



**M'Rimberia v Republic (Criminal Appeal E114 of 2022)  
[2023] KEHC 524 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 524 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E114 OF 2022  
TW CHERERE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**DOMINIC THARAMBA M'RIMBERIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against conviction and sentence in Isiolo S. O Criminal  
Case No. 1 of 2018 by Hon. E.Ngigi (PM) on 31st August, 2022)*

**JUDGMENT**

**The Trial**

1. Dominic Tharamba M'rimberia (appellant) was charged with the attempted defilement contrary to section 9(1) as read with section 9(2) of the [Sexual Offences Act](#) No 3 of 2006 (the act). He also faced an alternative charge of committing an indecently and intentionally contrary to section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006. The offences were allegedly committed on diverse dates December 30, 2017 against TK a child aged 8 years.

**Prosecution case**

2. Complainant stated that on the material day at about 01.00 pm, she was playing with other children when appellant who was their neighbour called her to his house where he locked her in, put her on his bed and defiled her. Her brother, a minor aged 7 years stated he was playing with complainant and that when appellant called her and locked her in his house, he screamed attracting the attention of neighbours who came after appellant had left. The third witness also a minor stated that she was informed by complainant's brother that appellant had called complainant to his house.



## Defence case

3. Appellant in his unsworn defence denied the offence and stated that the offence was not corroborated by medical evidence.
4. The trial magistrate after hearing both the prosecution and defence cases found the prosecution case proved and on August 31, 2022, appellant was convicted and sentenced to serve 10 years' imprisonment.

## The Appeal

5. By his amended grounds of appeal filed on November 25, 2022, appellant raises the following grounds:
  1. The trial magistrate did not comply with section 169 of the *Criminal Procedure Code*
  2. Complainant's age was not proved
  3. Prosecution case was not proved
6. Section 169 of the *Criminal Procedure Code* provides as follows:

### Contents of judgment

1. Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
  2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the *Penal Code* or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
  3. In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.
7. I have considered the judgment of the trial court and contrary to appellant's allegations, the trial magistrate complied with clearly set out the points for determination, the decision thereon and the reasons for the decision, and proceeded to date and sign the judgment in open court at the time of pronouncing it. The first ground of appeal therefore fails.
  8. In concerning whether the case against the appellant was proved beyond reasonable doubt, this court has a duty to determine whether the ingredients of the offence of attempted defilement were proved. Section 9(1) and 9(2) of the *Sexual Offences Act* provides that: -

- “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.
- (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”



9. In considering this ground, I have been guided by case law on the subject In the case of *Benson Musumbi V Republic* [2019] eKLR , the court held that:
- “ 21. 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.” (emphasis added).
10. The same was reiterated in *John Gatheru Wanyoike V Republic* [2019] eKLR where the court held that:
- “It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.” (emphasis added).
11. Concerning Complainant’s age, the charge sheet places her age at 8 years. Complainant stated she was 9 years old. In *Charles Nega V Republic* Criminal Appeal No 38 of 2015 [2016] eKLR Mrima J stated that: -
- “I however wish to further state that from the wording of section 9 of the *Sexual Offences Act* (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.”
12. In *Daniel Ombasa Omwoyo v Republic* [2016] eKLRW. Okwany J observed that:
- “On the issue of age of complainant, my reading of section 9(1) and (2) of the *Sexual Offences Act* show that age is not a factor for an offence under this section other than the requirement that the victim of the offence be a child. To my mind, the only requirement of age is that the victim be under 18 years this being the definition of a child under the Kenyan Law. “
12. The importance of proving age was underscored by the Court of Appeal in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR , as follows:
- ““The importance of proving the age of the 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.....”.
13. From the foregoing, I find that the prosecution failed to tender cogent evidence to prove that complainant was below the age of 18 years which is an important ingredient in proving the offence of attempted defilement.



14. English case law is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of *Miller vs Minister of Pensions* (1942) AC stated as follows: -

“It need not reach certainty but it must carry a high degree of probability. proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

15. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington vs DPP* 1935 A C 462. Similarly, in *Bakare vs State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.

16. Having failed to proof the age of the complainant, I find that prosecution failed to prove its case beyond any reasonable doubt. Mativo, J (as he then was) in *Elizabeth Waitibiegeni Gatimu vs Republic* [2015] eKLR stated as follows:

“The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him .....

17. From the foregoing analysis, I find and hold that the conviction and sentence imposed on appellant were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that appellant shall be set at liberty forthwith.

**DELIVERED AT MERU THIS 02<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Kitoto (PPC)

