Wanyama v Republic (Criminal Appeal E012 of 2024)
[2026] KEHC 2732 (KLR) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2732 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E012 OF 2024

WA OKWANY, J

FEBRUARY 19, 2026

BETWEEN

DANIEL WANYAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. Kelly (PM) delivered on 16th in MCSO No. E011 of 2022)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 30th January 2022 at Kihoto area within Naivasha Sub-County, he intentionally caused his genital organ to penetrate the vagina of A.W.G. (particulars withheld), a girl aged 5 years.

2. The prosecution called a total of four witnesses while the Appellant gave a sworn testimony and did not call witnesses.

The Prosecution's Evidence

3. PW1, M.W. (particulars withheld) testified that on 30 January 2022, at about 5.00 p.m., she accompanied the complainant (PW2) to look for a neighbour. They did not find her and remained outside waiting. The Appellant, whom she identified in court, called PW2 and asked her to accompany him to collect charcoal from his home.

4. PW1 stated that PW2 later called her crying and complaining of pain in her vagina. PW1 found PW2 wearing a pink dress, a yellow panty and black stockings. PW2 narrated that the Appellant had removed her clothes, inserted his penis into her vagina and anus and threatened to kill her if she screamed. PW2 was found stranded and confused.

5. PW1 inspected PW2 and observed blood stains, a torn hymen and injuries on her anus. PW1 took her to hospital where a P3 form and Post-Rape Care form were filled and later handed over to the police.

6. PW1 stated the accused was known to her family as he often sold meat to them. She denied any previous grudge. She identified the accused in court.

7. During cross-examination PW1 confirmed the accused was a familiar neighbour who frequently visited their home and sold them meat.

8. PW2 (the Complainant) gave a sworn testimony after voir dire examination. She stated that the Appellant, whom she identified in court, called her, took her into a forest, forced her to remove her clothes, threatened her and inserted his penis (kadudu) into her vagina and anus. He lay on top of her and warned her not to tell anyone about the incident.

9. She stated she felt pain and later informed PW1 of her ordeal. PW2 described the accused's penis by pointing to her groin and confirmed it resembled a pen.

10. She maintained that she told the truth and denied being coached or promised anything to testify.

11. PW3, Benjamin Kuria, was the Clinical Officer who examined the complainant. He produced her P3 form and Post-Rape Care form.

12. He testified that PW2, aged 5 years, had signs of recent defilement including external injuries on vagina, broken hymen, lacerations on vaginal labia and anus. The forms were filled on 30th January 2022 and 3rd February 2022 and stamped. PW3 did not conduct a DNA test and stated that PW2 had changed clothes by the time of examination.

13. PW4, No. 57772 Cpl Benjamin Njuguna was the Investigating Officer.

14. He received the complaint on 30th January 2022 and found PW2 in hospital in a bad condition and that she was admitted for three days. PW2 told him she had been defiled by the Appellant who sold meat to PW1. PW4 obtained and produced the birth certificate confirming PW2 was born in May 2016 and was therefore aged 5 years at the time of the incident.

15. PW4 testified that the accused was arrested shortly after the incident and that he was known to the complainant's family.

Defence Case

16. When placed on his defence, the Appellant testified that on 30th January 2022 he returned home from work at around 6.00 p.m. and was later arrested from his home around 9.00 p.m. He denied knowing PW2 well and denied defiling her or ever working in a butchery.

17. He stated he was not medically examined and that PW2's clothes were not taken for analysis.

18. On cross-examination he confirmed that he lived near PW2 and knew the family. He admitted that he had no evidence to support his alibi evidence regarding work.

19. After trial, the appellant was convicted and sentenced to life imprisonment.

The Appeal

20. Aggrieved by both the conviction and sentence, the Appellant lodged this appeal raising several grounds which may be summarised as follows: -

a. That the prosecution failed to prove its case beyond reasonable doubt.

b. That penetration and identification were not proved.

c. That his defence of alibi was wrongly rejected.

d. That the sentence of life imprisonment was manifestly harsh and unconstitutional.

Duty of the First Appellate Court

21. As a first appellate court, this Court is required to reconsider and evaluate the evidence presented before the trial court afresh and arrive at its own independent conclusion while bearing in mind that it did not see the witnesses testify. (See Okeno vs. Republic [1972] EA 32).

Issues For Determination

22. From the grounds of appeal, the record and submissions, the following issues arise for my determination: -

a. Whether the prosecution proved the essential elements of defilement beyond reasonable doubt: a. age of the complainant b. penetration c. identification/positive linkage of accused

b. Whether the appellant's defence of alibi was properly considered.

c. Whether the trial court misapplied section 124 of the *Evidence Act*.

d. Whether life imprisonment sentence was lawful, harsh or unconstitutional.

Analysis and Determination

Proof of Defilement

23. Section 8(1) of the *Sexual Offences Act* provides that: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

24. The prosecution was under a duty to prove the age of the complainant, penetration and positive identification of the perpetrator

25. This position was affirmed in Charles Karani vs. Republic, Criminal Appeal No. 72 of 2013, where the Court of Appeal held: -

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

Age

26. PW4 produced a Birth Certificate indicating that PW2 was born on 23rd May 2016 and was therefore 5 years old at the time of the assault. I find that the evidence on age was therefore conclusive.

Penetration

27. Penetration is defined in section 2 of the *Sexual Offences Act* as follows: -

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

28. In the instant case, the medical findings included a broken hymen, lacerations on labia and anus, and pus cells. PW3 testified these injuries were consistent with recent defilement. In PKW vs. Republic [2012] eKLR, it was held: -

> " Proof of a broken hymen alone is sufficient evidence of penetration; the slightest penetration of the female genitalia is sufficient to prove sexual intercourse."

29. My finding is that the absence of DNA testing or production of the complainant's clothes did not negate proof of penetration. In Barkat Ali vs. Republic [2021] eKLR, the court held: -

> " Lack of semen or DNA does not disprove penetration; medical and oral evidence may suffice."

30. I therefore find that penetration was proved beyond reasonable doubt.

Identification of the Accused

31. I find that PW1 and PW2 positively identified the accused as he was well known to the family as their neighbour and the man who regularly sold meat to them. I find that identification was therefore by recognition. In Anjononi & Others vs. Republic [1980] KLR 59, the Court of Appeal held: -

> " Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger."

32. I note that the incident herein occurred at about 5:00 – 6:00pm in daylight hours and that PW2 narrated, in detail, how she was lured, assaulted and later found stranded.

33. The court conducted voir dire and satisfied itself that PW2 understood the nature of an oath. I find that her testimony was consistent and compelling. I further find that even though PW2 was a single identifying witness, caution was applied. In Maitanyi vs. Republic [1986] KLR 198 the court stated: -

> " Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such a witness, especially when identification is involved."

34. I have carefully evaluated the evidence and I find no error in the trial court accepting PW2's testimony which was supported by PW1 and the medical evidence. I therefore find that identification proved beyond reasonable doubt.

Alibi Defence

35. The appellant raised an alibi that he was at work and only arrived home at 6.00 pm, but produced no witness or document to support this claim.

36. In Karanja vs. R [1983] KLR 501 the Court of Appeal held:

> "The burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution."

37. In the same judgment, the court continued:

> "In testing an alibi, the court may take into account the fact that the accused had not put forward his defence of alibi at an early stage of the case so that it can be tested by those responsible for investigation."

38. In this appeal, I note that the appellant first raised the alibi only at defence stage, thereby making investigation into the said line of defence impossible. The Appellant's employer was not called to testify and no documentary proof such as employment card, supervisor testimony was provided.

39. I find that the trial court was justified in rejecting the Appellant's alibi.

Section 124 of the *Evidence Act*

40. Section 124 of the *Evidence Act* provides:

> "where the evidence of the alleged victim is admitted in accordance with that section...the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence...: 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

41. In the present case, I note that the evidence of PW2 was corroborated by the medical findings by PW3. immediate complaint to PW1 and identification as a known neighbour.

42. I find that the trial court did not rely on uncorroborated testimony and committed no error.

Sentence

43. Section 8(2) of the *Sexual Offences Act* provides that: -

> "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

44. In Francis Karioko Muruatetu & another vs. Republic [2017] eKLR the Supreme Court held that mandatory death sentence is unconstitutional, but later clarified, in its directions of 6th July 2021, that the decision applies only to murder sentences and does not automatically apply to other statutes.

45. In Jared Koita Injiri vs. Republic [2019] eKLR, the Court of Appeal held: -

> "The *Sexual Offences Act* is not unconstitutional merely because it prescribes mandatory minimums."

46. In Christopher Ochieng vs. Republic [2019] eKLR, it was held: -

> " Mandatory minimum sentences under the *Sexual Offences Act* are still lawful unless declared unconstitutional through proper challenge."

47. I therefore find that the sentence imposed by the trial court is lawful.

48. The complainant in this case was a very young child and suffered serious physical injuries and trauma. Sentencing policy in sexual offences emphasizes deterrence and protection of minors. I find that the sentence imposed by trial court was statutory, lawful and proportionate. I find no reason to interfere with the sentence passed by the trial court.

Conclusion

49. After independently re-evaluating the entire record and submissions, I find that the prosecution proved all the essential ingredients of defilement beyond reasonable doubt.

50. Consequently, I find that appeal is not merited and I therefore dismiss it.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

19/02/2026

For Appellant Present

Miss Achieng For The State/respondent

Court Assistant Karani

File close