Wanjiku v Republic (Criminal Appeal E010 of 2025) [2026] KEHC 668 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E010 OF 2025

LN MUTENDE, J

JANUARY 29, 2026

BETWEEN

PAUL MBURU WANJIKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Paul Mburu Wanjiku, the Appellant, was charged with the offence of Attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. Particulars of the offence were that on Tuesday 21st June, 2022, in Nyahururu Sub-County, Laikipia County, intentionally attempted to cause his penis to penetrate the vagina of JNW a child aged 12 years.

2. In the alternative, he faced a charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences act*. Particulars of the offence were that on Tuesday 21st June, 2022, at around 2200hrs in Nyahururu Sub-County, Laikipia Sub-County, intentionally touched the buttocks of JNW a child aged 12 years with his hand.

3. Briefly, facts of the case were that JN stated to be 12 years old and in Grade 4 went in search of her aunt W. in company of her siblings in June, 2022. In the process they encountered the Appellant who sold to them mandazi with coffee. On being asked about their aunt he denied having knowledge as to her whereabouts but told her siblings K. and K. to go look for her. It rained hence the Appellant told the Complainant to shelter in his single roomed house.

4. The Complainant's clothes were wet hence he told her to take them off and wear his trouser. He told her to sleep on his bed. He went outside, returned and told her to take off her clothes but she refused. He attempted to remove them himself and in the process touched her buttocks, but she threatened to scream. At the time there was a knock on the door. The Appellant came off the bed and opened the door. Outside were motorcycle riders with her siblings. They were made to enter the police motor

vehicle and were taken to the police station where they were placed in cells. The following day she was taken to hospital for examination. Investigations conducted resulted into the Appellant being charged.

5. Upon being placed on his defence, the Appellant denied having known the victim. He stated that he was arrested on 21/06/2022, on a day that he spent at the shop from 5.00am to 10.00am, then 3.00pm to 8.00pm when he closed for the day. That around 10.30pm to 11.00pm he heard a knock on the door by K. who was not called to testify. He asked for a hammer. When he opened the door, he was hit and he fell down. Three men entered the house and assaulted him asking for money and they ended up taking Kshs.2,000/-. They searched and took Kshs.3,000/-. That two (2) women entered the house and took his stock and household goods. He escaped and went to the police station but the same individuals caught up with him and assaulted him further but he was rescued by the Corporal. The men alleged that he wanted to defile a child. J. and K. said they would avail the child. They went to the station with three children and a woman. All of them were taken in the police vehicle to the police station where they spent a night. The following day the girl was taken to the hospital and he was arraigned in court where he denied the charges.

6. The trial court considered evidence adduced and found the prosecution having proved all elements of the offence of attempted defilement hence convicted the Appellant and sentenced him to serve ten (10) years imprisonment.

7. Aggrieved, he appeals on grounds that;

    1. That the Appellant is a first time offender and understands the charge of the offence of Attempted Defilement contrary to Section 9(1) (2) and of the *Sexual Offences Act* No. 3 of 2006.

    2. That the Appellant pleaded not guilty but was sentenced to 10 years imprisonment.

    3. That the prosecution failed on duty and procedure for the investigations done did not meet the required standards to meet the conviction.

    4. That the prosecution failed to arraign crucial witnesses in court who had earlier recorded statements at the police station.

    5. That the prosecution failed in law and fact by tempering with the Complainant's mind for the teacher coached her outside the court room on what to state during the trial.

    6. That the trial Magistrate erred in law and fact by dismissing the Appellant's sworn defence.

    7. That the Appellant looks forward to this honorable court to allow the appeal and set aside the sentence imposed against him.

8. Following directions taken, the appeal was to be canvassed through written submissions but only the Appellant filed submissions.

9. The Appellant submits that the ingredients of the offence were not proved. That the age of the Complainant was not proved beyond reasonable doubt. That crucial witnesses were not called to testify. Relying on *Bukenya v Uganda* [1972] EA 549 it is urged that it was the duty of the prosecution to avail all witnesses even if they would have tendered inconsistent evidence.

10. That the Appellant's alibi evidence was not considered. Reliance was placed on *Karanja v Republic* [1983] KLR 501.

11. This being a first appellate court it is duty bound to re-examine evidence adduced at trial and scrutinize the findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in *Okeno v Republic* (1972) EA 32 thus;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R*., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R*., [1957] E.A. 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 findings 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] E. A. 424."

12. Section 9(1) of the *Sexual Offences Act* provides thus;

> A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

13. An attempt to commit an act that amounts to an offence is defined by Section 388 of the Penal Code that enacts;

> (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
>
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

14. A child is defined by Section 2 of the *Children Act* as;

> An individual who has not attained the age of eighteen years.

15. To prove the case the prosecution had the duty of proving the Appellant's guilt beyond reasonable doubt, was obligated to prove existence of the elements of the offence namely; the age of the victim; the attempt to penetrate the victim; and, positive identification of the perpetrator.

16. On the issue of age, it is proved by medical evidence, documents issued at birth or even evidence tendered by the parents/guardians of the victim. In *Francis Omuroni v Uganda*, Cr. Appeal No. 2 of 2000, the Court of Appeal of Uganda stated 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 victim's parents or guardian and by observation and common sense..."

17. The Complainant told the court that she was 12 years old and in Grade 4. The prosecution did not call her parents as witnesses to tell the court when exactly she was born. PW2 Ernest Muriithi the Clinical Officer stated that "J.N.W. born in 2010 was examined". However, he did not state his source of information.

18. The offence of defilement is committed when the culprit inserts his genitalia into the genital organ of the victim. The insertion may be partial or complete. (See Section 2 of the *Sexual Offences Act*). In the instant case the Appellant is envisaged to have attempted to commit such an act.

19. Evidence adduced was of a single witness. Section 124 of the *Evidence Act* provides thus;

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

20. Section 19 of the *Oaths and Statutory Declaration Act* provides thus;

> (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
>
> (2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

21. The Complainant was taken through voire dire examination by the court which was to determine if indeed she could have the competency and could speak the truth. This perse suggested that the Complainant was a child of tender years per the court's observation hence had to question her as to her suitability to testify either on oath or not. Upon being subjected to the examination, the court stated thus;

> " Given the age of the victim, she will give unsworn statement."

22. The court did not opine whether the victim understood the nature of oath, whether or not she was possessed of sufficient intelligence to justify reception of the evidence or if she understood the duty of speaking the truth. In the judgment, the court rendered itself thus;

> " It is hard to believe that the Complainant would have gone all the way to manufacture the evidence, bearing in mind that the Accused alleged that he did not know the Complainant prior to the incident. They did not have any grudge. What then would have been her motive to lie as much? The incident took place at night but the Complainant said that the light/lamp was on at the Accused person's house. There was therefore no question of mistaken identity on the Accused by the Complainant. The Accused was arrested and taken to [Particulars Withheld] Police Post by members of the public and/or riders. They had been informed by the Complainant's brothers that she had been left with the Accused. Even though the said riders did not testify in the case, the evidence of the Complainant was credible and believable."

23. This is a case where the prosecution called only three witnesses; the Complainant, the Clinical Officer and the Investigating Officer. According to the history given to the Clinical Officer, the assailant touched the victim's breasts after he told her siblings to leave.

24. PW3 No. 26xxx PC(W) Everlyne W stated that the Appellant was taken to the police station alongside the victim, SK 9 years and JK 16 years old by two (2) boda boda riders. The allegation was that the Complainant was found in bed with the Appellant. She interrogated them and found that she had gone in search of her aunt with her two (2) siblings, he denied knowing their aunt but offered them tea and mandazi and later sent her brothers away. They went to his house and slept. The two (2) brothers met some 'boda boda' riders who asked where their sister was. They went to the Appellant's house and found the Appellant and the Complainant sleeping and beat him up then took him to the police post.

25. Section 143 of the *Evidence Act* provides thus;

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

26. In K*eter v Republic* [2007] EA 135 the court of Appeal stated that;

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

27. In his defence the Appellant gave a different version of circumstances under which he reached the police station. The Complainant testified as to how they went in search of her aunt with her siblings. SK was stated to be 9 years old while JK was 16 years old. These were witnesses who could have been called to confirm the allegations by the Complainant. PW3 stated that they recorded statements but they were not traced to come to court. As to the 'boda boda' riders it was stated that they feared they

would be arrested. The question to be passed would be why the 'boda boda' riders were apprehensive of being arrested.

28. In B*ukenya & Others v Uganda* [1972] EA 549 the court delivered itself thus;

> "i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
>
> ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
>
> iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

29. It was key for the prosecution to call the 'boda boda' riders as well to confirm how the Appellant was arrested. The Complainant claimed that the Appellant touched her buttocks while trying to remove the trouser she was wearing while the Clinical Officer said she alleged he touched her breasts. This was a contradiction that went to the root of what the Appellant allegedly did.

30. If indeed the culprit touched the victim's buttocks or breasts, it would amount to an indecent act. Evidence of the Complainant was that she was told to remove clothes. She did not allege that the culprit manifested his intention to insert his genitalia into her genital organ. In *David Aketch Ochieng v Republic* [2013] eKLR, a Makau J stated that;

> "For a successful prosecution of an offence of attempted defilement the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/ or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

31. The particulars of the offence were that the Appellant attempted to cause his penis to penetrate the vagina of J.N. evidence on record did not support the averment.

32. As to the alternative charge, Section 11(1) of the *Sexual Offences Act* provides thus;

> Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

33. Section 2 of the *Sexual Offences act* defines indecent act as;

> any unlawful intentional act which causes—
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> (b) exposure or display of any pornographic material to any person against his or her will;

34. A question posed by this court was whether the offender touched the victim's buttocks or breasts? If indeed she was found asleep in his house. This perse introduced a doubt to the prosecution's case which should have gone to the benefit of the Appellant.

35. The upshot of the above is that investigations carried out were shoddy. Therefore, the appeal has merit and is allowed. The conviction is quashed and sentenced imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY, 2026.

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L.N. MUTENDE

JUDGE