Wanjohi v Republic (Criminal Appeal E034 of 2024)
[2025] KEHC 9203 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9203 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E034 OF 2024

LN MUTENDE, J

JUNE 26, 2025

BETWEEN

ANDREW WANJOHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Andrew Wanjohi, 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 particulars being that on the 22nd December 2023 at Laikipia West Sub-County within Laikipia County, he intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of P.W. a child aged 14 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 being that on the 22nd December, 2023, at Laikipia West Sub-County within Laikipia County, he intentionally and unlawfully caused his penis to touch the vagina of P.W. a child aged 14 years.

3. He was taken through full trial, convicted for the offence of defilement and sentenced to serve twenty [20 years imprisonment.

4. Aggrieved, the Appellant appeals on grounds that;

    1. The trial Magistrate erred in law and fact by making a finding that the prosecution had proved the ingredients of the defilement charge before the trial court.

    2. The trial Magistrate erred in law and fact by making findings that were against the weight of evidence.

    3. The trial Magistrate erred in law and fact failing to appreciate the fact that the prosecution evidence had glaring discrepancies and contradictions.

4. The trial Magistrate erred in law and fact by disregarding the defence of alibi.

5. The trial Magistrate erred in law and fact by convicting the Appellant.

6. The trial Magistrate erred in law and fact by passing a sentence that was excessive under the circumstances.

5. Facts of the case were that the complainant, P.W was away in Nairobi but she returned home on 21.12.2023. The following day the 22.12.2023 she was at home with her sibling, B. A man he identified as Tosha went to their house to borrow a matchbox. He had a knife that he placed on the table and warned her not to say anything and if she did he would kill her and her sibling B. B. went outside leaving the two [2] of them inside the house and Tosha seized the opportunity to molest her.

6. When her mother returned she didn't tell her about the ordeal. However, her mother noticed that she was wetting the bed. PW2 M.N. the complainant's mother sought to know why she was wetting the bed, which was a new phenomenon as she had long stopped urinating on the bed but the complainant remained mum. Her demeanor made her strike her, that is when she divulged the information to her. She called her father who went home and upon hearing from the complainant, they reported the matter to the police.

7. PW4 No. 113552 PC Robert Keter who received the report from the complainant and her parents booked the report and referred them to Sipili Sub-County Hospital for treatment. She was examined by PW3 Ann Wanjiru, a clinical officer who found some inflammation on the introitus to the vagina and a whitish discharge. The hymen was broken. The cervix was inflamed. She opined that penetration had been achieved. Upon testing the discharge, they found presence of a bacterial infection. Hence the Charges.

8. Upon being placed on his defence, the Appellant denied having committed the offence. He stated that on the material date he was approximately 1.2 kilometers away from the place where the act was stated to have been committed; and he was at a ceremony/function from 8.00 Hours up to 1900 Hrs. That on 22.12.2023 he left his house at 8.00 Hrs for Elijah Wangungu's home whose daughter had graduated. That he spent the whole day at the function which started at 14.00 Hours and ended at 1900 Hrs.

9. Following the court order, the Appellant adduced in evidence photographs to establish that he was elsewhere on the material date. But on cross examination it was established that the photographs were taken by a third party referred to as "a girl" and some of the photographs were screenshots printed from some cyber. He admitted having not produced photographs that captured him at the event.

10. The Appellant also referred to some photographs on his WhatsApp messaging app which he admitted that was altered/modified and were sent following his request after he was aligned.

11. DW2 Elijah Mathenge testified that he invited the accused, who was a close friend to a ceremony that was conducted from 2.00 pm to about 18.30 Hours.

12. DW3 Gerald Gichuhi Kiguru stated that he was at the graduation ceremony for Jane Muthoni on 22.12.2023 where he played the role of master of ceremony. That the accused was the last person to speak at the ceremony.

13. DW4 Jane Muthoni Wangungu testified to have had a ceremony from 2.00 pm which ended at 18.30 Hours. On cross examination she stated that she saw the Appellant who was invited by her father giving a speech towards the end of the ceremony at 18.00 Hours.

14. The court considered evidence adduced and reached a finding that the age of the Complainant was proved to be 14 years; the PRC form and P3 form filled in addition to direct evidence proved the act of penetration, and that the appellant was positively identified as the perpetrator.

15. On appeal the Appellant through learned counsel, Mr. Nderitu Komu, urged that the Complainant should have been subjected to voire examination as held in Maripett LoonKomok v Republic [2016] KECA 520 [KLR] that 14 years remains the correct threshold for voir dire examination.

16. That the rights of the Appellant were violated when the trial Magistrate failed to let him call more witnesses after the three [3] witnesses he indicated as the ones he would call testified. This according to him was denial of the right to adduce evidence.

17. That other than PW1 testifying that the Appellant put his urinating part into her urinating private parts, PW1 did not give further details of what happened which cast doubt on her credibility. Reliance in this regard is placed on the case of Ben Maina Mwangi v Republic [2006] eKLR where the court held that;

> " Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence."

18. It is submitted that failure to call B. as a witness without an explanation being rendered invites the court to the presumptions of the probability of him giving evidence that is adverse to the complainant as stated in Republic v Robert Ochieng Owino [2011] eKLR where the court stated that;

> " Likewise, I find that the failure by the State to avail any other eye witness to testify and more especially the witness whose full particulars the police had, leads this court to infer that the evidence of those uncalled witnesses may have tended to be adverse to the prosecution case. The State is under an obligation to avail before the court all evidence relevant to a case, to enable the court reach a just conclusion. The prosecution must not pick and choose and call only those witnesses whose evidence may tend to favour their case."

19. That there are glaring contradictions as to when the Complainant started wetting the bed as a result of defilement following evidence adduced by PW1 and PW2. And that the medical evidence adduced didn't prove defilement.

20. This being a first Appellate court, it is duty bound to re-consider evidence adduced at trial, re-evaluate it so as to reach conclusions while bearing in mind that it neither saw nor heard witnesses who testified hence making an allowance to that effect. This salient subject was discussed in Okeno Vs Republic [1972] EA 32 as follows;

> " 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 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. 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." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

21. This is a case where the Respondent/Prosecution presented a case arguing that the Appellant violated a child sexually. 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."

22. Looking at the ingredients provided by the definitive section of the law, the prosecution was obligated to prove elements constituting the offence of defilement which are;

i. The victim's age

ii. The act of penetration

iii. Positive identification of the assailant/perpetrator

23. On the question of the victim's age, it is crucial for the age to be proved because the victim must have been below the age of 18 years. The exact age of the victim must also be proved since it becomes pivotal as the criminal liability as framed in the statute is based on age. This argument was also emphasized in Elias Kasomo v Republic, Criminal Appeal No 504 of 2010 where the court of Appeal stated that;

> " 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".

24. In Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000, the Court of Appeal held 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."

25. The question of age was also considered in Mwalongo Chichoro Mwajembe v Republic, Msa Criminal Appeal No. 24 of 2015 [UR] the Court of Appeal stated that;

> " ....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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v Republic, Criminal Appeal No.19 of 2014 and Omar Uche v Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

26. The complainant told the court that she was 14 years. PW 2 her mother stated that she was born on 3.7.2009, and a birth certificate was adduced in evidence that established her age to have been the apparent age of 14 years. But chronological age of 14 years 5 months. At the time of the act she was a child

27. As to the element of penetration, Section 2 of the *Sexual Offences Act* defines penetration as;

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

28. In Hudson Ali Mwachango v Republic [2016] KECA 521 [KLR] the court stated that;

> "....the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured."

29. The Complainant testified that the assailant placed a knife on the table and told her to remain silent that he had gone to their house to borrow a matchbox. He threatened to kill her sibling if she said anything. Her younger brother left going outside and when they remained inside the house the two [2] of them, he undressed her by removing the part of trousers she was wearing. He also removed his trousers made her lie on the sofa then he proceeded to insert his genital organ used for urinating into hers. On finishing he left with his knife.

30. The complainant was examined a month later. The clinical officer was of the view that there was inflammation on the introitus entry to the vagina. The hymen was broken. According to him penetration had been achieved. Considering time that lapsed medical evidence found a month later may not be a fact of corroboration hence leaving evidence adduced by the Complainant as to what transpired in itself.

31. Section 124 of the *Evidence Act* provides that;

> " 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 33 *Evidence Act* [Cap. 80] Kenya the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

32. Corroboration in sexual offences is hence not a legal requirement. The court may convict solely on uncorroborated evidence of the victim if satisfied that the Complainant is truthful and reasons are recorded for the satisfaction.

33. At the outset the trial court was faulted for allegedly not conducting a voire dire examination. Ordinarily, the examination is used to establish the competency of a child of tender years to testify and/or if the child understands the nature of oath where sworn evidence is to be given.

34. It has been argued that the statutory definition of a child of tender years should not be considered as a test of competency in respect of testifying [see Patrick Kathurima v Republic [2015] KECA 539 [KLR].

35. Kibangeny Arap Kolil v Republic [1959] EA 92, 94 the court held that in the absence of any definition in the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya of the expression "child of tender years" for the purpose of Section 19 of the said Act, such expression, in the absence of any special circumstances, is taken to mean any child of any age, or apparent age, of under fourteen years.

36. This is a case where the learned trial Magistrate by all intents and purposes did carry out the voire dire examination. The Complainant was subjected to the examination and the original handwritten proceedings captured the information thus:

> " Voire Dire
>
> PW 14 years, K.A.G. Mwireri. I am in form 2."

Then the court proceeded to record thus;

> " From the voire dire I find she is truthful and forthcoming with details. She is calm and clear in her statements"

37. The Complainant having been of an apparent age of 14 years, but, chronological age of 14 years 5 months, failure to conduct elaborate voire dire examination was not fatal. It is apparent that the Complainant was in form 2 and having been observed by the learned Magistrate, then, further having been subjected to cross examination where she answered questions put forth appropriately, failing to subject her to an exhaustive voire dire examination was not fatal to the prosecution case.

38. Also presented is the argument that there were apparent contradictions in evidence of PW1 and PW2 as to when the Complainant started wetting the bed and by placing a knife on the table. She stated that he told her not to say anything lest he harmed her and the sibling B. What she was saying in actual fact was that he instilled in her fear, silence and indeed she kept quiet. On cross examination she stated that she did not tell her mother at the outset because she was afraid. She testified that she started wetting the bed and her mother asked her why. That she also asked what Tosha had gone to do at their home. Thereafter she disclosed what he had done to her.

39. In Twahangane Alfred v Uganda Criminal Appeal No 139 of 2001 [2003] UG CA, 6 it was held that;

> " with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

40. In Dickson Elia Nsamba Shapwata and another v the Republic Cr Appeal No 92 of 2007 the Court of Appeal of Tanzania stated that on the question of contradictions;

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

41. This is a case where the Complainant testified to have been afraid of reporting the incident to her mother because the assailant did threaten her.

42. It was the evidence of PW2 that on 22.12.2023 the complainant urinated on her bed thereafter she confirmed urinating. She confronted her but punished her by beating her with a cooking stick that is when she divulged the information. Indeed, PW1 did not testify to the question having been punished. PW1 stated how she was full of fear due to the threat. The alleged contradiction was minor.

43. In Phillip Nzaka Watu v Republic [2016] KECA 696 KLR the Court of Appeal stated that;

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

44. A minor who was under threat may have not remembered everything to the minutest detail. Thus, cannot be dismissed as a major contradiction.

45. On the question of not calling B. as a witness, Section 143 of the *Evidence Act* provides as follows;

> "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."

46. In Keter v Republic [2007] EA 135 it was stated that;

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

47. The age of Bonnie was given as 5 years. Section 125 of the *Evidence Act* provides;

    a. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease [whether of body or mind] or any similar cause.

    b. A person suffering from a mental illness is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

48. Although the law is clear, generally children as young as five [5] years may qualify to testify but some children may be unripe or immature to be competent. Therefore, failure to call B. was not detrimental to the prosecution's case.

49. The Complainant identified the Appellant as the assailant. It is not in dispute that the appellant was well known to the complainant and her mother prior to the act.

50. The Appellant however, put up an alibi defence. The complainant testified that the act was committed at 16.00 Hrs or thereabout. But the appellant claimed that he could not have done it as he was elsewhere. The burden of proving the falsity of the Appellant's defence of alibi lay with the prosecution [see Karanja v Republic [1983] KLR 501].

51. In an endeavor to demonstrate that he was not at the house of his neighbor PW2 in the evening as alleged he adduced in evidence some images depicting him at a ceremony. At the outset the prosecution

objected to the production of the images because there was non-compliance with Section 78 of the *Evidence Act*. The learned prosecution counsel argued thus;

> "We object to the production of the photos. They do not comply with Section 77 *Evidence Act* which states that all photographs should be duly certified and accompanied by a certificate of duly certified scenes of crime accident. The photographs do not appear to be original. They appear to be screenshot where the material date has been put at the top and screenshotted. As such we cannot verify the authenticity of the said photographs. We have not been served prior to today's hearing date. In order to verify their authenticity, we object to the production of the same.
>
> Accused:
>
> I pray that my phone was used to take the said photographs. I wish to produce the same as evidence."

52. In its ruling the court was of the view that Section 78 of the *Evidence Act* related to officers appointed by ODPP and was silent on an accused producing the document. The court considered the production of primary evidence pursuant to Section 65 of the *Evidence Act*; as well as fair trial of an accused as provided by Article 50 clause 2[k] of *the Constitution*. In the result the photographs were adduced in evidence.

53. However, in cross examination it was revealed that photographs were taken by a third party who sent them to the Appellant through WhatsApp platform. The Appellant alluded to the photographs having been printed at a cyber cafe and screenshots having been sent to him, screenshots that were made at 18.22 Hours. On further cross examination he stated that the WhatsApp images were altered/modified on 4.7.2024 at 16.15 hours. Some seven [7] months after the alleged date of having been taken. Such evidence would not have been credible.

54. It is submitted that the Appellant was denied the right to adduce evidence. Reliance is placed on Article 50 [2] [k] of *the Constitution* which provides thus;

> [2] Every accused person has the right to a fair trial, which includes the right—
>
> [k] to adduce and challenge evidence;

55. The complaint is that the court failed to allow the Appellant to call an additional witness. This is a case where the Appellant upon being placed on his defence indicated that the defence would call a total of four [4] witnesses. Whereby the court granted the Appellant time to call the three witnesses who were to support his alibi defence. On the stated date, indeed the Appellant availed all witnesses indicated. Instead of closing the case he notified the court that he was to call another witness. This was vehemently opposed by the State. It was urged that the Appellant sought to fill the loop holes that were apparent following evidence adduced. To this end the court was of the view that the court could not continue to hear witnesses in perpetuity.

56. Article 50 [2] [k] of *the Constitution* provide thus;

> [2] Every accused person has the right to a fair trial, which includes the right—
>
> [k] to adduce and challenge evidence;

57. In addition to challenging evidence presented by the prosecution, an accused has the constitutional right to call additional witnesses. Failure by the court to allow the accused to call a witness may amount

to violation of constitutional rights especially so if the accused is prejudiced so as not to present a complete defence. Incase of a denial the justification must be justifiable.

58. Notably, the accused is presumably innocent until proven otherwise. This means that an accused is not obligated to prove his innocence as the burden of proof remains on the prosecution throughout the trial, the standard being beyond reasonable doubt. [Also see Nguku v Republic [1985] KLR 412].

59. A court of law would be expected to be cautious where an accused person seeks to call witnesses and where he is limited, in the circumstances. For instance, in the matter the request to call the additional fourth witness was definitely made late without any reason being advanced for the court to form the opinion whether or not it was to be simply an abuse of the court process considering that the defence was of alibi and three [3] witnesses were called to support the argument.

60. Be as it may, it is worth noting that the argument of violation of the right above was not a ground of appeal. This court should be limited to grounds raised as a principle of fair trial.

61. On the question whether the sentence was excessive, it is desirable for a sentence to be proportionate to the offence committed. In Ogola s/o Owour v Republic [1954] it was held that;

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case [R - v- Shershowsky [1912] CCA 28TLR 263]." See also Omuse - v- R [supra] while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered [see also Sayeka – vs- R. [1989 KLR 306]"

62. In Shadrack Kipkoech Kogo v Republic, Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated that;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered [see also Sayeka –vs- R. [1989 KLR 306]"

63. Section 8[3] of the *Sexual Offences Act* provides that;

> " A person who commits an 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 years."

64. The law provides for mandatory minimum sentence. Therefore, the sentence of 20 years imprisonment was not excessive.

65. The upshot of the above is that the appeal is bereft of merit. Accordingly, it is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE, 2025.

L.N. MUTENDE

JUDGE