful and cannot be impeached.

49. Finally I find no merit in this appeal. The same is dismissed in its entirety. The conviction by the trial court is upheld and sentence is confirmed.

DATED IN NYERI THIS 31ST DAY OF OCTOBER 2025.

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MAUREEN A. ODERO

JUDGE