



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaara v Republic (Criminal Appeal E004 of 2022)  
[2025] KEHC 12806 (KLR) (3 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12806 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E004 OF 2022  
DO CHEPKWONY, J  
SEPTEMBER 3, 2025**

**BETWEEN**

**FRANCIS KAMAU KAARA ..... APPELLANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Senior Principle Magistrate's  
Court at Gatundu (Hon. Hosea M. Ng'ang'a, Principal Magistrate)  
delivered on 13th January, 2022 in Sexual Offences Case No.E012 of 2021)*

**JUDGMENT**

1. The Appellant, Francis Kamau Kaara, was charged, tried and 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. Following his conviction, the trial Court sentenced him to serve ten (10) years imprisonment, which is the minimum prescribed sentence under the Act for this offence.
2. The particulars of offence were that:-

“On 23<sup>rd</sup> February, 2021 at [Particulars Withheld] village located within Gatundu South Sub-county in Kiambu County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of C.W.M a child aged 5 years old”.
3. Dissatisfied with both the conviction and sentence, the Appellant filed Memorandum of Appeal dated 26<sup>th</sup> January, 2022 advancing several Grounds of Appeal which are summarized as follows:-
  - a. That the Learned Magistrate erred in law and in facts in finding that the Appellant was guilty of the offence of attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offence Act No. 3 of 2006.



- b. That the Learned Magistrate erred in law and in facts when he proceeded to convict the accused person of the offence of Attempted Defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offence Act No. 3 of 2006 on the strength of an uncorroborated evidence of the complainant who was a minor.
  - c. That the Learned Magistrate erred in law and in facts when he relied on the evidence of the investigating officer who did not even visit the alleged scene of crime to ascertain whether the colour of dirt on the clothes the complainant wore were the same that on the scene of crime and hence arrived at the wrong finding.
  - d. That the Learned Magistrate erred in law and in facts when he relied on the evidence of PW2 the complainant's mother where none of the children said to have been playing with the complainant said to have seen the accused person go with the complainant including her brother who according to the complainant was present playing with her on the material day and thus arrived at the wrong finding.
4. As this is a first appeal, this Court has the duty to re-evaluate, re-analyse and re-assess the evidence that was presented before the trial Court to determine whether the conviction and sentence were well-founded. This duty is grounded on the principle that the appellate court must independently consider the facts and law while giving due regard to the trial Court's advantage of observing the demeanour and credibility of witnesses as they testified. The guiding authority in this regard is the case of *Okeno – v- R.* [1972]E.A. 32, in which the Court held that the appellate court ought to carefully scrutinize the entirety of the trial Court's record to ensure that the trial Court properly directed itself on the evidence and law in the case that was before it.
5. In the present case, this Court has read through the record vis-à-vis the Grounds of Appeal set out in the Memorandum of Appeal and finds for consideration being:-
  - a. Whether the evidence tendered by the prosecution proved the elements of the offence of attempted defilement beyond a reasonable doubt.
  - b. Whether the trial Court properly addressed and applied the relevant legal principles, including the credibility and corroboration of the evidence of a minor.
  - c. whether the Appellant's defence was adequately considered; and,
  - d. whether the sentence imposed was lawful and proportionate in the circumstances of the case.
6. The prosecution presented five witnesses to testify in support of its case against the Appellant. These are: The minor complainant, referred to C. W. )PW1), the Complainant's mother, MG (PW2), the Medical Officer who examined the complainant, Dr. Wangui Kamau (PW3), the Arresting Officer, No.242527 PC Samson Mbugua (PW4), and the Investigating Officer, No.106816 PC Fredrick Kabuyesi (PW5).
7. PW1, the minor complainant, testified after undergoing a voir dire examination to determine her ability to provide reliable testimony. She stated that she was a pupil in PP1 at [Particulars Withheld] Primary School and lived with her parents. PW1 identified the Appellant, whom she referred to as "Kamacha" via a video link during their testimony. PW1 narrated that on the day of the incident, the Appellant, who resided in the Muhora area, approached and requested her to escort him. She agreed



- and the Appellant led her to a nearby field, where the Appellant removed her stockings and panties, lowered his trousers, and attempted to push what PW1 described as his “thing for urinating” into her private parts. PW1 states that she felt pain during the attempt, after which the Appellant stopped and left her.
8. PW1 further testified that she put on her clothes and went home, where she informed her mother PW2, about what had happened. PW2 subsequently took her to a hospital and later to the Police Station. Although PW1 could not recall the name of the hospital or the Police Station, she confidently identified the Appellant as the person who had attempted to defile her, pointing him out during her testimony via the video link.
  9. During cross-examination, PW1 stated that she knew the Appellant because she had seen him before in the Muhora area. She reiterated her account of the events, emphasizing that the Appellant took her to the field and did bad things to her while they were alone. However, she admitted that she could not recall the exact date of the incident. PW1 also mentioned that her clothes were dirty following the ordeal.
  10. PW2, the complainant’s mother, testified that she lived with her husband and their three children who include PW1. She confirmed that PW1 was five years old at the time of the incident, as evidenced by her Birth Certificate (No.065XXXX05). PW2 stated that on the evening of 23<sup>rd</sup> February, 2021, PW1 returned home at around 8.00pm and she noticed that her clothes were dirty. When PW2 inquired on what had happened. PW1 was initially reluctant to speak. However, after some encouragement, PW1 disclosed that the Appellant had taken her to a field, removed her clothes and defiled her. She further told her that she had asked the Appellant to stop because she was in pain and he left her.
  11. PW2 testified that she informed PW1’s grandmother about the incident before taking PW1 to Gatundu Hospital later that night. She also stated that she reported the matter to the Police Station. PW2 produced the following documents as evidence. A Treatment Card, a P3 Form, a PRC Form.
  12. During cross-examination, PW2 reiterated that she did not witness the incident herself and that it was her daughter PW1, who narrated the events to her. PW2 further stated that PW1 had been playing with other children at the time of the incident, but she did not know the identities of these children. Additionally, PW2 confirmed that the doctors conducted medical tests on PW1 but did not find any evidence of physical injuries.
  13. PW3, Dr. Wangui Kamau, testified that she had examined PW1 following allegations of sexual assault by a person known to her. According to her findings, PW1 was in fair physical condition, and although her clothes were not torn, there were dirt on her hair and her stockings. PW3 reported that there were no visible injuries to PW1’s private parts, her hymen was intact, and there was no evidence of penetration.
  14. PW3 explained that the P3 Form, which was filled three months after the incident, corroborated the findings recorded in the PRC Form. She clarified that while no physical injuries were observed on the victim, sexual harassment could still occur without penetration. PW3 added that an attempted sexual assault, especially in a young child like PW1, could cause pain without resulting in injuries due to the child’s development stage. She noted that the absence of injuries did not negate the possibility of an attempt to defile.
  15. During cross examination, PW3 confirmed that the medial examination revealed no physical injuries to PW1’s private parts. However, she emphasized that the findings were consistent with an attempted defilement. She highlighted the presence of torn stockings, dirt on PW1’s head, and complaints of pain in her private parts as positive indicators of an attempted sexual assault.



16. PW4, No.242527 PC Samson Mbugua, testified that he was the Arresting Officer in this case having received the Appellant who had been apprehended by an irate villager, who in the company of the area chief, and handed over to him. PW4 re-arrested the Appellant and placed him in custody and ensured his proper transfer to the relevant authorities for further investigations.
17. PW5, No.106816 PC Fredrick Kabuyesi, testified that he was assigned to investigate the matter. He stated that he obtained the initial details from the Occurrence Book (OB) and confirmed that the Appellant was already in custody when he took over the case. PW5 explained that he recorded PW1's statement, in which she narrated the events of the day, and subsequently, he charged the Appellant with the offence of attempted defilement. Additionally, PW5 produced PW1's Birth Certificate as prosecution Exhibit 1 (PEXB1) to confirm her age.
18. During cross examination, PW5 confirmed that PW1 mentioned she had been paying with other children before the incident occurred. However, PW5 admitted that he did not obtain statements from any of these children or from the villagers who apprehended the Appellant. PW5 further stated that there was no evidence to suggest that PW1's mother owed the Appellant money or that the charges were fabricated. He emphasized that his investigations relied on the consistent testimonies of PW1 and other witnesses, including the medical findings provided by PW3.
19. Upon being found to have a case to answer, the Appellant was placed on defence and he elected to give unsworn evidence. He denied the charges, alleging that the case against him was fabricated. He claimed that on the night of his arrest, he had gone to see Mama W to collect the money she owed him. The Appellant stated that later that evening, two men identified as Baba M (related to PW1) and N, called him outside. When he stepped out, he encountered a crowd approximately 300 meters from his home. He alleged that the crowd began beating him with sticks while accusing him of defilement. The Appellant stated that he was eventually rescued and handed over to the police. He denied any involvement in the alleged offence and maintained that he was unaware of the charges against him until his arrest.

### **Analysis and Determination**

20. This Court has carefully reviewed the entire record of proceedings, the Memorandum of Appeal, the submissions of the parties and the applicable law. It is incumbent upon this Court to consider the arising issues in determining whether the evidence presented by the prosecution met the threshold required to sustain a conviction. Thus, the central issue for determination is whether the prosecution proved the elements of the offence of attempted defilement beyond a reasonable doubt and if so, whether the conviction and sentencing by the trial Court was legally correct.
21. In criminal cases, the burden of proof rests solely on the prosecution, and the standard of proof required is that of beyond reasonable doubt. Additionally, the prosecution must prove all the essential ingredients of the offence one is charged with as defined in the relevant statute.
22. For the offence of attempted defilement under Section 9(1) of the *Sexual Offences Act* No.3 of 2006, the prosecution must establish the following elements beyond reasonable doubt:-
  - a. The complainant was a minor as defined under the Act.
  - b. There was an act or attempt to penetrate the complainant's private parts.
  - c. The accused was positively identified as the perpetrator of the offence.



23. To consider if the above elements were established to the required standard of proof, the Court now proceeds to evaluate the evidence that was adduced by the prosecution and accused during trial.
24. On the age of the complainant, (PW1, also referred to as victim), Section 2 of the [Sexual Offences Act](#), defines a ‘child’ as anyone below the age of Eighteen (18 years).
25. The age of the complainant is a critical element in cases involving sexual offences against children, as emphasized in [Hudson Ali Mwachongo – v- Republic](#) [2016]eKLR, where the Court of Appeal underscored that the age of the victim must be conclusively proven to determine whether the complainant falls within the ambit of the Act.
26. In this case, the prosecution adduced evidence to show that PW1, the complainant was five (5) years old at the time of the alleged offence through PW2, the complainant’s mother who testified and produced a Birth Certificate (PExhibit 1) to confirm the victim’s age is five (5) years. It is trite, that production of a Birth Certificate provides conclusive proof that PW1 was a minor, hence the prosecution sufficiently proved this element of the offence.

### **Attempt to Penetrate**

27. On the issue of proving an attempt to penetrate, it is worth noting that the offence of ‘attempted defilement’ is defined under Section 9(1) of the [Sexual Offences Act](#) as follows:-

“9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement”.
28. Additionally, Section 388 of the [Penal Code](#) defines an ‘attempt’ as follows:-

“An act done with intent to commit an offence, forming part of a series of acts which would constitute its actual commission if it were not interrupted”.
29. For the prosecution to prove an attempt to defile, there must be evidence demonstrating an overt act aimed at causing penetration of the complainant’s private parts. In this case, PW1 testified that the Appellant removed her stockings and underwear, attempted to insert his “thing for urinating” into her private parts, and stopped when she complained of pain.
30. However, the medical evidence presented by PW3, the Medical Officer, contradicted PW1’s account. PW3 categorically stated that there were no physical injuries to PW1’s private parts, her hymen was intact, and there was no evidence of penetration. PW3 further noted that while PW1’s stockings were dirty, in this Court’s view, this observation alone cannot conclusively indicate an attempted sexual act.
31. In the case of [David Aketch Ochieng – v- Republic](#) [2015]eKLR, the Court of Appeal held that attempted defilement requires clear evidence of acts that would cause penetration, even if penetration does not occur. The prosecution must demonstrate a series of actions that unequivocally show intent to defile. In the present case, no such evidence was provided beyond PW1’s uncorroborated testimony.
32. Moreover, the prosecution failed to present corroborative evidence, such as statements from the children who were reportedly playing with PW1 at the time of the incident as indicated by PW2, her mother. The absence of such corroboration raises doubts on whether the events occurred as described by PW1.



## Identification of the Accused

33. On the issue of the accused person's identification, PW1 testified that she knew the Appellant, who she referred to as "Kamacha". While familiarity with the accused may lend some weight to her testimony, the Court must assess the reliability of her identification under the prevailing circumstances. In the case of *Wamunga – v- Republic* [1989]KLR 424, the Court of Appeal cautioned that:-

“It is trite law that where the only evidence against a Defendant is that of identification or recognition, the trial court must examine such evidence carefully to ensure that the identification was free from error before it can be safely relied upon.”

34. In this case, the prosecution did not provide any independent witness to corroborate PW1's identification of the Appellant. Neither the children who were playing with PW1 nor any other witnesses testified to having seen Appellant lead PW1 to the field or engage in any suspicious behaviour with her. The Investigating Officer, PW5 during cross-examination admitted that he did not record statements from the children or the individuals who apprehended the Appellant.

35. The absence of corroborative evidence weakens the reliability of PW1's identification of the Appellant as the perpetrator. Additionally, no physical evidence was presented to link the Appellant to the scene of the alleged offence.

36. When placed on defence, the Appellant raised a defence, wherein he denied the charges and alleged that he was beaten by a mob before being handed over to the police based on false accusations. The Investigations Officer, PW5 did not provide any evidence to refute this claim. While no direct evidence of malice or fabrication was adduced, the inconsistencies in the prosecution's case and the lack of corroborative evidence raise significant doubts about the reliability of the allegations against the Appellant. In the case of *Nzuki – v- Republic* [1993]KLR 171, the Court of Appeal held that:-

“Suspicion, however strong, cannot form the basis of a conviction. Guilt must be proved beyond reasonable doubt”

37. In this case, the prosecution's failure to provide corroborative evidence, the lack of physical injuries and the omissions in the investigations, all contribute to reasonable doubt over the Appellant's guilt. The court also notes that the trial Court relied heavily on PW1's uncorroborated testimony, contrary to the guidance provided under section 124 of the *Evidence Act*, which allows for a conviction based on the uncorroborated evidence of a child only if the court is satisfied that the child is truthful. In this case, the inconsistencies in the evidence cast doubt on the credibility of PW1's testimony.

## Conclusion

38. In conclusion, it is trite that in criminal cases, the prosecution bears the burden of proving each element of the offence beyond reasonable doubt. The evidence presented in this case before the trial Court was insufficient to meet this threshold. The medical findings did not support the allegations of attempted defilement, and the lack of corroboration and thorough investigations further weakened the prosecution's case. This Court is guided by the principle that any doubt must be resolved in favour of the accused, and proceeds to find that the conviction in this case cannot stand for those reasons. Consequently, this Court finds merit in the present appeal and the same is hereby allowed.

39. In view of the above finding, the following orders issue:-

- a. The entire Judgment of the trial Court is set aside.



- b. The conviction of the accused is quashed and sentence of Ten (10) years imprisonment meted against him set aside.
- c. The Appellant to be released forthwith unless lawfully held on other lawful grounds.

Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Gitari counsel for Appellant

Mr. Gacharia counsel for the State

Appellant – present

Court Assistant – Mr. Kinyua

