



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 6396 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E035 OF 2024
AN ONGERI, J
MAY 16, 2025**

BETWEEN

GIFT KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. D. WANGECI
(SPM) in Wundanyi S.O Case no. E021 of 2022 delivered on 25th April 2024)*

JUDGMENT

1. The appellant was sentenced to 15 years imprisonment for the offence of attempted defilement of a minor contrary to Section 9(1) (2) of the SOA no. 3 of 2006.
2. The particulars of the charge were that on 10th October 2022 at 1000hours at Ronge location at Mwatate sub county within Taita Taveta county, the appellant attempted to defile H.W, a girl aged 15 years.
3. The appellant was also charged with an alternative count of committing an indecent act with a child c/s 11(1) of the SOA no. 3 of 2006 in that in the same particulars as in count 1 above, the appellant touched the breasts and buttocks of H. W. a girl aged 15 years.
4. The appellant pleaded not guilty to the charge and the prosecution called four witnesses.
5. The prosecution evidence in brief was that on the material day, the complainant was at home washing clothes when the appellant who is her cousin called her to his house.
6. The appellant asked her to sit and told her to communicate with his brother who was in Nairobi on phone.



7. The complainant told him she would not as it was her mother who had always been communicating with him.
8. The appellant stood up and locked the door and took a fimbo and tried to hit the complainant.
9. He then picked her and pushed her into his bedroom. He pushed her onto the bed and went outside. The complainant stood up but he returned and pushed her back onto the bed again. He removed her trousers to her knees. She was in her periods. He removed a condom from a bag that was hanging on the wall.
10. The complainant said the appellant went outside again and came back. The complainant heard her father calling her and she stood up, pulled up her trousers and pushed him away out.
11. The complainant said that later that evening, she told her mother what had happened. The matter was reported to Nyumba kumi and to the police at Msau police station.
12. The appellant said in his defence that he called the complainant to inquire from her why she had reported him to her brother. He called his brother but he could not reach him.
13. The appellant said the complainant's father arrived and called her and she left.
14. The following day her parents and the village elder asked him what he had done. The village elder called the chief and reported a case of attempted defilement. He was taken to Msau police station and subsequently charged.
15. The trial court found the appellant guilty as charged and sentenced him to 15 years imprisonment.
16. The appellant has appealed against both conviction and sentence on the following grounds:
 - i. That the Learned Trial Magistrate erred in both facts and law in failing to appreciate the fact that the charges as laid out were not proved to the required standards not proved as required in law.
 - ii. That, the Learned Trial Magistrate again erred in law and fact in failing to appreciate that the instant matter was materially contradicted and inconsistent hence insufficient to attain a conviction let alone sustain one.
 - iii. That, again, the Learned Trial Magistrate further erred in law and in fact, in not considering that the appellant's statement in defence was on point pragmatic, plausible and was not dislodged hence still stands and seek its reinstatement rendering an acquittal.
17. The parties filed written submissions as follows;
18. The appellant submitted that he seeks to overturn his conviction and 15-year sentence for attempted defilement, arguing the trial court erred in multiple respects.
19. He contends the charge sheet was defective, improperly drafted under the *Sexual Offences Act*, and should have been incest given the familial relationship.
20. Further, the Appellant submitted that the prosecution failed to prove penetration or attempt thereof, with the altered charge sheet suggesting fabrication.
21. That the evidence was riddled with inconsistencies - the alleged incident time conflicted between witnesses (10am vs 2pm), no eyewitnesses testified, and the complainant's conduct was implausible (failing to scream for help despite others being nearby).



22. Further, that critical witnesses were absent, including the complainant's mother (the alleged first informant), village elders, and the Nyumba Kumi official who purportedly investigated.
23. The Appellant further submitted that the medical evidence was inconclusive, showing no definitive signs of assault.
24. The appellant asserts this was a malicious prosecution stemming from a land dispute with the complainant's family, noting the clan elders were never involved despite the serious allegations.
25. He highlights the prosecution's failure to challenge his alibi defense or corroborate key elements of the offense.
26. Citing numerous authorities, he emphasizes the prosecution's burden to prove guilt beyond reasonable doubt, arguing the evidence fell short - relying on hearsay, containing material contradictions, and lacking proper evaluation of his defense.
27. The appellant urges the court to re-examine the evidence holistically, consider the apparent framing, and grant him the benefit of doubt as required by law.
28. Ultimately, he prays for the appeal to be allowed, his conviction quashed, and his immediate release from imprisonment.
29. The respondent's written submissions opposed the appellant's appeal, arguing that the trial court correctly convicted him based on credible and consistent evidence.
30. Further, that the appellant was charged with attempted defilement and an alternative charge of committing an indecent act with a minor.
31. That the prosecution proved its case beyond reasonable doubt, relying primarily on the complainant's clear and coherent testimony, which detailed how the appellant lured her into his house, locked the door, threatened her with a stick, pushed her onto his bed, and attempted to remove her clothes while retrieving a condom—all indicating an intent to defile.
32. The act was only interrupted when the complainant's father called out for her. The respondent asserts that the complainant's testimony, supported by medical evidence confirming her age (16 years), was consistent and credible, meeting the legal standard under Section 124 of the [Evidence Act](#).
33. The appellant's defence failed to provide a plausible explanation for his actions, and the trial magistrate's findings were sound, with no material contradictions or inconsistencies in the prosecution's case.
34. Citing relevant case law, the respondent argued that the appellate court should not overturn the lower court's findings unless they were plainly wrong, which they were not. Consequently, the respondent urges the court to dismiss the appeal and uphold the conviction.
35. This being a first Appeal, the duty of the first Appellate Court is to re-evaluate the evidence and the law presented before the trial court and to arrive at its own independent conclusions.
36. This is a crucial role that ensures a fair and just outcome for the parties involved in the appeal.
37. The Court of Appeal in *Okeno v. Republic* [1972] EA 32 clearly outlined this duty, stating that;

“ A first appellate court must itself weigh conflicting evidence and draw its own conclusions...
It is its duty to rehear the case on the record and to reconsider the materials before the trial



judge. The appellate court must then make its own findings of fact and law, bearing in mind however that it has not had the advantage of seeing and hearing the witnesses."

38. This principle has been consistently upheld in numerous subsequent Kenyan cases. For instance, in *Selle & Another v. Associated Motor Boat Company Ltd & Others* [1968] EA 123, the court reiterated that;

"... the Court on first Appeal is not bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the evidence itself on the face of it bears no sufficient weight to support the findings."

39. Therefore, when faced with a first appeal, the appellate court undertakes a comprehensive review of the trial court's decision, scrutinizing the evidence, the legal principles applied, and the overall fairness of the judgment. It is not simply a review of errors of law but a complete reconsideration of the case.

40. The issues for determination in this appeal are as follows;

- i. Whether the appellant committed the offence of attempted defilement.
- ii. Whether the appellant was positively identified
- iii. Whether the age of the complainant was proved.
- iv. Whether the appeal should be allowed.

41. I have carefully considered the appeal, the evidence on record adduced before the trial court, and the submissions by both parties, this court makes the following determination;

42. The conviction and sentence of the appellant cannot stand. While the gravity of the alleged offence is not lost on this court, the prosecution failed to meet the requisite standard of proof beyond reasonable doubt.

43. The complainant's testimony, while detailed, contained material inconsistencies regarding the time of the incident and lacked corroboration from key witnesses who should have testified - particularly her mother, the village elders, and the Nyumba Kumi official.

44. The medical evidence was inconclusive, showing no signs of assault, and the appellant's defence raised plausible questions about potential ulterior motives given the alleged land dispute between the families.

45. The trial court erred in relying solely on the complainant's uncorroborated testimony under Section 124 of the *Evidence Act* without properly addressing the inconsistencies and gaps in the prosecution's case.

46. The appellant's defence that this was a fabricated case arising from a family dispute was not adequately disproven.

47. Furthermore, the charge of attempted defilement was not sufficiently established, as the evidence did not conclusively demonstrate that the appellant took substantial steps toward penetration with the requisite intent.

48. There must be an overt act that goes beyond mere preparation and demonstrates a substantial step towards committing defilement.



49. In criminal cases, the benefit of doubt must always accrue to the accused. Here, the contradictions in timing, the absence of material witnesses, the lack of physical evidence, and the existence of possible alternative motives create sufficient doubt about the appellant's guilt.

50. I therefore allow the appeal and quash the conviction and set aside the 15-year sentence.

51. The appellant is to be released from custody unless otherwise lawfully held for any other reason.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI THIS 16TH DAY OF MAY, 2025.

.....

A. N. ONGERI

JUDGE

In the presence of:

Court Assistants: Maina/Millicent

..... for the Appellant

..... for the Respondent

