Halake v Republic (Criminal Appeal E038 of 2024)
[2025] KEHC 9005 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9005 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E038 OF 2024

FR OLEL, J

JUNE 23, 2025

BETWEEN

SHUNA WARIO HALAKE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal arising from the conviction and sentence dated 24.10.2024 and delivered by Hon S.K. Arome (PM) in Marsabit SPMCR (SO) No E002 of 2024)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of attempted defilement contrary to provisions of section 9 (1), (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 15th day of January 2024, at North Horr sub county within Marsabit county intentionally attempted to cause his penis to penetrate the vagina of W.H a child aged 15 years old.

2. In the alternative, he was charged with the offence of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on the 15th day of January 2024, at North Horr sub county within Marsabit county, intentionally touched the breasts of W.H., a child aged 15 years.

3. The Appellant took plea and denied the charges faced. The prosecution called six (6) witnesses to prove their case, and on being placed on his defence, the Appellant gave sworn evidence. The trial magistrate considered the evidence adduced and found the Appellant not guilty of the offence of attempted defilement, but convicted him of the offence of indecently touching the complainant's breasts.After mitigation, the trial court proceeded to convict him and sentenced him to serve ten (10) years' imprisonment.

B. Evidence At Trial

4. PW1 W.G.B. underwent voire dire examination, and the court determined that she was fit to give sworn evidence. She testified and stated that she resided with her parents within[particulars withheld] and was 15 years old. On 15.01.2024, she was walking from [particulars withheld] watering point enroute to their home, when the accused accosted and held her from behind. He proceeded to pulled her to the ground, ripped off the dhira dress and attempted to rape her. She screamed for help and luckily, Teso Dambala and Gumato Ramata, who were in the vicinity, came to assist her in the nick of time before the appellant managed to raped her.

5. It was her further evidence that they found the appellant on lying on top of her and assisted in having him arrested before they were escorted to North Horr police station. she was later taken to the hospital, where she was treated and given a P3 and Post rape care forms. PW1 confirmed that she knew the accused and would normally see him within the manyatta offloading goods from vehicles.

6. Under cross-examination, PW1 confirmed that the incident occurred at [particulars withheld], where she had gone to drink water. She had found the appellant bathing and on sighting her, he followed her, held her from behind, pushed her to the ground, and proceeded to lift her dhira dress in an attempt to defile her. The incident had occurred near some houses, and due to her screams, a lady came to assist her before the appellant had succeeded in his nefarious scheme.

7. PW2 SG testified that he was a resident at [particulars withheld] and confirmed that PW1 was his daughter. On 15.01.2024, she had been assigned to go out and graze their goats in the grazing fields. Enroute back, she met the accused at Abdul shell, wherefrom he had followed her from behind, had pulled her to down on the ground and attempted to rape her. He confirmed that he did not witness this incident but had been informed of what transpired by Teso's daughter and Gumato Ramadha, who witnessed the incident and called the police.

8. PW3 Teso Dabala stated that she was a resident of North Horr sub-county and on 15.01.2024 had been sent to the shop to buy soap at about 11.00 am. Enroute back, she found both the appellant and PW1 naked under a palm tree and PW1 was screaming and asking the appellant to leave her alone. When the appellant saw her, he stood up and ran away. She went and reported this incident to Mama Ware, who accompanied her to the scene, together with other members of the public. This incident was reported to the police, who also came and rearrested the Appellant. Under cross examination PW3 confirmed that she witnessed the incident and saw the Appellant lying on top of PW1.

9. PW4 Gumato Hassan stated that she was a nutritionist working at North Horr Health centre. On 15.01.2024 at about 12.00 noon, she was at home, when she heard noise outside her house. She stepped out and saw her neighbour, the Appellant holding PW1, who was resisting and trying to wrap herself using Gutina cloth. She intervened and requested PW1 to call her parents and she also called the police, both of whom arrived shortly thereafter.

10. PW4 confirmed that she knew the accused as he was a watchman working at the shell petrol station next to her residence and identified him in court as the assailant. She further confirmed that the accused was re-arrested by the police and they all proceeded to North Horr police station, where they recorded their statements.

11. Under cross examination, PW4 confirmed that PW3 had called her neighbour Haro and not her, and that the incident had occurred next to her house. Further she had found the minor wrapping herself using Gutina cloth behind her kitchen, while the Appellant did not have his shirt on him.

12. PW5 Salesa Guracha Molu, stated that she was a clinical officer working at North Horr sub county hospital and was on duty on 15.01.2024, when PW1 was brought to the hospital by the police seeking to have her examined and was given a history of attempted defilement. She carried out a general examination and laboratory tests all of which gave negative results for HIV, Urine analysis and pregnancy test, though the minor had UTI. Further analysis of high vaginal swab did not reveal the presence of spermatozoa, she filled in both the P3 form and Post rape care form and produced the same in court as exhibit 2 & 3. In cross examination she confirmed that there was no penetration.

13. PW6 PC Meshack Mawele testified that on 15.01.2024 at about noon, he was on duty at North Horr police station when he received a call from PW4, who informed him that there was a man who had tried to defile a minor and she requested for his assistance to help in apprehending him. He rushed to the scene accompanied by PC Nyerere and they found that the appellant had been arrested by members of the public, while the victim was also standing by the side.

14. He gathered that the victim was from [particulars withheld] watering point, where she had taken their goats and sheep to drink water, and enroute back had stopped at shell petrol station to drink water. The accused, who was a watchman at the said petrol station, had followed her up to the point where there were some tress and proceed to grab her, pushed her to the ground and tried to defile her.

15. Luckily for the minor, other person passing by witnessed the incident and had rescued her. The appellant had also been arrested by members of the public and they proceeded to rearrested him and escorted both the victim and the accused to North Horr police station. They later escorted PW1 to North Horr health centre where she was examined and treated. Under cross examination PW6 confirmed that they found that the appellant had already been arrested by members of the public and re arrested him.

16. In defence, the Appellant denied defiling PW1 and further pointed out that his position was confirmed by the evidence of PW5, who did not find any evidence of defilement. He further confirmed that he knew PW1 as they came from the same Manyatta, but insisted that he had been framed and had not done any wrong.

17. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the alternative charge of committing an indecent act with a child and, after mitigation, proceeded to sentence the Appellant to serve ten (10) years in prison.

C. The Appeal

18. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that;

    a. That the learned trial magistrate erred in law and fact by failing to consider my defence.

    b. That the sentence melted by the lower court was harsh and excessive.

    c. That the learned trial magistrate erred in the matter of law and fact by failing to consider my mitigation.

    d. That the learned trial magistrate erred in law and fact that the time spent in remand was not taken into account in the sentence as required under section 333(2) of the Cpc .

    e. That the learned trial magistrate erred in both law and fact when he failed to note that the investigators of this case failed to investigate the case to the required standard by the law.

19. The Appellant prayed that his conviction and sentence be quashed and he be set free.

D. Analysis & Detrmination

20. The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno versus Republic (1072) EA 32, Pandya versus Republic (1957) EA 336) &Shantital M Ruwala versus Republic (1957) EA 570, where the court of appeal set out the duties of the first appellant court.

21. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant and the respondent Counsel and find that the following issues arise for determination;

    a. Whether the ingredients of the offence of committing an indecent Act with a child were proved and/or in the alternative, whether the trial court erred in its evaluation of the evidence and should have convicted the Appellant of the offence of attempted defilement.

    b. Whether the sentence passed should be interfered with.

22. In criminal cases, the burden of proof lies with the prosecution and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, thus consequently have established their case and deserve to have judgment given in their favour. See Miller vs. Ministry of Pensions (1947) 2 All ER, 372 , Republic Vs Edward Kirui (2014) eKLR, and Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688

23. The offence of attempted defilement is premised under section 9 of the *Sexual Offences Act* as follows:

9. Attempted defilement

    (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

    (2) 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.

    (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.

19. The term attempt is defined by section 388 of the *Penal Code* as follows: -

    1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

    2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

    3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

20. The locus classicus on incomplete offences (inchoate crimes) is guided by the case of Moses Kabue Karuoya vs. Republic [2016] eKLR, where Mativo J stated as follows;

> "In the case of Benard K. Chege vs Republic, this court had the occasion to address its mind and define in detail the ingredients of incomplete offences, also described as inchoate offences. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An inchoate crime offense requires that the accused have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.
>
> Strictly inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts. Every inchoate crime or offense must have the mens rea of intent or recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct". The dividing line between legal and illegal conduct is whether there is a "substantial step" towards committing a specific crime. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intentions by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence. The essential ingredients of an attempt to commit an offence have been laid down in the following words: -
>
> > "In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury and the moral guilt of the offender is the same as if he had succeeded."
> >
> > Thus, for there to be an attempt to commit an offence by a person, that person must:-
> >
> > a. Intend to commit the offence;
> >
> > b. Begin to put his intention to commit the offence into execution by means which are adopted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;
> >
> > c. Do some overt act which manifests his intentions, that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

But in fact, he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond doubt.

The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of Williams, Ex Parte The Minister for Justice and A-G. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency, or insufficient means on the part of the accused person. In fact, that the person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from the criminal responsibility for the attempt which he made before desisting....."

21. In the same case, the learned Judge further stated that;

> " .... The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case Williams, Ex Parte The Minister for Justice and A-G. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, that the person, having done something which amounts to an attempt then voluntarily desists from continuing the attempt, does not relief him from the criminal responsibility for the attempt which he made before desisting....."

22. Thus the prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; they 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 where there was failed defilement, because there was no penetration.

i. Age

23. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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." (emphasis added)

24. PW1 stated that she was not school going and resided with her parents in Mayatta Sesi, with North Horr constituency. She stated that she was not very sure of her age but she estimated that she was 15

years old. PW2, her father, PW4, PW5 and PW6 all described PW1 as a minor. Based on the finding in the case Edwin Nyambogo Onsongo (supra) I do find that though the prosecution did not produce PW1's birth certificate, she was intelligent enough to estimate her age and this was corroborated by the evidence of PW2, PW4, PW5 and PW6 all of whom referred to her as a minor.

iii. Identification.

24. On identification, PW1 knew the appellant well as a person residing within their manyatta and also identified him in court. PW3 & PW4 also found the Appellant in the act of attempting to undress PW1 and when he saw them, he took off, but was arrested shortly thereafter by members of the public. The Appellant in defence also confirmed this fact and stated that he had no personal difference with PW1. This therefore was a case of recognition as the victim knew the appellant by name and the incidence of was confirmed to have occurred in broad day light at about mid-day.

iii. Whether the evidence disclosed proved the offence of attempted defilement and/or in the alternative if the offence of indecent act with a child was proved.

25. The evidence of PW1, PW3 and PW4 outrightly proved that the Appellant indeed attacked PW1 from behind in broad day light, fell her down and forcefully removed her dress/dhira. She screamed for help and luckily for her both PW3 and PW4, who were within the vicinity came to her rescue forcing the Appellant to run away.

26. The direct evidence adduced by the prosecution witnesses above mentioned, did prove that the Appellant, without doubt began to carry out his intention to commit the offence in a way suitable to show what he intended to achieve through his overt act which manifested in his intentions. His intention was to rape/defile PW1 and without doubt the prosecution evidence adduced was sufficient to prove the offence of attempted defilement.

28. The trial magistrate therefore did err in his evaluation of the evidence adduced and unfortunately arrived at the wrong decision of convicting the Appellant of the offence of committing an indecent act with a child instead of the main count of attempted defilement as the appellant conceived the idea/ plan to commit the offence and made definite steps to effectuate his intention. Further PW1 did not state that the Appellant touched her breast and no conviction can therefore be sustained on that basis.

29. The question then that arises is whether the Appellants Appeal should succeed and/or if this court had power under Section 354 (3), (a), (ii) of the Criminal procedure code to alter the findings of the trial Magistrate and enter a conviction for attempted defilement as proposed by the prosecution.

30. Section 354 of the *Criminal Procedure Code* provides that:

> Powers of the High Court
>
> (1) At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal, and the respondent or his advocate may then address the court.
>
> (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.
>
> (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
>
> (a) In an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or with or

iii. without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

31. This provision of the criminal procedure code expressly allows the Appellate court to alter the finding of the trial court. I do therefore set aside the Appellants' conviction of the offence of committing an indecent Act with a child contrary to section 11(1) of the *sexual Offences Act*, No 3 of 2006 and do convict him of the offence of attempting to defile PW1 (W.G) contrary to provision of section 9(1), (2) of the sexual offence Act, 2006.

(iii) SENTENCING

32. The principles guiding interference with sentencing by the appellate court were properly set out in S Vrs Malgas (1) SACR 469(SCA) at para 12, where it was held that;

> “ A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court.........however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.

33. Similarly, in Mokela Vs The State (135/11)(2011) ZASCA 166, the Supreme Court of South Africa held that;

> “ it is well established that sentencing remains pre-eminently within the discretion of the sentencing court. The salutary principle is that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by the sentencing court. In my view, this includes the terms and conditions imposed by the sentencing court on how or when the sentence is to be served.”

34. As regards the sentence, the Appellant was charged with defilement contrary to sections 9(1) and 9(2) of the *sexual offences Act* No. 3 of 2006 which expressly provides that a person found guilty of the offence of attempted defilement is liable to be sentence to a minimum sentence of ten (10) years.

35. Be that as it may, the Appellant had a legitimate expectation that during trial he was to be subject to equal treatment before the law and would be accorded a fair hearing, which included his right to have all relevant provisions of the law applied favourably where the circumstances allow. See Ahmad Abolfathi Mohammed & Another Vs Republic (2018) Eklr & Bethwel Wilson Kibor Vs Republic (2009) eKLR

36. The trial magistrate erred in law and fact by failing to call for a pre-sentence report before conviction as mandated under Paragraph 22.13 of the sentencing Guidelines, which provides that;

> “To pass a just sentence, it is pertinent to receive and consider relevant information. The court should as a matter of course, request for pre-sentence report where a person is of a felony as well as in case where the court is considering a non-custodial sentence……. Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations.”

37. By virtue of provisions of Article 27(1) of *the Constitution* of Kenya 2010, the appellant has a legitimate expectation to be treated equally before the law and have equal protection and benefit of the law. Sentencing constitutes part of the trial process, and indeed, where a pertinent process is not undertaken which could favour the appellant, it would constitute an affront to provisions of Article 50(2), (p) of *the Constitution* of Kenya 2010 if the same was not applied.

38. The Appellant also expressly brought it to the attention of the trial court that he had served nine (9) months in custody and sought to have the said period deducted from his sentence, which plea was not taken into consideration by the trial court during sentencing. This too was an error as the Appellant was entitled to have the same considered pursuant to Section 333(2) of the *Criminal Procedure Code*.

Disposition

39. The upshot, having considered the evidence adduced at trial and submissions made, I do find that the Appeal on conviction fails.

40. The probation officer -Marsabit county is directed to file a pre-sentence report within the next 21 days from the date of this Judgement for consideration by this court before the final findings on sentence are made.

41. It is so ordered

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 23RD DAY OF, JUNE 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 23rd Day of JUNE, 2025.

In the presence of:-

………………………………………Appellant

…………………………………For O.D.P.P

…………………………………Court Assistant