



REPUBLIC OF KENYA



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**Wanjala v Republic (Criminal Appeal E049 of 2023)
[2025] KEHC 19196 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E049 OF 2023
MS SHARIFF, J
DECEMBER 18, 2025**

BETWEEN

FRED WANJALA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Sexual Offences Case No. E012 of 2021 at the Principal Magistrate's Court at Sirisia by Hon. R. K. Langat-PM delivered on 27 th July 2023)

JUDGMENT

A. Background

1. 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* No. 3 of 2006. The particulars being that 23rd April 2022 at Kanduyi Trading Centre in Bungoma South Sub- County within Bungoma County, the Appellant intentionally caused his penis to penetrate the vagina of R.S.J a child of 14 years.
2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the same child.
3. The Prosecution called four (4) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony, but did not call one witness.



B. The Duty of a First Appellate Court

4. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

5. Subsequently, this Court is fully aware of its duty as the first appellate Court as espoused in the case of *Okeno Vs R* (1972) EA 32 where the Court stated: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”

C. Evidence

6. The Complainant testified as PW1. She told the Court that she was a student in class 7 and that she was 15 years old as she was born on 14th June 2009. According to her, she saw the Appellant on the day of the incident. She recalled on 23rd April 2021, at 9.00 p.m. as she was selling milk Kanduyi beside the road. The Appellant approached her requesting to purchase some milk and took her purse and started walking towards Shireji area. She pursued him and ended up in a bushy area where he forcibly held her and defiled her. She told the Court at the time of the incident it was raining and there were no people around. She testified that the Appellant held her by the throat while on the ground and beating her on the back and used his penis to penetrate her vagina. She told the Court that she screamed out in pain and that was when her cousin, who had left her at the milk stand to go collect a debt, appeared and the Appellant ran away with the money. They proceeded to report the incident at Bungoma Police Station and pursue medical assistance at Bungoma General Hospital. She told the Court that there was flood light that enabled her to see the Appellant and proceeded to conduct dock identification. She also did attend an identification parade wherein she picked out the Appellant herein. On cross-examination, she told the Court that she does not know the Appellant by name and that he bought milk from.
7. PW2 DNJ, testified that she resided in Kanduyi where she sells milk and that PW1 herein was her cousin. She recalled on 23rd April 2022 at about 9.00 p.m. she left PW1 to go collect money for the milk she had sold and on returning she found PW1 was not at the milk stand and she proceeded to search for her. On nearing Drujin hotel she heard sounds and on looking she found the Appellant herein defiling PW1 and he ran away holding on to his trouser. PW1 was lying on the ground with no inner pant and skirt. According to her, the security lights and her mobile phone light aided her in seeing the Appellant and that she has been seeing him in the area as he is a casual labourer there. She told the Court that she



- proceeded to report the incident and seek medical attention for PW1. On cross-examination, she told the Court that she identified that Appellant very well as he was wearing a blue t-shirt at the scene and that there were no other people around. She told the Court that the Appellant ran away on seeing her and she called out his name while raising an alarm.
8. PW3 Dr. Claudia Wafula Wena, testified that and that she was attached to Bungoma County Referral Hospital. She told the Court that she filled the P3 form of the Complainant herein on 23rd April 2022 at around 9.00 p.m. According to her, the Complainant was brought in with a history of defilement by a person known to her. On physical examination, she observed that she had a left tender and swollen eye with a bleeding bruise. On her right upper back, she observed presence of teeth marks which were involved by slightly swollen skin, the lower limb on her thigh region was painful and the pain existed to the genital region. On vaginal examination, it was observed that PW1 had painful external genitalia with her libia swollen and tender. she noted no tears or lacerations and she had presence of whitish discharge. She noted that the hymen was not intact, looking freshly broken, and the vaginal walls of the Complainant were reddish and tender. She produced the P3 forms as PEXH 3. She also produced in Court a PRC formed filled on 26th April 2022 as PEXH 4. The laboratory examination did not indicate presence of spermatozoa. Her prognosis was that the Complainant was defiled and physically assaulted. She produced in Court the Complainant's Outpatient card indicating she was seen on 25th April 2022 as PEXH 2. On cross-examination, she told the Court that she saw the victim on 26th April 2023, but the incident occurred on 23rd April 2022. She told the Court that the Complainant visited the hospital after 2 days and she concluded that the Complainant was defiled and physically assaulted.
 9. PW4 NO. 70XXXX CPL Sarah Alusei testified that he was stationed at Bungoma Police Station and that she was the investigating officer in this matter. According to her, the Complainant accompanied by a guardian lodged a report of defilement that occurred on 23rd April 2022 at around 21.00 hours at Kanduyi trading centre. It was their statement that the Appellant approached the Complainant's milk stand with the cover of wanting to buy milk and ended up taking off with the Complainant's purse heading towards Malaba general direction. In pursuit the Complainant followed the Appellant into the bush on the left side of the road as you face Malaba and when he got hold of her he proceeded to tear off her inner pant and skirt and defiled her. She recorded their statements and escorted them to Bungoma County Referral Hospital for medical assistance and examination. On 30th April 2022, at around noon, the Appellant was apprehended and brought to the station by members of the public. The Complainant was summoned and she was able to identify him. She proceeded to visit the scene of the crime and observed that the grass looked disturbed and she took photographs of the scene. She produced the photographs and the Certificate as PEXH 5 A-25B respectively. She produced in Court the skirt and inner pants the Complainant was wearing on that day as PEXH 6 & 7 respectively. She also produced in Court a copy of the Complainant's Birth Certificate that indicates she was born on 14th June 2009 meaning at the time of the incident she was 14 years old, as PEXH 1. On cross-examination, she testified that the incident occurred at around 9.00m p.m. and that the Complainant was taken to the hospital on 26th April 2022. She told the Court that on 25th April 2022, the Complainant visited Elgon View Hospital.
 10. At the close of the Respondent's case, the Appellant was found to have a case to answer and was placed on his defence under Section 210 of the Criminal Procedure Code. In his defense, the Appellant denied committing the offence, he testified that he was apprehended by four women at the market and was not informed about the reasons for the same and that the charges against him are a surprise.
 11. The trial Court after considering the evidence adduced by both parties found that the Prosecution had proved their case against the Appellant beyond reasonable doubt. The Appellant was convicted and sentenced to serve Fifteen (15) years in prison.



D. Appeal

12. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal undated in which he raised the following amended grounds of appeal:
 - a. That the trial Court erred in law and fact in appreciating the evidence of identification recognition from PW1 and PW2 that did not meet that tenets of the first report and were marred with discrepancies and contradictions that are inconsequential to conviction.
 - b. That the trial Court erred in law and fact in not making a finding that the Appellant was subjected to unfair trial pursuant to Article 50 (2) (p) and 24 (1) (e) COK 2010.
 - c. That the trial Court erred in law and in fact in not appreciating the Appellant's defence that overwhelmed the Prosecution case.
 - d. That the trial Court erred in law and in fact in not weighing the conflicting evidence that were inconsequential to conviction.
 - e. That the trial Court erred in law and in fact in not making orders that the Appellant sentence should run from the date of arrest.
13. He prayed that this Court allows his appeal in its entirety and that he be set at liberty
14. The appeal was canvassed by way of written submissions. Both parties complied.

E. Analysis and Determination

15. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the submissions and the applicable law. In the circumstances, it is my view that the issues for determination emanating therein are as follows:
 - i. Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt and
 - ii. Whether the sentence meted out on the Appellant complied with Section 333(2) of the CPC

i. Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt

16. 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*. The section provides that:
 - “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years.”
17. To sustain the charge of defilement against the Appellant, the Prosecution needed to prove the following essential ingredients of the offence of defilement:
 - a. That the Complainant was, at the material time, a child as defined under section 2 of the Children's Act and of the age between 12 years and 15 years
 - b. That there was penetration of the child's vagina; and;



- c. That it was the appellant who caused such penetration of the complainant's vagina or genitalia.

Age

18. On the age of the Complainant, the Complainant testified that she was 15 years old. PW2, testified that the Complainant was 13 years and produced the Complainant's birth certificate which indicates that she was born on 14th June 2009 showing that the Complainant was 13 years 0 months 9 days which meant she was still aged 13 years at the time of the incident. PW4 produced in Court a copy of the Complainant's birth certificate as PEXH.1.
19. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:
- “Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
20. Rule 4 of the Sexual Offences Rules of Court Rules is explicit 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.”
21. Therefore, in this case, in the absence of any other evidence to the contrary, I find that Complainant was aged 12 years 10 months 9 days when the alleged incident of defilement occurred.

Penetration

22. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
23. In the instant case, the Complainant gave sworn testimony that the Appellant was the one who defiled her on 23rd April 2022. According to her, she saw the Appellant on the day of the incident. She recalled in 23rd April 2021, at 9.00 p.m. as she was selling milk Kanduyi beside the road. The Appellant approached her requesting to purchase some milk and took her purse and started walking towards Shireji area. She pursued him and ended up in a bushy area where he forcibly held her and defiled her. She told the Court at the time of the incident it was raining and there were no people around. She testified that the Appellant held her by the throat while on the ground and beating her on the back and used his penis to penetrate her vagina. She told the Court that she screamed out in pain and that was when her cousin, who had left her at the milk stand to go collect a debt, appeared and the Appellant ran away with the money.
24. On the P3 form and PRC form, PW3 noted, that the minor required trauma counselling. On physical examination, she observed that she had a left tender and swollen eye with a bleeding bruise. On her right upper back, she observed presence of teeth marks which were involved by slightly swollen skin, the lower limb on her thigh region was painful and the pain existed to the genital region. On vaginal examination, it was observed that PW1 had painful external genitalia with her libia swollen and tender. she noted no tears or lacerations and she had presence of whitish discharge. She noted that the hymen



was not intact, looking freshly broken, and the vaginal walls of the Complainant were reddish and tender. She produced the P3 forms as PEXH 3. She also produced in Court a PRC formed filled on 26th April 2022 as PEXH 4. The laboratory examination did not indicate presence of spermatozoa. Her prognosis was that the Complainant was defiled and physically assaulted. She produced in Court the Complainant's Outpatient card indicating she was seen on 25th April 2022 as PEXH 2. In the case of Mark Oiruri Mose v R [2013] eKLR, the Court of Appeal stated that:

“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 girl's organ.”

25. In this case, it is clear from the evidence adduced before the trial Court that the Complainant's evidence was adequately corroborated by the medical evidence. More so, upon PW2 catching the Appellant red-handed defiling the Complainant. Further, the Complainant's evidence remained unchallenged even under cross-examination.
26. The aforementioned all point to the fact that the Complainant's testimony was the truth, it was well corroborated. Accordingly, the evidence undoubtedly proved that indeed the Complainant was penetrated/ defiled through beastly act of an adult.

Identification

27. As to whether the Appellant was the perpetrator, the Complainant's testimony was that the Appellant approached her milk stand on the guise that he intended to purchase milk from her only for him to make away with her purse. She told the Court that her pursuit of the Appellant led her to a bushy area, wherein he proceeded to physically assault her and defile her and with the aid of flood lights she was able to identify him, as this was the second time she was seeing him. Further when she was summoned at the police station she was able to recognize the Appellant as the person who physically assaulted her and defiled her. During her examination, PW2 also corroborated the Complainant's evidence on identification when she told the Court that with the aid of security lights and mobile lights she saw the Appellant prior to his escape from the scene, and that she recognized him as a casual labourer he sees at the trading centre, insisting on cross-examination that she knew the Appellant very well. It is thus clear that the Complainant knew the Appellant well and recognized him as the perpetrator hence his testimony that she knew him not was a lie. In the circumstances, I find that the Appellant was properly recognized as the perpetrator of the offence.
28. In the end, I find and hold that the Prosecution proved the guilt of the Appellant herein beyond reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The conviction of the Appellant for the offence of defilement contrary to Section 8(1) of the [Sexual Offences Act](#) was sound and the same is hereby upheld.
29. On the issue of contradictions thus discrediting the Prosecution's case. In Joseph Maina Mwangi Vs Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”



30. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his/her testimony cannot be relied on. The Court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. [See Nyakisia Vs R. E. A. C. A. Crim. App. 35-D-71; -/5/71].
31. This Court has subjected the evidence adduced before the trial Court to a fresh scrutiny and it notes that some of the issues are mostly on the date stamps which in my humble view is neither here nor there as the Prosecution only had to prove the elements of the criminal offence herein which in my view, were met.
32. In this case, considering the weight of evidence adduced by the Prosecution weighed against that adduced by the Appellant, it is outright that the Appellant was responsible for the sexual abuse on the Complainant.

ii. Whether the sentence meted out on the Appellant complied with Section 333(2) of the CPC

33. The Appellant submitted that he was arrested on 30th April 2022 and his sentence was meted out on 20th July 2023. He reminds the Court that he was in remand during his trial and that the same should be considered.
34. It is thus clear that the Appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated.
35. The sentence provided for under Section 8 (3) of the *Sexual Offences Act* is as follows:

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

36. In Mbogo vs. Shah (1968) EA 93 the East Africa Court of Appeal stated as follows on the circumstances under which an appellate court may interfere with the discretion of a subordinate court: -

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

37. Section 333 (2) of the Criminal Procedure Code provides thus:-
 - (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
38. The Judiciary Sentencing Policy Guidelines state as follows in respect to Section 333 (2) of the CPC:-
 1. The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.



2. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.
39. In *Bethwel Wilson Kibor vs. Republic* [2009] eKLR it was held:-
- “By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
40. I have perused the trial Court’s record and specifically the proceedings on sentencing where the said court stated as follows: -
- “Taking into account the nature of the offence and the circumstances surrounding the offence together with what the accused person said in mitigation. I would sentence the accused person to Fifteen (15) years imprisonment”
41. I find that the trial Court failed to apply the requirements under Section 333 (2) during sentencing. I further find that the sentence meted did not factor in the period that the Applicant spent in remand custody during his trial.

F. Conclusion

42. Consequently, I find that the instant appeal is merited only on sentence. For clarity purposes, the sentence of Fifteen (15) years imprisonment imposed on the Appellant shall commence from 30th April 2022, being the date of arrest.
43. It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 18TH DAY OF DECEMBER 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Appellant

Ms Kibet for Respondent

Peter Machoni - Court Assistant

