Wanyama v Republic (Criminal Appeal E076 of 2022)
[2026] KEHC 385 (KLR) (Crim) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E076 OF 2022

MS SHARIFF, J

JANUARY 22, 2026

BETWEEN

DANIEL NATEMBEYA WANYAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Sexual Offences Case No. E010 of 2020 at the Chief Magistrate's Court at Bungoma by Hon. C.A.S Mutai-SPM delivered on 12{{^th}} February 2022.)

JUDGMENT

A. Background

1. The Appellant herein was charged with the offence of rape of an imbecile person contrary to Section 146 of the Penal Code. The particulars were that on 4th of February 2020 at about 1230 hours within Bungoma County, he intentionally caused his penis to penetrate the vagina of BN, a person with mental disabilities.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11(A) 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.

3. The Respondent called Six (6) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony, but did not call any witness.

B. Evidence

4. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v 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. 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"

B.1. Respondent's Case

6. PW1, Abiud Nakitare, testified that the victim was his niece and the Appellant was a neighbor. It was his testimony that on 4th February 2020, he met with his mother while on his way to work and she informed him of the heinous act that the Appellant had committed against the victim and that he had been caught in flagrante delicto /red handed by one Job Wabwile.

7. PW2, Catherine Wanyama Wekesa, testified that she was the mother to PW1, that the Complainant in that case was her grandchild and the Appellant was her neighbour. According to her, on 4th February 2020, while at the farm, she saw the Appellant pass by and a few minutes later an immediate neighbor, Job Wabwile, came to the farm where she was and alerted her that the Appellant had raped the complainant whom she went home and found her in tears. She testified that upon going to confirm the news, she found the victim's pant had been torn apart and on inspection, she noticed some blood on her genitalia. She quickly alerted PW1 who assisted in the apprehension of the Appellant and they later took the Complainant to the hospital.

8. PW3, Job Wabwile Kundu, testified that PW1 was his eldest brother and that the Complainant was his niece. That on 4th February 2020, he had been heading home when he saw the Appellant herein with the victim seated on a sack outside PW2's house. He proceeded to his house and on opening his window he noticed that both of them were out of sight, which prompted him to proceed to PW2's homestead and that as he approached the flowers bed, he saw the Appellant as he commanded the Complainant to lay down, the Appellant then removed his shirt, while the Complainant laid on the ground facing up while crying and he then laid on top of her. That when PW3 inquired from the appellant of his actions, the Appellant denied any ill motive and he then stood up abruptly, and the Complainant was then able to crawl from beneath him. That the appellant then fled and this witness

went to search for PW2 whom he alerted of what he had seen. On cross-examination he told the Court that the Complainant was laying down, the moment he caught to Appellant in the act, he fled the scene, this witness said that he had not raise any alarm.

9. PW4, John Waramba, testified that he was a clinician attached to Webuye sub-county hospital. That on 4th February 2020, the Complainant then aged 19 was taken to the facility with a history of rape and upon examination, he observed that she was physically and speech wise challenged. On vaginal examination, he had noted that she had bruises on both her labia majora and minora. On laboratory examination, the VDRL in general diseases was negative, but the urine analysis and high vaginal swab outcome indicated high presence of epithelial cells. He opined that the Complainant had been raped. He produced the Complainant's P3 form filled on 6th February 2020 as PEXH 1.

10. PW5 No. 92857 CPL Irene Moit, then stationed at Chwele Police Station was the investigating officer. It was her testimony that the Complainant, born on 27th November 2009, had been accompanied by a guardian to lodged a report of defilement that occurred on 4th February 2020. This witness testified that PW2 had indicated in her statement that on 4th February 2020, while she was at the farm, the Appellant approached the Complainant's house and defiled her. She also established that the Complainant is mentally challenged and this prompted their visit to Kakamega Referral Hospital where the complainant's mental instability was confirmed.

11. PW5 testified that she had visited the scene of crime where she recovered one black biker which had been tampered with. She produced the Complainant's birth certificate, National Council of Persons with Disability card and a black biker as PEXH 3,4 5 respectively. She told the Court that the Appellant had been apprehended by members of the public on 4th February 2020, and had been escorted to Chwele Police Station where the Complainant identified him as "uncle Dan". On cross-examination, she told the Court that there was an eye witness, PW3, who had recorded a statement.

12. PW6, Mbatii, testified that he was attached to Kakamega General Hospital and that he conducted the Complainant's mental assessment. It was his evidence that the Complainant was on a wheel chair, she could neither walk nor talk and was not oriented to her surroundings, time or people and that she had bruises on her genitalia and exhibited the behavior of a patient born with cerebral palsy. He reduced his finding into a comprehensive report which he produced as PEXH 6.

B.2 Appellant's Case

13. At the close of the Respondent's case, the Appellant was placed on his defence whereat he denied committing the offence and also denied knowing the Complainant. He testified that on 4th February 2020 at about 1230 hours he had been at his home and that he had quarreled with a neighbor over land, wherefore the charges against him were tramped up.

C. Appeal

14. At the conclusion of the trial, the trial Court found that the Respondent had proved it's case against the Appellant beyond reasonable doubt. The Appellant was convicted and sentenced to serve life imprisonment.

15. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal in which he raised the following amended grounds of appeal:

    a. That the learned trial magistrate grossly erred in law and facts by failing to ensure that the Appellant was accorded a fair trial pursuant to Article 50 (2) (c) (g) (h) and (j) of *the Constitution*.

b. That the learned trial magistrate erroneously misdirected himself in law and facts by failing to comply with provisions of the law under Section 213 & 310 of the C.P.C.

c. That the learned trial magistrate grossly erred and/or misdirected himself in law by making a finding that the Prosecution had proved their case beyond reasonable doubt.

d. That the learned trial magistrate erred in law and facts by sentencing the Appellant to harsh and excessive indeterminate life sentence without considering that the same is inconsistent with Article 25 (c), 27 & 28 of *the Constitution* and international laws.

16. He prayed that this Court allows his appeal in its entirety and that he be set at liberty

17. The appeal was canvassed by way of written submissions. Both parties complied with the Court directives.

D. Analysis And Determination

18. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the rival submissions of parties and the applicable law and the issues for determination emanating therefrom are as follows:

i. Whether the Respondent's case against the Appellant was proven beyond reasonable doubt; and

ii. Whether the sentence meted out on the Appellant was harsh and excessive

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

19. The operative Section 146 of the Penal Code titled as "Defilement of idiots or imbeciles" provides that:

> "Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."

20. The Respondent's evidence adduced in support of the alleged defilement of the Complainant, an individual with mental impairment, is primarily derived from the testimony of PW6 and corroborated by other Respondent's witnesses. PW2, an eye witness, unequivocally identified the Appellant and provided a detailed account of the sexual assault, stating that he saw Appellant force the complainant to lay down while facing up and he then removed his shirt and then laid on top her.

21. The medical evidence of PW3 corroborated the occurrence of the rape; a physical examination of the victim had revealed bruises on her interior and exterior vaginal opening and a vaginal swab of the victim had tested positive of high epithelial cells.

22. PW5, the investigating officer, had also testified that the Complainant suffered from mental impairment. The Complainant's card from the National Council of Persons with disability which was produced as PEXH4 attested to this fact.

23. In the end, I find and hold that the Respondent proved the charge rape of an imbecile person against 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 rape of an imbecile contrary to Section 146 of the Penal Code was sound and the same is hereby upheld.

24. On the issue of whether the Appellant's constitutional rights were infringed, the Appellant pleaded and submitted that his fundamental rights were threatened and denied by the Respondent's failure to disclose to him the evidence it was going to use against him in advance, notably the Respondent's witness statements and other documentary evidence relevant to the case. On this ground, I wish to associate myself with the Court's observation in Joseph Ndungu Kagiri v Republic [2016] eKLR that:

> " The law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).
>
> (13) The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.
>
> Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c)which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.
>
> The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *The Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.
>
> As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of *the Constitution*. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe[18] where the Supreme Court of Canada observed, 'The obligation to disclose was a continuing one and was to be updated when additional information was received.'"

25. While I agree with the above observations, it must be noted that rights go hand in hand with duties and responsibilities. Nowhere in the Court record is it revealed that the Appellant asked to be supplied with specific documents and was denied.

26. I have perused the trial Court record which shows that at the onset of the trial, on the 10th February 2020, the Appellant was silent on whether he had been furnished with requisite documents or not.

It is unclear why the Appellant did not raise any issue at the earliest instance, if at all he did not have the documents.

27. In the circumstances, I find that the Appellant's rights were not violated in any way. That ground too fails.

28. On the issue of whether the trial Court grossly violated Sections 213 & 310 of the Criminal Procedure Code, the Appellant submitted that he was not granted an opportunity to address the Court after the trial Court placed him in his defence.

29. Section 213 of the Criminal Procedure Code donates a right to both an accused person and the Prosecutor to address the Court both at the no case to answer stage and at the conclusion of the trial. Section 310 on the other hand donates a right to the State to seek leave to call evidence in rebuttal of any new evidence that may be raised by an accused person in his defence. The right in Section 310 is however not absolute. It is subject to section 161 of the Criminal Procedure Code which claws back this right making it merely discretionary. It is simply to the effect that the fact of an accused person giving new evidence in his defence does not per se guarantee the Prosecutor a right of reply except where the Director of Public Prosecution is personally present in Court and he is the one conducting the proceedings.

30. In the circumstances, I find that the trial Court did not in any way violate the appellant's rights to address the court. That ground too fails.

ii. Whether the sentence meted out on the Appellant was harsh and excessive

31. The Appellant was sentenced to life imprisonment. However, Section 146 of the Penal Code prescribes a term of fourteen (14) years. Considering the Appellant's mitigation, I hereby substitute the sentence of life imprisonment with a term of fourteen (14) years' imprisonment. The sentence shall run from 10th February 2020, the date of the Appellant's arrest pursuant to Section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

E. Conclusion

32. Consequently, I find that the instant appeal is merited only on sentence.

33. It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JANUARY 2026

m.s.shariff

JUDGE

In the presence of:

Appellant

Mr Otieno For Respondent

Peter Machoni - Court Assistant

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