

KENYA / JUDGMENT

Republic v Wanyela [2026] KEMC 596 (KLR)

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COURT

Magistrate's Court

BEFORE

TO Omono

CASE / FILE NUMBER

Sexual Offence E006 of 2025

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Republic v Wanyela (Sexual Offence E006 of 2025) [2026] KEMC 596 (KLR) (28 April 2026)
(Judgment) Neutral citation:

[2026] KEMC 596 (KLR) Republic of Kenya In the Bungoma Law Courts Sexual Offence E006 of 2025 TO Omono, RM April 28, 2026 Between Republic Prosecution and Duncan Wanjala Wanyela Accused

Judgment

1. Before this court is Duncan Wanjala Wanyela (in this judgment referred to as 'the Accused Person') facing a charge of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 003 of 2006, whose particulars are that: On diverse dates between 05 th day of January 2025 and 21 st day of January 2025 in Bungoma South Sub-County the Accused Person intentionally and unlawfully caused his penis to penetrate the vagina of one H.N.W a child aged 15 years 2. The Accused Person also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 003 of 2006, whose particulars are that: On diverse dates between 05 th day of January 2025 and 21 st day of January 2025 in Bungoma South Sub-County the Accused Person intentionally and unlawfully caused his penis to come into contact with the vagina of one H.N.W a child aged 15 years 3. The Accused Person pleaded not guilty to all the charges facing him prompting the prosecution to call five (5) witnesses in a bid to prove their case against the Accused Person beyond reasonable doubt. 4. A summary and an analysis of the evidence placed before this court is set out below. Evidence The Prosecution Case 5. PWI H.N.W stated that she was born on 03 rd July 2008. She added that she left her grandparent's home on 05 th January 2025 when her uncle one Noel Makhanu, allegedly threatened to defile her. She proceeded to her boyfriend's (Accused Person) home and arrived on the same date at around 2100hrs. 6. She stayed with the Accused Person for three days when the Accused Person left for work in Machakos. The Accused Person stayed in Machakos for ten (10) then went back to their home where they continued staying together. 7. Some days later, while going to Webuye in the company of the Accused Person, they met her uncle; Dennis Makhanu,

aboard a lorry near Webuye fly over. Dennis Makhanu tricked them to board the lorry only for the lorry to be driven to [Particulars withheld] Police Station where they were placed in police custody. 8. She was treated at [Particulars withheld] Dispensary. She added that she used to have sex with the Accused Person during their stay together. 9. PW2 MNM is PW1's mother. It was her testimony that PW1 was born on 03 rd July 2009. 10. On 06 th January 2025 at around 0900hrs, she received a call from her father (PW3) who informed her that PW1 was missing from home. A search for PW1 ensued until 21 st January 2025, when she received a call from her brother, one Dennis, who informed her that PW1 and the Accused Person had been arrested and were being held at [Particulars withheld] Police Station. 11. She proceeded to [Particulars withheld] Police Station, where she found PW1 and the Accused Person. She escorted PW1 to [Particulars withheld] Dispensary for medical examination. 12. PW3 EKM is PW1's grandfather. He testified that he stays with PW1. He added that PW1 disappeared from home on 05 th January 2025. He reported PW1's disappearance to the area chief, who advised him to report the matter at [Particulars withheld] Police Station. 13. On 14 th January 2025, PW3 called him and informed him that PW1 and the Accused Person had been arrested. He proceeded to the police station when he found PW1 and the Accused Person in police custody. 14. PW4 Asha Wesaya is a Clinical Officer at [Particulars withheld] Dispensary. She examined PW1 at the facility on 22 nd January 2025, when PW1 visited the facility while in the company of PW2, with a history of PW1 having disappeared from their home to a man's place. 15. She interviewed PW1 who told her that she had eloped with the Accused Person and that they had had sex on diverse occasions. 16. She added that PW1's medical examination showed that PW1 presented an old-looking torn hymen. PW1 had also contracted a Urinary Tract Infection and a Sexually Transmitted Infection. She formed an opinion that PW1's vagina had been penetrated. She produced PW1's treatment notes (Pexh.1) and P3 form (Pexh.2). 17. PW5 No. 258720 PC (W) Lydia Nyongesa of [Particulars withheld] Police Station conducted investigations into this matter. She testified that on 13 th January 2025 at around noon, she received and booked a report from PW3 to the effect that PW1 had disappeared from home. 18. It was her further testimony that on 21 st January 2025 at around 2000hrs, members of the public took PW1 and the Accused Person to the police station after arresting them in Webuye. She escorted PW1 and the Accused Person to [Particulars withheld] Dispensary for medical examination. 19. She produced a copy of PW1's birth certificate serial number 1754061 showing that PW1 was born on 03 rd July 2009. The Accused Person's Case 20. After considering the prosecution's case, this court on 28 th April 2025, placed the Accused Person on his defence. This court explained to the Accused Person his rights under section 211 of the Criminal Procedure Code. The Accused Person elected to remain silent as guaranteed by Article 50 (2) (i) of the Constitution of Kenya. 21. When confronted with such a situation Ougo J in *Doris Kemunto v Republic* [2019] eKLR rendered herself as follows: '... I find that the appellant chose to remain silent willingly and has the right to do so. She did so after the provisions of section 211 of the Criminal Procedure code were explained to her on the day the court set down the case for defence hearing. The fact that she chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case

against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defence of the appellant. An accused person does not assume any burden to prove his innocence...' 22. The foregoing shows that even in instances like this where an Accused Person chooses to remain silent, the prosecution is still obligated to discharge its burden of proof beyond reasonable doubt. Simply put, the Accused Person does not have a duty to prove his innocence. 23. In the circumstances, this court will proceed to determine whether the prosecution discharged the burden of proof to the required standards.

Analysis and Determination

24. In *George Opondo Olunga v Republic* [2016] eKLR, the court stated that the ingredients of the offence of defilement were the age of the victim, penetration and proper identification of the perpetrator. 25. Hereunder is an analysis on whether the prosecution discharged its burden of proving the above ingredients of the charges facing the Accused Person. Age of the Victim/Complainant 26. PW1 and PW2 stated that PW1 was born on 03 rd July 2009. This oral testimony was corroborated by a copy of PW1's birth certificate serial number 1754061 (Pexh.1) produced by PW5. 27. Rule 4 of the Sexual Offences Rules of Court Rules provides that: " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document." 28. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows on how a complainant's age can be proved in a defilement case: " ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." 29. The authorities cited above show that age can be proved by credible documents like a birth certificate and even the oral evidence of a child of sufficient intelligence, as well as the oral evidence of a child's parent or guardian. 30. In the instant case, the prosecution relied on PW1's oral evidence on her age, PW1's mother's oral evidence on PW1's age, and a copy of PW1's birth certificate placed before this court. 31. The Accused Person neither impeached the contents of the said copy of PW1's birth certificate nor controverted PW1 and PW2's oral testimony on PW1's age. 32. It is against this background that this court holds and finds that PW1 was 15 years and 6 months old as of 05 th January 2025 when she was reportedly defiled. This begs the question whether PW1 was 15 years old or 16 years old as of 05 th January 2025. 33. The Court of Appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR cited with approval in *CD V Republic (Criminal Appeal 31 Of 2022)* [2023] KECA 431 (KLR) settled the question above by rendered itself thus : Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and

not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the Sexual Offences Act , a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.” 34. In the circumstances, and guided by the authority above, this court holds and finds that the PW1 was aged 15 years at the time of the incident herein. The Act of Penetration 35. PW1 testified that she had sex with the Accused Person on diverse occasions as set out in the charge sheet. The Accused Person did not dispute PW1’s testimony regarding their sexual intercourse on diverse dates. 36. PW1’s testimony on having sex with the Accused Person on diverse dates remained unshaken even after cross-examination. 37. PW1’s testimony on engaging in sex was corroborated by the medical evidence (Pexh. 1 & 2) placed before this court by PW4. 38. There is no evidence on record to show that PW1’s hymen was broken in any other manner other than by sexual intercourse. Further, no evidence was placed before this court to show that PW1 was born without a hymen (See *Kamau v Republic (Criminal Appeal E040 of 2020)* [2024] KEHC 3772 (KLR)). 39. It is against this backdrop that this court holds and finds that the prosecution proved beyond reasonable doubt that PW1’s vagina was penetrated by a penis. Identification or Recognition of the Offender 40. PW1 testified that the Accused Person was well known to her since the Accused Person was her boyfriend. PW1 also stated that she stayed with the Accused Person for several days. The Accused Person did not dispute the fact of being known to PW1 and staying together with PW1 for several days. 41. Given the undisputed boyfriend–girlfriend relationship between PW1 and the Accused Person, there can be no room for mistaken identity regarding the perpetrator. 42. The foregoing shows that this was a close and shut case of recognition. 43. For the reasons above, this court finds that the Accused Person was properly identified as the offender/perpetrator. 44. Before penning off, this court will address two issues that arose during the hearing of this matter. 45. First, during cross-examination of PW4, the Accused Person raised concerns on why he was not medically examined. This court notes that PW1 was found to be infected with a Urinary Tract Infection (UTI) and a Sexually Transmitted Infection (STI). The lines along which the Accused Person cross-examined PW4 could point to the Accused Person urging this court to find that the failure to examine him for UTI and STI was fatal to the prosecution's case. 46. Whereas it is usually desirable to medically examine an Accused Person for STI where the complainant tests positive for STI, the law in this jurisdiction is that failure to medically examine the Accused Person is only fatal to the prosecution case where the evidence on record is barely adequate to convict the Accused Person. 47. To this end, this court relies on the holding by the Court of Appeal in *Geoffrey Kioji vs R, Nyeri Criminal Appeal No.270 of 2010* - cited in *Dennis Osoro Obiri vs R (2014) eKLR*) where the court stated that:- “ Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was

perpetrated by the accused person. Under proviso to section 124 of the Evidence Act Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim, if the court believes the victim and records the reasons for the belief.” (Emphasis added) 48. The evidence placed before this court by the prosecution, even in the absence of the Accused Person’s medical examination report/ results, points to an irresistible conclusion that the Accused Person defiled PW1. The evidence is overwhelming against the Accused Person. 49. Given the reasons above, it is this court’s finding that the failure to medically examine the Accused Person for STI was not fatal to the prosecution’s case. 50. Finally, the evidence on record shows that PW1 fled her grandparents’ home and thereafter proceeded to the Accused Person’s home on her own volition. PW1 stayed with the Accused Person for several days while being defiled without raising any alarm. 51. One may be attempted to argue that such conduct by PW1 shows that PW1 fully appreciated what she got herself into. 52. This court is of the considered view that the conduct of a 15-year-old child cannot excuse an act of defilement of such a child by an adult. By running away from her grandparents’ home, PW1 did not invite any adult to defile her. She was a child in need of care and protection. The Accused Person, being an adult, ought to have done better than he did in this matter. The Accused Person took advantage of a helpless child. Therefore, the Accused Person must bear the consequences of his actions.

Determination

53. The upshot of the foregoing is that: a. The Accused Person is convicted under section 215 of the Criminal Procedure Code for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 003 of 2006; and b. The alternative charge is moot. JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 28 TH DAY OF APRIL 2025 T. O. OMONO RESIDENT MAGISTRATE In the presence of: Mr. Minishi for ODPP C/A: Albert Accused Person

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