



**Bulinda v Republic (Criminal Appeal E004 of 2024)  
[2025] KEHC 10193 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E004 OF 2024**

**S MBUNGI, J**

**JULY 14, 2025**

**BETWEEN**

**JULIOUS BULINDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and Sentence in Kakamega CMCCR  
(SO) NO. E122 OF 2021 By Hon. Angeline Odawo -Principal Magistrate)*

**JUDGMENT**

1. The appellant was charged with attempted defilement contrary to section 9(1) as read with section 9(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 3rd day of August 2021 at around 1400 hours, at [Particulars Withheld], Shidodo Sub-County within Kakamega County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of YO a child aged 5 years old.
2. In the alternative the Appellant 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. On the 3rd day of August 2021 at around 1400 hours at [Particulars Withheld] Shidodo Sub-location Khayega location Kakamega East Sub-County within Kakamega County intentionally touched the vagina of one YO a child aged 5 years old with his penis.
3. During trial the prosecution called three witnesses who testified in support of their case. The appellant was placed on his defence he gave sworn evidence and called 1 witness. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of attempted defilement and proceeded to sentence him to serve life imprisonment.



### **Facts at Trial.**

4. PW1 YO told the court in her evidence that the appellant lived with her and her mother, though she did not know his name. She testified how on the material day, the appellant took off her clothes, took off his clothes and lay on top of her. That she screamed for help and her mother came and rescued her.
5. On cross examination, she stated that she did not know the name of her father and where her mother was at the time she gave evidence. She also reiterated that she sued to live the appellant and her mother in the same house.
6. PW2 was Christine Amatsi testified to the court that she was the clinical officer who examined the complainant and filled the Post Rape Care form, she found that on examination there was an attempt to defile the minor and produced the PRC form, Laboratory Request form and payment receipts as Pexhibit 1, Pexhibit 2 and Pexhibit 3 to the court.
7. PW3 Syrene Adongo Police Constable No. xxx who was the investigating officer , She testified how she investigated the case, she produced age assessment report as exhibit 3.

### **Defence Case**

8. The Appellant elected to give sworn evidence, he denied committing the offence he dismissed the case as a frameup for he has never done anything serious like that .
9. His witness John Lihaha told the court that he knew the appellant for a long time, that he loves kids and that he was framed.
10. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on the following grounds: -
  - i. That the learned trial magistrate erred in law and by holding that the Respondent had proved their case beyond reasonable doubt against the appellant.
  - ii. That the learned magistrate erred both in law and fact by rejecting the evidence offered by the Appellant against the Respondent's case.
  - iii. That the learned trial magistrate erred in both law and fact by awarding the excessive sentence to the appellant.
  - iv. That the learned trial magistrate erred in both law and fact by wrongly analyzing the evidence before herself and hence arrived at a wrong finding.
11. The appellant prayed that the appeal be allowed, and the judgment of the subordinate court be set aside.
12. The merits of this appeal were to be canvassed by way of written submissions but at the time of writing the judgment no party had filed.

### **Analysis and Determination.**

13. This being first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate



court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

14. I have looked at the grounds of appeal, the lower court proceedings and the trial court’s judgment.
15. I find the following broad issues for determination.
  - I. Whether the prosecution proved the case beyond reasonable doubt.
  - II. Whether the defence of the appellant was considered.
  - III. Whether the sentence meted by the trial court was commensurate to the offence convicted of.

**Issue 1: Whether the prosecution proved the case beyond reasonable doubt.**

16. The Appellant was charged and convicted with the offence of attempted defilement contrary to Section 9 (1) as read with Section 9(2) of the [Sexual Offences Act](#) which provides:
  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
17. The prosecution was supposed to prove beyond reasonable doubt the following elements
  - i. Age of the complainant
  - ii. Proof of attempted penetration .
  - iii. Positive identification of the assailant.

**Age of Complainant**

18. The essence of proving the ingredient of age was stated in the case of Benard Kiptoo [v Republic \(Criminal Appeal 1 of 2020\)](#) [2021] KEHC 1125 (KLR) where the court stated:

“Age of the victim in sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the evidence to the imposed will be dependent on the age of the victim. See also the case of Hadson Ali Mwachongo Vs R by the court of Appeal in Mombasa, where the court stated:

“The importance of proving the age of a victim of defilement under the [Sexual Offences Act](#) by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”

19. The Court of Appeal in Edwin Nyambogo Onsongo Vs. Republic (2016) EKLK 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.

20. The ingredient of age was proved by the production of age assessment report dated 10.8.2021 which was produced as Exhibit No. 4. The complainant was aged 5 years at the time of examination. This piece of evidence was not challenged at all. Medical assessment of age is one of the modes accepted to prove the particular age of a person. In the case of *Joseph Kieti Vs Republic (2014) eKLR*, the court state "in defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and commons sense..."

### **Proof of Attempted penetration**

21. On the proof of penetration, penetration is defined under Section 2 of the [\*Sexual Offences Act\*](#) as follows:

"The partial or complete insertion of the genital organs of a person into the genital organs of another person."

22. The act of penetration can be proved by the testimony of the victim or medical evidence or any other evidence.

23. In the case of *Andrew Runya Munga Vs Rep (2021) EKLR* the court held that:

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and collaborated by the medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration..."

24. The act of attempted penetration is not defined under [\*sexual offences act\*](#), so we take refuge under section 388 of the criminal procedure code which provides:-

- (1). When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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 fulfillment 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.

25. From the above definition the prosecution is obliged to prove the acts /steps the appellant did towards fulfilment of his intention to penetrate the vagina of the complainant.



26. The complainant told the court the appellant removed his clothes , removed her clothes and laid on top of her.
27. The medical evidence showed that on examination the complainant genital organ labias were swollen and red, there was inflammation at the fourchette area and swelling of the clitoris. This shows that there was an attempt to penetrate into her genital organ.
28. On the issue on whether it was the appellant who attempted to penetrate the vagina of the complainant, I say it is him for she told the court she used to live in the same house with the appellant and her mother. The offence was committed during day time and further the girl aged 5 years is too naive to think of framing anyone.
29. I note that her mother who ran to rescue her after she screamed never testified, that not withstanding i note the trial court believed the testimony of the complainant and correctly relied on section 124 of the *evidence act* which provides:-“.....Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.
30. So in a nutshell I find that the prosecution adduced evidence which proved the case beyond reasonable doubts , the trial court considered the evidence adduced by the prosecution and also the defence, in page 4 of the judgement the learned trial magistrate stated “ the defence of the accused does not puncture any doubt into the prosecution evidence that is very clear , corroborative and consistent .....” contrary to the appellants assertion that his defence was not considered.
31. From the foregoing, I find the conviction was safely entered against the accused person and I do upheld the conviction. The appellant appeal on this limb is dismissed for want of merit.
32. On sentencing, the appellant was sentenced to serve life imprisonment. *Sexual offences act* section 9(2) states:-(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.
33. The learned trial magistrate in sentencing the appellant to life imprisonment said she took into account the appellants mitigation and age of the victim.
34. The law allowed the trial magistrate to impose any imprisonment term of not less than 10 years, meaning that a term of life imprisonment could be lawfully imposed.
35. Sentencing is a discretion of the court of law, but the court should look at the facts and the circumstances in their entirety to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharashtra at paragraphs 70 – 71, where the court held;
 

“Sentencing is an important task in the matter of crime. One of the prime objectives of criminal law is the imposition of appropriate, adequate, and proportionate sentences commensurate with the nature and gravity of the crime and how the crime is committed.
36. Further, this Court is guided by the principles set out in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR, where it was stated as follows:
 

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, a sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with



a sentence unless that sentence is manifestly excessive in the circumstances of the case, or the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless one of the matters already stated is shown to exist.”

37. The objectives of sentencing should be considered in totality. (See the judiciary guidelines on sentencing.
38. The supreme court has recently pronounced that all the sentences stipulated under *sexual offences act* are lawful.
39. In Petition No E018 of 2023 Republic v Joshua Gichuki Mwangi wherein the court faulted the Court of Appeal’s decision to reduce the sentence meted out on the appellant from 20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act. The Supreme Court noted that:

“The reasoning behind the court’s decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence, which was not the case in the present matter.”
40. The trial court, in my view, exercised its judicial discretion lawfully, I note the victim was aged 5 years old and the appellant was said to be suffering from HIV infection and obviously he wanted to pass it to the innocent child. To me it was necessary to remove him completely from the society to safeguard other vulnerable persons from the appellant inhuman tendencies, I find no reason to interfere with the sentence passed by the trial magistrate. Therefore the judgment both on conviction and sentence is upheld. The appeal is dismissed for want of merit.
41. Right of appeal 14 days

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14<sup>TH</sup> DAY OF JULY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Appellant – present

Court prosecutor - Ms. Osoro present

Court Assistant – Elizabeth Angong’a

