

KENYA / JUDGMENT

Wasilwa v Republic [2026] KECA 513 (KLR)

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COURT

Court of Appeal

BEFORE

SG Kairu, AK Murgor, P Nyamweya

CASE / FILE NUMBER

Criminal Appeal E112 of 2022

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Wasilwa v Republic (Criminal Appeal E112 of 2022) [2026] KECA 513 (KLR) (13 March 2026)
(Judgment)

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[2026] KECA 513 (KLR)

Republic of Kenya

In the Court of Appeal at Mombasa

Criminal Appeal E112 of 2022

SG Kairu, AK Murgor & P Nyamweya, JJA

March 13, 2026

Between

Moses Situma Wasilwa

Appellant

and

Republic

Respondent

(An appeal from the Judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.) delivered on 28th February, 2023 in Criminal Appeal No. 7 of 2020)

Judgment

- 1.This is a second appeal from the Judgment of the High Court of Kenya at Mombasa (Njoki Mwangi J.) delivered on 28th February 2023. The original conviction was by the Senior Principal Magistrate's Court at Kilifi (Hon. S. D. Sitati RM) in a judgment delivered on 7th November 2019 in Criminal Case (S.O.) No. 27 of 2018.
- 2.The Appellant, Moses Situma Wasilwa, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars to the offence are that on 24th December, 2016 at [Particulars Withheld] Village within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of DWN, alias F, the complainant, a child aged 15 years.
- 3.The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars to the charge are that on the same day in the same place he intentionally and unlawfully touched the vagina and breast of DWN, alias F, a child aged 15 years with his penis.
- 4.He denied committing the offence, whereupon the Prosecution called 4 witnesses in support of its case during the trial.
- 5.PW1, the complainant, a Form 3 student in secondary school, stated that she was born on 5th February, 2002 and is 17 years old. She testified that she knows Moses Situma, the Appellant who works at Vipingo Hospital, and that she has known him since 2016 when she took her brother, G to the Hospital, where the Appellant worked. The Appellant asked for her phone number, which she gave to him.
- 6.On 24th December, 2016, while the victim was at her grandmother's house, just opposite her parents' home, the Appellant sent her a text message at around 11:00 p.m requesting to see her. Shortly thereafter, the Appellant sent her a text message to tell her that he was at the door, and the complainant opened the door and ushered him in; that by that time her brother G was already asleep. The complainant and the Appellant chatted, and after a while he started kissing her. He then told her that he loved her and promised to facilitate her recruitment into the police force, to be an "askari" and that he would also buy her land. Thereafter, they had sex before the Appellant left. She stated that besides G, her uncle, whom she did not name, but whom she said is of unsound mind were also in the house.
- 7.The complainant stated that schools opened in January, 2017 and she returned to [Particulars Withheld] Girls High School in Kisii. While there, she missed her menstrual cycle (periods) for the months of January, February and March, 2017 and suspected that she was pregnant. In March, 2017, when schools closed for the term, she came home and after two weeks went to the Appellant for a pregnancy test. The Appellant confirmed that she was, indeed, pregnant and cautioned her about revealing that information to anyone. He then gave her some tablets to swallow to enable her to abort the pregnancy but nothing happened.

8. On 29th April, 2017, before schools opened for term two, the complainant travelled to her aunt in Kisii. She called the appellant and informed him that the abortion tablets did not work. The Appellant advised her to travel back to Mombasa and not to go to school. The complainant travelled back to Mombasa, whereupon the Appellant instructed her to go to Sun n' Sand lodging at Sea Level where she met a man, whose name she did not recall. The man guided her to a room within the lodging and instructed her to wait for the Appellant. After about three to five hours of waiting, the Appellant arrived and prepared lunch for her. He then inserted some pills in the victim's abdomen and instructed her to wait for about six to seven hours. He then left her at the lodging. The victim stated that, besides observing fluids oozing out of her vagina, the abortion was not successful. She then sent a text message to the Appellant to inform him that the medication did not work. The Appellant came back the following morning and again attempted to procure the abortion.

9. The complainant stated that she stayed at the lodging for a total of five days during which period her mother and her brother would send text messages enquiring as to her whereabouts; that the Appellant would tell her mother not to worry or look for her as she would one day return home. After five days, the Appellant went to the lodging and told the victim to return to her parents' home, which she did. Her uncle then took her for examination at Kilifi County Hospital where she was confirmed to be pregnant and also diagnosed with Gonorrhea. She went back to school until on 29th July, 2019 and when schools closed for the second term break, she went to reside at Shanzu with her aunt.

10. On 1st August, 2017, she went into labour, and called the Appellant for assistance. He gave her Kshs.100 and told her not to disclose to her parents that he was the one responsible for the pregnancy. She left the child in the care of her cousin after delivery. When the child was nine months old, her uncle suspected the Appellant to be the father since the child resembled him. It was then that she disclosed to her mother and uncle that the Appellant was the child's father.

16. She later recorded a statement with the police, and identified the P3 and the PRC form. She indicated that they had sex twice.

17. LMO PW2, the complainant's mother stated that her daughter was 18 years old having been born on 2nd May, 2001 she produced a copy of her Certificate of Birth which indicated that PW1 was born on 5th February, 2001; that her daughter was a student of a high school in Kisii until sometime in early August, 2017 when the school's Principal informed her that her daughter was pregnant and would be sent home after the school closed at the end of second term.

18. The witness stated that on 1st August, 2017 the complainant called her and informed her that she was in labour pains and requested her to contact the Appellant to come and assist her. PW2 asked her if the Appellant was responsible for the pregnancy but she kept quiet. On 8th August, 2017, both the Appellant and PW2, hired a taxi to pick the complainant and the new born baby from the aunt's house in Shanzu. Again, PW2 asked the victim about the father of the child but she told her that "Raster", a friend to the Appellant, was responsible. But the Appellant denied knowledge of any person known as "Raster". PW2 took a photo of the child to the Appellant and

told him, “like father like daughter” as the child resembled him.

20. Asked where she was on 24th December, 2016, PW2 replied that she was in her house while the victim was across in her grandmother’s house. She also stated that the victim disappeared on or about 1st April, 2017 and returned home on or about 8th April, 2017 and that she came to learn that she had all along been at the Sun n’ Sand Beach Hotel. She stated that the Appellant is a neighbour and a doctor, but that his clinic did not have a name; that she had known him since July, 2016 and that there was no grudge whatsoever between them.

21. Dr. Salim PW3, a medical officer at Kilifi County Hospital produced, the P3 form dated 20th April, 2018 on behalf of Dr. Ahmed who was studying abroad; that at the time of her examination, the complainant’s hymen was broken and that she had given birth about nine months before and was attending pre-natal clinics. He estimated the age of the injuries to her genitalia to be in weeks. He also produced the PRC form.

22. Regarding the broken hymen, PW3 stated that he could not specify when it was broken, but he ruled out that the victim had contracted Gonorrhea.

23. Cpl Clara Bingo No. xxx PW4 of Kilifi Police Station Gender Desk investigated the matter. On 8th May, 2017, she received a complaint from PW2, who was in the company of PW1, to the effect that PW1, was supposed to be in school on 3rd May, 2017, but was not. She was informed that PW1 had been kept by a man. She stated that PW1 was taken to Kilifi County Hospital for medical examination. She then interrogated and recorded her statement which disclosed that it was the Appellant who defiled her. The Appellant was arrested by members of the public and charged with the offence.

25. In his Defence, the Appellant stated that he is a resident of Vipingo and a businessman; that on 24th December, 2016, he came from work at around 8:00 p.m. and due to the day’s work, he retired to bed early in order to prepare for the festivities of 25th December, 2016. He did not go anywhere on 25th December, 2016; that two years later allegations emerged, and he was arrested and charged with the offence. He denied the charges and stated that the victim did not even know who had sex with her. He stated that the victim also stays in Vipingo at about 400 m from his house.

26. The Court found that the complainant was a child at the time of the alleged offence. Relying on the Birth Certificate produced in evidence, the court was satisfied that the complainant was 15 years old on 24th December, 2016 and therefore fell within the definition of a child under the law.

27. The court further found that penetration had been proved based on the complainant’s direct and detailed testimony and the medical evidence indicating that the complainant’s hymen was absent, and the fact of the resultant pregnancy, which the court considered corroborative of sexual penetration. The court also found that the Appellant was positively identified as the person who defiled the complainant. In finding that the elements for the offence of defilement was proved, the trial court proceeded to convict the Appellant as charged and sentenced him to serve 20 years imprisonment.

29. Aggrieved by the conviction and sentence, the Appellant filed an appeal to the High Court which upheld both the conviction and the sentence, and dismissed the appeal in its entirety.

30. Dissatisfied, the Appellant has filed this appeal on the grounds that; the learned Judge was in error in failing to appreciate that the burden of proof was shifted, in violation of Section 110 of the Evidence Act; in failing to appreciate that Section 24 of the National Police Service Act and Article 263 of the Constitution were violated; in failing to find that Article 49(1)(f) of the Constitution was violated. In his supplementary grounds, he contended that; the learned Judge, failed to appreciate that the Rasta man, a friend of the Appellant was responsible for the pregnancy; that the prosecution's failure to conduct and present DNA test reports rendered it unsafe for the Appellant's conviction; in failing to appreciate, that Sections 8(1) as read with Section 8(3) of the Sexual Offences Act as charged are not in tandem with the spirit and letter of the Constitution,

31. the Bill of Rights and in particular, Article 19(3)(a) of the Constitution, as the Appellant was not accorded equal treatment compared to convicts who were sentenced under other sections of the Penal Code or other laws that do not mandate sentences; that he was not brought before the court when his judgment delivered as required by Section 168(2) of the Criminal Procedure Code, and the court was required to maintain decorum, formality, and respect just as if it were in the actual courtroom. In his written submissions, the Appellant submitted that the conviction was unsafe as the prosecution failed to discharge the burden of proof required in criminal cases. He argued that under Sections 107 and 109 of the Evidence Act, the burden of proving all the elements of the offence of defilement lay wholly with the prosecution and never shifted to the Appellant. In support of this principle, he relied on the classic authorities of *Woolmington vs DPP* [1935] AC 462 and *Miller vs Minister of Pensions* [1947] 2 All ER 372, which establish that an accused person bears no obligation to prove his innocence.

34. The Appellant submitted that although a child was born as a result of the alleged defilement, no DNA testing was conducted to link him to the pregnancy; that further, the complainant delayed reporting the alleged offence for about two years and that the complainant's mother (PW2) attributed the pregnancy to another man, described as "the Rasta man", a friend of the Appellant; that in those circumstances, the prosecution ought to have invoked Section 36 of the Sexual Offences Act to procure DNA samples for forensic testing. He argued that only a DNA report could have conclusively established penetration and identified the Appellant as the perpetrator. It was argued that the failure to conduct and present DNA evidence rendered the conviction unsafe. The Appellant relied on the case *Emmanuel Japala vs Republic* [2019] eKLR for the proposition that in serious sexual offence cases attracting severe sentences, DNA testing is a crucial investigative tool and its omission may create reasonable doubt.

37.The Appellant further challenged the credibility of the complainant's testimony, submitting that the contradictions regarding the identity of the person responsible for the pregnancy, coupled with the long delay in reporting, undermined the prosecution's case. He argued that any reasonable doubt arising from these inconsistencies ought to have been resolved in his favour, as required by law.

38.On sentence, the Appellant submitted that the mandatory minimum sentence imposed under Section 8 of the Sexual Offences Act was unconstitutional and unjust, as the prescribed sentence specified fettered judicial discretion, and was prejudicial to sentencing of an individual; that it also violated the right to a fair trial, dignity, and equality before the law.

39.Finally, the Appellant submitted that the Judgment of the High Court was invalid as it was delivered in his absence while he was in custody contrary to Section 168 of the Criminal Procedure Code. He argued that since the offence carried a minimum sentence of 20 years' imprisonment and was not a misdemeanour, the court had no jurisdiction to deliver the judgment in his absence. He maintained that this omission violated his right to a fair trial, which includes the right to be present at the delivery of judgment.

41.In their written submissions, learned prosecution counsel for the Respondent submitted that this being a second appeal, this Court ought not to interfere with concurrent findings of fact by the trial court and the High Court unless it is demonstrated that the two courts acted on wrong principles of law or that their conclusions were unsupported by the evidence on record. Counsel maintained that both the trial court and the first appellate court properly evaluated the evidence and correctly upheld the conviction and sentence.

42.It was also submitted that the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. On the age of the complainant, counsel argued that the evidence of PW1 and PW2, together with the Birth certificate produced in court, conclusively established that the complainant was 15 years old at the time of the offence. On penetration, it was submitted that the medical evidence contained in the P3 and PRC forms showing old hymenal tears, coupled with the complainant's pregnancy and the subsequent birth of a child, sufficiently proved penetration. On identification, counsel submitted that this was a case of recognition rather than mere identification, as the complainant was well acquainted with the Appellant prior to the incident and had interacted with him on several occasions, including during the attempts to procure an abortion.

44.It was further submitted that the prosecution did not shift the burden of proof in violation of Section 110 of the Evidence Act; that the trial court believed the complainant's testimony, and after careful evaluation found that the Appellant's unsworn defence amounted to a mere denial which did not raise any reasonable doubt.

45.On the complaint that crucial witnesses were not called and that another man was mentioned as responsible for the pregnancy, it was submitted that the allegation of a "rasta man" was a red herring meant to mislead the court and exonerate the Appellant; that the prosecution called sufficient witnesses to establish its case and that there was no requirement in law to call a

multiplicity of witnesses where the evidence on record was adequate. It was further submitted that delays in naming perpetrators in sexual offences involving minors are not uncommon and do not render the complainant's evidence as unreliable.

46. With regard to the alleged violation of Section 24 of the National Police Service Act and Articles 49(1)(f) and 263 of the Constitution, counsel submitted that these issues were being raised belatedly and were an afterthought, having not been canvassed during trial or before the High Court.

47. On sentence, State Counsel submitted that the sentence imposed was lawful, proper, and reasonable. Counsel argued that sentencing is a discretionary function of the trial court and that an appellate court should not interfere unless the sentence is illegal, based on wrong principles, or manifestly excessive; that the trial court considered the Appellant's mitigation, the seriousness of the offence, and the impact on the complainant, and that the High Court correctly declined to interfere with the sentence. It was urged that both the conviction and sentence were sound in law, and should be upheld.

48. This being a second appeal, the jurisdiction of this Court is circumscribed by Section 361(1) of the Criminal Procedure Code. The provision stipulates as follows: "A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—*a.* on a matter of fact, and severity of sentence is a matter of fact; *or b.* against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

49. From the foregoing provision, it is clear that this Court has no jurisdiction to entertain matters of fact on a second appeal as was held by this Court in *Stephen M'Irungi & Another vs. Republic* 1982 – 88 1KAR 360: "Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

50. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issues that falls for determination are; *i.* Whether the burden of proof was shifted to the Appellant in violation of Sections 107, 109, and 110 of the Evidence Act; *ii.* Whether the failure to conduct and produce DNA evidence rendered the conviction unsafe; *iii.* Whether the prosecution proved the essential elements of the offence of defilement beyond reasonable doubt; *iv.* Whether alleged contradictions, inconsistencies, and failure to call certain witnesses fatally undermined the prosecution case; *v.* Whether sections 8(1) and 8(3) of the Sexual Offences Act are unconstitutional, particularly with respect to mandatory minimum sentences. *vi.* Whether the Appellant's constitutional rights under Articles 49(1)(f), 24 of the National Police Service Act, and Article 263 of the Constitution were violated; and *vii.* Whether the

delivery of the High Court judgment in the absence of the appellant rendered the judgment invalid under section 168 of the Criminal Procedure Code.

51. We begin with whether the burden of proving the offence at any time shifted to the Appellant. We have considered the Appellant's complaint and the Judgments of the two courts below, and find that there is nothing on the record to suggest that either court required the Appellant to prove his innocence. The courts merely evaluated the Appellant's unsworn defence against the prosecution evidence and found it insufficient to displace the prosecution case. The prosecution at all times bore and discharged the legal burden under Sections 107 and 109 of the Evidence Act. So that, this ground therefore fails.

53. The next issue is whether the offence of defilement was proved. The essential elements of defilement are proof of age, penetration, and identification of the perpetrator. Regarding the first element of the offence, namely proof of age, this Court in the case of *Justin Kubasu vs Republic* [2020] eKLR cited with approval *Edwin Nyambogo Onsongo vs Republic* [2016] eKLR, and *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015, where the Court stated: "...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. What ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it must be credible and reliable."

54. In the present appeal, the age of the complainant was proved through the production of her Birth certificate by her mother, which indicated that she was born on 5th February, 2001. There was also the oral testimony of both the complainant (PW1) and her mother, that established that the complainant was 15 years old at the time of the offence on 24th December, 2016. On this basis both the trial court and the High Court correctly found that the complainant was a child within the meaning of Section 2 of the Sexual Offences Act.

56. Turning to the second element, penetration is defined under Section 2 of the Sexual Offences Act as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

57. The complainant gave clear and consistent evidence that the Appellant had sexual intercourse with her. This evidence was corroborated by medical evidence showing that her hymen was broken. There was further evidence that she thereafter became pregnant and had given birth to a child, all of which pointed to penetration.

58. The third element that the prosecution was required to prove was the positive identification of the Appellant as the person who defiled the complainant. This was not a case of fleeting or dock identification, but one of recognition, which, as this Court has repeatedly held, is more reliable than identification of a stranger.

59.The evidence on record showed that the complainant knew the Appellant prior to the incident. She first met the Appellant in 2016 when she took her injured brother to a private hospital in Vipingo where the Appellant worked. Thereafter, the Appellant requested for and obtained her telephone number, following which they communicated regularly. The complainant therefore had no difficulty recognizing the Appellant on the night of 24th December, 2016 when he came to her grandmother's house. The interaction was neither brief nor under conditions that impaired recognition. The circumstances of the offence were such that there was no possibility of her having mistaken the Appellant's identity.

61.Further, after the complainant informed the Appellant of her pregnancy, he remained in communication with her throughout. He cautioned her against disclosure, supplied her with tablets in an attempt to procure an abortion, facilitated her stay at a lodging for that purpose. He also assisted when she went into labour and gave birth to the child.

62.Although the complainant initially named another person as responsible for the pregnancy, the trial court correctly accepted her explanation that she has done so at the Appellant's instigation. Both the trial court and the High Court were entitled to accept that explanation, particularly in light of the complainant's age, vulnerability, and the Appellant's position of influence over her at the material time.

63.The trial court, having seen and heard the complainant testify, found her to be a truthful and credible witness. The High Court, upon re-evaluation of the evidence, affirmed that finding. Our reexamination of the entire evidence as pertains to the Appellant's identity, would lead us to conclude, as did the trial court and the High Court that the Appellant was positively identified as the perpetrator of the offence.

65.That said, the Appellant placed considerable emphasis on the absence of DNA evidence linking him to the child born as a result of the defilement. He argued that under Section 36 of the Sexual Offences Act the trial court ought to have ordered a DNA test to ascertain whether the Appellant committed the offence.

66.The question of whether the absence of DNA evidence is fatal to the prosecution case was considered by this Court in the case of Robert Mutungi Mumbi vs Republic [2015] eKLR, where it was stated: "Section 36(1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including DNA testing, to establish linkage between the accused person and the offence. Clearly, that provision is not framed in mandatory terms... DNA evidence is not the only form of evidence by which the commission of a sexual offence may be proved."

67. More recently, in the case of *Chembe vs Republic* [2024] KECA 647 (KLR), this Court reaffirmed that position and held that the absence of DNA evidence does not, of itself, vitiate the prosecution case or render a conviction unsafe. The Court emphasized that to sustain a conviction for the offence of defilement, the prosecution is required to prove three essential elements only: the age of the complainant, proof of penetration, and the positive identification of the perpetrator. DNA evidence is not an essential element.

68. In the present case, the complainant gave a detailed account of the sexual act and when it occurred, and consistently identified the Appellant as the perpetrator. The medical evidence confirmed penetration, and the resultant pregnancy was a strong corroborative factor. The Appellant's conduct after the incident provided compelling circumstantial evidence pointing to his culpability. There was no error of law in the failure to order DNA testing. This ground also fails.

69. On alleged contradictions and failure to call witnesses such as the complainant's relatives and lodging attendants, Section 143 of the Evidence Act stipulates that: "No particular number of witnesses shall in the absence of any provisions of law to the contrary be required for purposes of proof of any fact."

70. The calling of a multiplicity of witnesses would not have added any value to the prosecution's case particularly since, the evidence on record was sufficient to sustain the conviction. This ground is without merit.

71. As concerns the complaints regarding Articles 49(1)(f), Article 263 of the Constitution, and Section 24 of the National Police Service Act it is observed that they were raised belatedly and were not substantiated by evidence. In any event, even where a violation of the right to be presented to court within the prescribed time is established, such violation does not automatically vitiate a conviction. The appropriate remedy lies elsewhere.

72. With respect to delivery of the High Court Judgment in the Appellant's absence, Section 168 (3) of the Criminal Procedure Code, clearly provides that: "(1).....(2).....(3) No judgment delivered by a court shall be invalid by reason only of the absence of a party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to secure, or defect in serving on the parties or their Advocates or any of them, the notice of the day and place".

73. By virtue of the above provision, this ground is lacking in merit and also fails.

74. Having considered all the grounds of appeal, the supplementary grounds, the submissions by counsel, and the record of appeal, we are satisfied that the conviction was sound, with the result that we have no reason on which to interfere with the decisions of the lower courts.

75.As concerns the Appellant’s submission on the constitutionality of the mandatory minimum sentence prescribed under Section 8(3) of the Sexual Offences Act, the Supreme Court has consistently held that mandatory minimum sentences under the Sexual Offences Act are not per se unconstitutional. In this case, the sentence imposed was lawful and within the statutory framework. See Supreme Court decision in Republic vs Mwangi;

76.Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR). Consequently, there is no basis for interference with the sentence.

78.Accordingly, the appeal lacks merit and is hereby dismissed in its entirety. We uphold the conviction and sentence of the trial magistrates court as upheld by High Court of Kenya at Mombasa on 28th February 2023.It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.S. GATEMBU KAIRU, FCI Arb, C.Arb.....JUDGE OF APPEAL A. K. MURGOR..... JUDGE OF APPEAL P. NYAMWEYA.....JUDGE OF APPEAL I certify that this is the true copy of the original signed DEPUTY REGISTRAR

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