

KENYA / JUDGMENT

JWG v Republic [2026] KECA 243 (KLR)

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COURT

Court of Appeal

BEFORE

K M'Inoti, S ole Kantai, A Ali-Aroni

CASE / FILE NUMBER

Criminal Appeal 116 of 2019

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JWG v Republic (Criminal Appeal 116 of 2019) [2026] KECA 243 (KLR) (13 February 2026)
(Judgment)

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[2026] KECA 243 (KLR)

Republic of Kenya

In the Court of Appeal at Nyeri

Criminal Appeal 116 of 2019

K M'Inoti, S ole Kantai & A Ali-Aroni, JJA

February 13, 2026

Between

JWG

Appellant

and

Republic

Respondent

(Appeal from the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 29th September 2017 in HCCR.A NO. 24B OF 2016)

Judgment

1. In this second appeal, the appellant, James Wahome Githinji, challenges the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 29th September 2017, by which the first appellate court dismissed the appellant's appeal against conviction and sentence of life imprisonment by the Chief Magistrates Court at Nyeri for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act.

2. The particulars of the charge against the appellant in the Chief Magistrate's Court stated that on the night of 19th and 20th October 2011, at [Particulars Withheld] Village in Nyeri County, the appellant caused his genital organs to penetrate those of JWN, a girl of eleven years. The appellant also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. It was alleged in the particulars that at the same time and place as in the main count, the appellants touched JWN's genitals with his penis.

3. The prosecution case was constructed around the evidence of five witnesses. The essence of that case was that for about one year before the material date, the appellant was cohabiting with JWN's mother and that they were living in a two roomed house in [Particulars Withheld] with JWN and her two siblings. The children slept in one room while the parents slept in the other. On the material night, PW1 testified that her mother was not home and that the appellant went to the children's room where she was sleeping with the other children and carried her to his room. After threatening to kill her if she screamed, the appellant undressed her and himself and defiled her for about two hours.

4. The mother did not come home for two days, and PW1 decided to go with her siblings to their grandmother to see if the mother was there. Before leaving, she went to her parents' bedroom and found clothes strewn all over. As she was picking up the clothes, she touched a body under the bed. She went and called a neighbour named Maina, who went into the bedroom and found PW1's mother dead, having been strangled with a piece of cloth. PW1 went to report at the police station in the company of her siblings, from where her grandmother was summoned. PW1 informed the grandmother that the appellant had defiled her. However, no report of defilement was made to the police. Subsequently the body of the mother was recovered to the mortuary.

5. After the death of her mother, PW1 and her siblings went to live with her grandmother (PW2). PW1 did not go to the hospital after the defilement and was not examined by a doctor until 27th May 2015, almost four years after the incident. The medical examination was conducted barely a month before PW1 testified in court on 29th June 2015. The age of PW1 was proved vide an age assessment report from Nyeri General Hospital conducted on 6th January 2016, which indicated that she was approximately 15 years old when she testified and 11 years old at the time of the alleged defilement.

6.The medical evidence was adduced by Dr. Joseph Njoroge Silas (PW3), who produced in evidence a medical report purportedly prepared by his colleague Dr. Shaban, who had allegedly examined PW1. The report showed that PW1 had no injuries and that although the hymen was broken, it was not freshly broken. She had no abnormality or discharge, and she was HIV negative. We shall revert to this medical report later in this judgment.

7.Sergeant Philip Wachira Muriuki (PW4) testified that on 12th May 2015 at about 11 pm, the appellant went to the Gichira Police Post and stated that he had killed a person at [Particulars Withheld] Secondary School in [Particulars Withheld] and that he had decided to surrender because he was not at peace. He locked him up, and the next day, he was informed by another police officer, PC Simiyu, that the appellant had defiled PW1.

8.The testimony of Chief Inspector Evans Omuga, the investigating officer (PW5), was similar to that of PW4, only to add that according to him, the appellant allegedly stated that he committed the murder in 2011 at [Particulars Withheld] and that the name of the victim was JWM. He also stated that he had defiled PW1. The appellant took him to the scene in [Particulars Withheld], but they found that the house was no longer there. The appellant also took PW5 to the home of the deceased's mother, PW2, where the deceased was buried and PW2 told him that the appellant had killed the deceased. PW5 testified that PW1 informed him that the appellant had defiled her and killed her mother and that it was he who took PW1 to hospital for medical examination.

9.When he was put on his defence, the appellant gave sworn defence but did not call any witnesses. The substance of his defence was that while working in a hotel in Chaka on 11th May 2015, he learnt of allegations that he had committed the offences of murder and defilement in [Particulars Withheld]. He asked for permission from his employer and proceeded to Othaya Police Station to inquire about the allegations of murder and defilement against him. He was surprised when he was locked up in a cell and accused of having gone to the police station to report that he had committed offences and surrender.

10.The next day he was driven in a police Land Rover to [Particulars Withheld] Police Station where he met PW1 and PW2 and they were further driven to a homestead where he was alleged to have murdered the deceased. Subsequently, he was charged in court with the offence of defilement, which he maintained was fabricated. The appellant admitted that he knew the deceased but claimed that they were working together rather than cohabiting a husband and wife.

11.As already pointed out, the trial court convicted the appellant and sentenced him to life imprisonment. His first appeal to the High Court was dismissed by the judgment the subject of this second appeal. In his supplementary grounds of appeal, the appellant faults the first appellate court for: misapprehending the evidence and ignoring the fact that he went to the police station to find out the allegations against him rather than to confess to having committed offences; acting on unreliable medical evidence; holding that the ingredients of the offence charged were proved to the required standard; rejecting his defence without cogent reasons; and imposing a harsh and excessive sentence.

12. In his written submissions the appellant submitted that the first appellate court misapprehended the evidence because he had gone to Othaya Police Station after the brother of the deceased accused him of having murdered the deceased and defiled PW1 in 2011, but instead, he was locked up in a cell on the allegation that he had gone to the station to confess and surrender. He contended that the charges against him were fabricated because the alleged defilement had not been reported at any police station. He submitted that PW1 reported to the police only the murder, but not the alleged defilement and wondered why an offence allegedly committed on the night of 19th and 20th October 2011 was not reported to the police until 27th May 2015.

13. It was the appellant's further submission that the prosecution did not prove to the required standards all ingredients of the offence of defilement, namely, the age of PW1, penile penetration and the identity of the perpetrator of the offence. He contended that the offence was allegedly committed at night and the trial court did not inquire about the prevailing lighting, meaning that the identification was by a single witness under difficult circumstances and therefore not free from the possibility of error.

14. On penetration, the appellant faulted the medical evidence because PW1 was examined almost four years after the alleged defilement and submitted that the evidence had no probative value. He also contended that the two courts below erred by relying on a medical report that was not signed or dated and did not bear the name of the maker. The appellant argued further that loss of hymen in the circumstances of this case was not evidence of defilement. He contended that he had been HIV positive since 2009 and that if he had defiled PW1 for two hours as alleged, it was not possible that she was still HIV negative.

15. As regards the age of PW1, the appellant argued that it was not proved by a birth certificate. He misleadingly claimed that no age- assessment report was produced by the prosecution. On failure to consider his defence, the appellant submitted that the courts below rejected his defence offhand without proper consideration, particularly his evidence as to why he had gone to the police station. He also faulted the first appellate court for failure to exhaustively weigh and reappraise the entire evidence. On the basis of the above arguments, the appellant urged the Court to allow his appeal.

16. The respondent, represented by Mr. Naulikha, Assistant Director of Public Prosecutions, opposed the appeal. The respondent, unfortunately, addressed the appellant's initial grounds of appeal rather than the supplementary grounds of appeal on the basis of which the appellant canvassed his appeal. As far as the respondent's submissions are relevant to the supplementary grounds of appeal, the respondent submitted that the first appellate court correctly held that the prosecution had proved all the ingredients of the offence of defilement and, in particular, penetration.

17.It was the respondent's further submission that the two courts below thoroughly analysed the appellant's defence and gave reasons why they did not find any merit in it. Relying on *David Njuguna Wairimu v Republic* [2010] eKLR, the respondent submitted that there is nothing objectionable when the first trial court analyses evidence and comes to the same conclusion as the trial court. Accordingly, the respondent urged the Court to dismiss the appeal in its entirety.

18.We have carefully considered this appeal. The Court explained the duty of a second appellate court as follows in *Karani v. Republic* [2010] 1 KLR 73: "This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." (Emphasis added).

19.The appellant impugns the decision of the first appellate court for among others, failure to consider relevant evidence; for holding that the prosecution proved its case beyond reasonable doubts, and for failure to properly re-evaluate the evidence on record, which are clearly issues of law.

20.The offence with which the appellant was charged was allegedly committed on the night of 19th and 20th October 2011. Although PW1 reported the death of the deceased to the police the same day that the body of the deceased was discovered, she did not report to the police the alleged defilement on that day, the earliest opportunity she had in contact with the police. Even PW2, whom PW1 had allegedly informed that she had been defiled by the appellant, did not report to the police.

21.From the evidence on record, the defilement was not in fact reported to the police until 27th May, 2015 almost four years after the alleged offence. Similarly, PW1 was not subjected to medical examination until the same day that the report was made to the police, and barely a month before she testified in court on 29th June 2015. Again, that was a lapse of almost four years. In these circumstances, one wonders what the true value of the medical examination was after lapse of such a long time.

22.The explanation for that inordinate delay is that PW1 and PW2 were traumatised by the murder of the deceased. While not in any way down-playing or trivialising the trauma they must have suffered, to wait for four years to report such a serious offence as defilement to the police is, to say the least, most unusual.

23.There is even a more fundamental problem with the Medical Examination Report (P3), which was produced in evidence as Exhibit 2, and relied upon by the two courts below. That report was required to be completed by a medical officer or practitioner carrying out the medical examination. When PW3 testified, he told the Court that he was doing so on behalf of Dr. Shaban. The medical report he testified on and which was produced in evidence as Exhibit 2 did not bear Dr. Shaban's name or signature or the date when the examination was conducted. From that

report, one cannot tell the name and designation of the person who allegedly carried out the medical examination.

24. It is the signature on such a report which authenticates the report and indeed, section 77(1) of the Evidence Act requires such report to be “under the hand of a medical practitioner” and section 77(2) allows the court to presume the signature on such a medical report to be genuine and that the person who signed the report held the office and qualifications indicated therein as of the date he or she signed the report.

25. A proper reading of section 77 leaves no doubt that the report must be signed by the maker before the court can admit it and make the presumptions allowed by the section. The report in question was not signed by the maker, who, in any event, was not even disclosed in the report, and therefore ought not to have been admitted in evidence because its authenticity could not be vouched for. Without a signature, the report cannot be authenticated, and the court cannot make presumptions under section 77(2).

26. This Court cautioned against casual admission of medical reports as follows in *Sibo Makovo v. Republic* [1977] KECA 31 (KLR): “It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.” (Emphasis added).

27. As to why the appellant was not apprehended earlier and charged with the offence of murder, which was reported to the police immediately after the discovery of the body of the deceased, the prosecution gave a rather casual and lame explanation that the appellant had disappeared from the vicinity. There was no evidence of any efforts made by the police to trace and apprehend him.

28. Against the explanation by the police, the appellant gave a plausible defence, namely that he was all along employed in a hotel in Chaka, within the same County as [Particulars Withheld], where the death of the deceased occurred. Even after the appellant allegedly confessed to PW4 and PW5, police officers, that he had murdered the deceased, he was never charged with the offence of murder, raising the question whether indeed the appellant had made any such a confession.

29. There is also a major discrepancy between the prosecution and the defence on why the appellant went to Othaya Police Station, which the two courts below did not even try to resolve, save opting to believe the prosecution version without a cogent explanation why the appellant’s defence was rejected. According to the prosecution, the appellant, from nowhere, just surrendered himself to the police and confessed to having murdered the deceased and defiled PW1. This version of events simply does not look plausible because PW4 and PW5, being senior police officers, would have been expected to make arrangements to record the appellant’s alleged confession in the manner prescribed by section 25A of the Evidence Act. They did nothing other than to keep regurgitating the assertion that the appellant had confessed to the murder of the

deceased and the defilement of PW1 to them.

30. Against the prosecution version of events, is that of the appellant, namely that after a brother of the deceased threatened him and alleged that he had murdered the deceased and defiled PW1, he went to Othaya Police Station to report and find out about the allegations. That is when the police arrested him and claimed that he had surrendered and confessed to the two offences.

31. We ask ourselves, why would a murder and defilement suspect who was successfully on the run for four years suddenly appear at the police station and confess to the offences, and shortly thereafter recant the alleged confession? The two courts below did not seriously consider whether the prosecution's case, pitted against the appellant's defence, was plausible. All that the courts did was to say that the defence did not displace the prosecution's case, without addressing the above fundamental questions.

32. Taking into account all the above fundamental and unanswered questions, gaps in the prosecution case, the manner in which the case was investigated, the inordinately long period it took to report the offence and conduct medical examination, the reliance on a medical report that did not disclose its maker and was neither signed nor dated, we are satisfied that the prosecution did not prove its case against the appellant beyond reasonable doubt and that his conviction is not safe.

33. In the circumstances, we allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant. He shall be set at liberty forthwith, unless he is otherwise lawfully detained. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 13TH DAY OF FEBRUARY, 2026. K. M'INOTI JUDGE OF APPEAL..... S. ole KANTAI JUDGE OF APPEAL..... A. ALI-ARONI JUDGE OF APPEAL. I certify that this is a true copy of the original Signed DEPUTY REGISTRAR

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