



**Bigogo v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 6556 (KLR) (Crim) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E020 OF 2024**

KW KIARIE, J

MAY 21, 2025

BETWEEN

PETER OBAE BIGOGO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E058 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala–Principal Magistrate)

JUDGMENT

1. Peter Obae Bigogo, the appellant herein, was convicted of the offence of attempted defilement contrary to section 9 (1) as read with section 9(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 14th day of June 2022, at Wanjohi area, Kipipiri sub county, within Nyandarua South sub County of Nyandarua County, intentionally attempted to cause his penis to penetrate the vagina of M.N.G., a girl fourteen years.
3. The appellant was sentenced to ten years' imprisonment. He has appealed against the conviction. He was in person and raised the following grounds of appeal:
 - a. The court erred in law and fact by failing to notice that the essential ingredients of the offence as charged were not proved.
 - b. That the learned magistrate erred in law and fact by failing to consider the appellant's defence.
 - c. The learned magistrate erred in law and fact by failing to record reasons for believing the minor victim contrary to Section 124 of the [Evidence Act](#).
4. The state did not file grounds for opposing the appeal or provide their submissions.



5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno v Republic* [1972] E. A 32 to guide my decision-making process.
6. Section 9 (1) of the *Sexual Offences Act* provides as follows:

A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
7. An attempt to commit a crime is defined in the Oxford Concise Law Dictionary (2nd Edition) as:

Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.
8. For an attempted offence to be committed, the actions complained of must pass the “but for” test.
9. Black’s Law Dictionary, on the other hand, defines the word attempt as follows:

The fact or an instance of making an effort to accomplish something, esp. without success.

Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing the intended crime. Under the Model *Penal Code*, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.
10. In *Benson Musumbi v Republic* [2019] eKLR, the court considered what needed to be proven regarding the elements of the offence of attempted defilement. It stated as follows:

The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration.
11. An attempt is typically characterised as an inchoate offence. According to Black’s Law Dictionary, a principal feature of this crime is that it can occur even if the substantive offence is not successfully consummated.
12. An offence of attempted defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
 - a. The age of the complainant;
 - b. The overt act committed; and
 - c. Positive identification of the assailant.

These are the ingredients the prosecution must prove against an accused person.
13. The complainant testified that she was 14 years old. Her mother, PW2, testified that she was born in January 2008. As of June 2022, she was 14 years and six months old. Though no certificate of birth was produced, her age was proven.



14. On the 14th of June 2022, at around 6 p.m., the complainant was sent to fetch some milk from her grandmother's house. By 6:45 p.m., she had not arrived. This was the testimony of her mother, PW2. This prompted her to begin searching for her. While searching, she testified that she heard her daughter's voice coming from the appellant's house. When the appellant saw them, he attempted to flee, but her brother restrained him. The complainant then left the appellant's house and ran away.
15. The complaint testified that he called her while she passed by the appellant's house. She went into his house. Upon entering, he held and carried her to the bedroom. He ordered her to stay there and went back to the sitting room. He returned with a condom. The appellant then pushed her to his bed and removed her pair of trousers and panties. She threatened to scream, but he warned her not to. He unzipped his trousers. He tried to penetrate her vagina but she resisted. When he heard people approaching his house, he told her to hide behind the door. She heard her mother's voice and went out quickly.
16. Francis Kung'u Wanjohi (PW3) was in the search party. When he saw them, the appellant wanted to run away, but he was restrained. The complainant was hiding behind a door.
17. Peter Obae Bigogo, the appellant, contended that his arrest was stage-managed. The complainant went to his compound at about 7:19 p.m. and informed him that her uncle and mother were at the gate and that the two wanted to beat him. Shortly thereafter, the girl's uncle pushed her inside his house while her mother raised an alarm. Curiously, this allegation was not presented to the witnesses. A suggestion was made to the complainant that she ran to the appellant's compound, calling out for help while being hotly pursued by her mother and uncle. However, she denied this. To the complainant's mother, the closest question to the defence was whether her brother (PW3) accompanied the complainant and whether he was armed. No question was posed to PW3 that was relevant to the defence that the appellant raised.
18. After analysing the evidence on record, I find that the prosecution proved its case against the appellant to the required standards.
19. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nelson v Republic* [1970] E.A. 599 as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* [1950], 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewcity* [1912] C.CA 28 T.LR 364.
20. Section 9(2) of the *Sexual Offences Act* provides:

A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
21. The appellant was sentenced to the minimum prescribed sentence. I have no reason to interfere with it. The appeal is dismissed for want of merit.

DELIVERED AND SIGNED AT NYANDARUA THIS 21ST DAY OF MAY 2025.

KIARIE WAWERU KIARIE

JUDGE

