Munyathia v Republic (Criminal Appeal 6 of 2018)
[2025] KEHC 13989 (KLR) (7 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 6 OF 2018

TW OUYA, J

OCTOBER 7, 2025

BETWEEN

LUKAS MWAKA MUNYATHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the Honourable A.N.Ogonda from Kigumo Criminal Case No. 549 of 2015 delivered on 4th October 2017)

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to Section 9 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the 24th day of April 2015 at around 05.00am Particulars withheld, Maragua Sub County, he intentionally attempted to cause his penis to penetrate the vagina of ENK a child aged 5 years.
2. The matter proceeded to full trial and the appellant was convicted of the offence of attempted defilement contrary to Section 9 (1) of the *Sexual Offences Act* and sentenced to ten years imprisonment.
3. Aggrieved with the conviction and sentence, the appellant lodged the instant appeal urging the following grounds:
    a. That he did not plead guilty to the charge
    b. That the honourable court failed to consider his mitigation thus convicting him despite being a first offender;
    c. That the honourable court failed to feel mercy on him despite pleading to be remorseful;
    d. That the alternative charge be converted to a community service order

e. That the honourable court to furnish the appellant with the court proceeding to adduce more information for his appeal.

4. The Respondent called six witnesses to adduce evidence. The trial court conducted a voir dire and established that the complainant gives an unsworn statement. EN (PW1) testified that she attends [Particulars withheld] Primary School in grade one. She testified that she knew the Appellant as Wamuthee. It was her testimony that the appellant resides close to their home. One time when she was in nursery school, she went to see the Appellant at his house. She was not alone but in the company of Lucy, Wangari, Ciru, Kepha and Vickie. The appellant called her to his house and asked her to remove her panty. He promised to buy her biscuit, jolly and a lollipop if she removed her panty. The appellant then took off her panty then proceeded to touch her in her female genitalia. The appellant did not do anything else other than touch her. Shortly thereafter Lucy came in and informed her that her mother was calling her. Lucy instructed her to wear her panty; she did so and followed Lucy. Upon narrating to her mother what had happened, her mother took her to the hospital. She identified the appellant as the one who had touched her private parts.

5. PW2, FN , stated that she is the mother to PW1, who is her second born. It was her testimony that on 24.04.2015 she was getting feeds for the cow at around 4.00 pm when she left PW1 with LW aged 8 years, Irene Wanjiru aged 3 years and VW aged 10 months. When she came back, she demanded to know where PW1 was, only to be informed by Lucy that PW1 was sleeping in the appellant's house. She immediately instructed Lucy to go and get PW1. Shortly thereafter, Lucy returned alleging that PW1 did not have an inner wear. On inquiry, PW1 informed PW2 that the appellant had bought her Lollipop. PW1 decided to escort PW1 to hospital and later reported the matter to the police. PW1 was examined and a P3 Form filled. The medical report revealed that she had not been defiled. The appellant had been PW1's neighbour for two years. She testified that PW1 was born on 17th November 2009. She produced PW1's birth notification as proof of age. She wanted to know why the appellant was asking PW1 to remove her panty. The appellant was arrested by members of the public and escorted to the police station. She confirmed that she recommended the appellant for the job that he was engaged in prior to the incident.

6. LW testified as PW3, she is 9 years old and a pupil at [Particulars withheld] Primary School. She gave an unsworn statement stating that on 24th April 2015 she was at home with her siblings as her mother had left to fend for cows. They decided to go to the appellant's house, together with other children in the neighbourhood, to borrow a bicycle. As they were riding the bicycle down the hill, the appellant called PW1 to his house under the guise that he wanted to show her how to play the guitar. She left PW1 with the appellant and continued playing. She met her mother who demanded to know where PW1 was. Immediately she heard that she was at the appellant's house, she instructed PW3 to go and bring her home. She went to the appellant's house and found PW1 in bed, with her panty on top of the bed. She informed PW1 that PW2 was calling her. She also informed PW2 that she had found PW1 on the appellant's bed without a panty.

7. CK testified as PW4. He testified that he is a clinical officer at Maragua hospital where he had worked since 2006. He stated that he personally filled the P3Form, Post Rape Care Form and the Treatment notes of PW1. The P3Form was dated 28.04.2015. Upon undertaking a physical check up on PW1, it was established that the hymen was intact. There was neither any lacerations nor bleeding. No discharge was observed and both the HIV and Syphillis tests came out negative. A high vaginal swab revealed some pus cells but no spermatozoa was noted. There was no medical evidence to suggest that PW1 had been defiled. Nevertheless, antibiotics were administered as well as prophylaxis to prevent HIV infection. The medical examination was done about four hours after the incident.

8. No. 234617 CI Isaack Ewaton testified as PW5. He testified that he was stationed at Maragua police station at the time of the incident. It was his testimony that in 24.04.2015 at around 5.30pm he was on duty at Maragua Police Station when a girl was brought to the station in the company of her mother. It was alleged that the child had been defiled by a neighbour. The child was escorted to Maragua Sub County hospital where she was treated and discharged. On 25.04.2015, he proceeded to the home of the child where he established that the appellant was a caretaker at a farm neighbouring PW1's home. He recorded the statement of the mother and two other children. The accused was then arrested and arraigned in court. In the course of the trial, he recommended that the case be withdrawn due to lack of of evidence. The complainant had alleged that the appellant had enticed her with mandazi and sweets. The appellant was identified to him by PW2. He confirmed that the appellant was arrested by members of the public.

9. At the close of the prosecution case, the appellant was found with a case to answer and put to his defence. He testified by giving an unsworn statement. In his defence, he alleged that the case had been actuated by malice as PW2 is th one who helped him secure the job he had been engaged in as a caretaker. He alleged that there was bad blood between PW2 and himself as PW2 used to steal items from the appellant's employer. PW2 had wanted that he be sacked and ejected from the homestead. Therefore, the issue of attempted defilement was a mere set up to achieve the malicious end. In fact, there were other witnesses who could have been called but refused to come to court as the case had no factual basis.

10. DW2 John Karigi Mwangi testified that he is a cobbler and a neighbour to the appellant. He states that when he heard that the appellant had been arrested, he inquired the circumstances from her daughter, who was playing with PW1 and PW3 on the day of the incident. He alleged that her daughter informed him that PW2 had coached them on what to say to the police. He was away on the day of the incident.

11. DW3 Lydia Wanjiru testified that she is a pupil at Kiyuu Primary School. Both PW1 and PW3 are her school mates. It was her testimony that on 24.04.2015 she was out playing with PW1 and PW3 when PW2 came and collected her daughter, Irene Wmabui. She is not aware of any incident that occurred on that day.

12. DW4 Lucy Wanjiru Njeru. She states that she is a peasant farmer. It was her testimony that PW2 informed her on one Friday that the appellant had attempted to defile her daughter. She did not know the truth of the allegation made by PW2. The appellant was her neighbour.

13. The appeal was canvassed through written submissions.

14. The Respondent submitted that the prosecution has proved its case against the appellant to the required standard and therefore there was no ned to disturb the sentence as it was legal and proper in law.

15. The Appellant did not file any submissions nor was he produced despite several Production Orders being issued.

16. From the grounds of appeal, it is unclear whether the appeal is against both the conviction and sentence. Nevertheless, it is evident that the matter proceeded to full trial, therefore, the first ground is that the appellant did not plead guilty to the offence is immaterial.

17. This is a first appeal and the duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See Okeno VS Republic [1972] EA 32.

18. In Kiilu & Another VS. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
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> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

19. The same was reiterated in the case of David Njuguna Wairimu V – Republic [2010] eKLR where the Court of Appeal stated:

> " The duty of the first appellate court is to analyze the 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 appellant 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 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."

20. I have duly considered the evidence, grounds of appeal and the submissions. The issue I find falling for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, were the ingredients of the offence of attempted defilement proved?

21. Section 9(1) and 9(2) of the Sexual Offence 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"

22. The ingredients of the offence of attempted defilement were set out in the case of Benson Musumbi V Republic [2019] eKLR where 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."

23. This position was reiterated by the court 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."

24. Thus, in determining this Appeal, the court has to establish the following:

    a. Whether the age of the complainant was proved.

    b. Whether the appellant was positivity identified by the minor as her assailant.

    c. Whether there was an act to cause penetration, which was not successful.

25. It was the prosecution case that PW1 was five years old at the time of the offence. PW2 produced a copy of PW1's birth notification that indicated that she was born on 17th November 2009. She was therefore aged 5 years and 5 months at the time of incident.

26. The Court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR stated, 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."

27. In the persuasive decision 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."

28. There is no evidence that the credibility of the birth notification was challenged in any way at the trail. Birth notification documents are ordinarily issued as proof that a child has been born. I therefore find that it is reliable means of proving a child's age. I therefore find that the age of PW1 was proved and that she was a minor.

29. Nothing much turns on the identity of the appellant since the case is based on recognition evidence. The appellant was a neighbor to PW1 and was well known to him. both PW2 and PW3 testified that they knew the appellant as their neighbor. A fact that has been corroborated DW2 too.

30. Madan JA in Anjononi and Others vs The Republic [1980] KLR remarked thus while distinguishing recognition from identification evidence:

> " This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

31. As to whether there was an act to cause penetration, which was not successful this court makes reference to the holding in the case of Benson Musumbi v Republic [2019]eKLR

> " In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence."

32. This was reiterated in Bungoma Hc. Cri. Appeal No. 176 of 2016 eKLR where Riechi J held that:

> " When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved."

33. Section 388 of the Penal Code defines " attempt" as:-

388(1)

(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.

34. The above section brings out the two main ingredients of an attempt offence. One is the intention (mens rea) and the other is the execution of the intention (actus reus). The prosecution must among others prove the steps taken by the accused to execute the defilement which did not succeed.

35. In David Aketch Ochieng [2015] eKLR Makau J. observed as follows on attempted defilement:

> " The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of *Sexual Offences Act* No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprits genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."

36. In the instant case PW1 testified that the appellant touched her female genitalia. However, while PW1 was firm that the appellant only touched her female genitalia, she did not specify whatever the appellant might have used to touch her female genitalia. Also, whereas PW3 testified that she saw PW1 in the appellant's bed without a panty, she did not testify to the position that PW1 was in: whether sitting, standing or lying on the bed. Furthermore, her testimony is silent on what the appellant was doing at that time.

37. Similarly, the medical evidence was emphatic that there was no evidence of penetration. Pw4 Observed that neither any lacerations nor bleeding was observed on physical examination of PW1. Also, there was no discharge and both the HIV and Syphillis tests came out negative. A high vaginal swab revealed some pus cells but no spermatozoa was noted. He formed an opinion that there was no medical evidence to suggest that PW1 had been defiled.

38. At no point in her testimony did PW1 state that she saw the appellant's penis. From the evidence it is clear that the appellant was preparing to commit the act but had not attempted to do so. Considering this evidence and the case law cited above I find that there was no attempted penetration.

39. The end result is that the prosecution failed to prove the ingredient of attempted defilement. I find that the conviction is unsafe.

40. I therefore allow the appeal, quash the conviction and set aside the sentence. I hereby order that the appellant to be released forthwith unless lawfully held under a lawful warrant.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 7TH DAY OF OCTOBER, 2025.

HON. T. W. OUYA

JUDGE