Ali v Republic (Criminal Appeal E015 of 2025)
[2025] KEHC 16328 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E015 OF 2025

JN ONYIEGO, J

NOVEMBER 13, 2025

BETWEEN

ABSHIR MOHAMED ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Xavier Francis – RM, delivered on 07.03.2025 in Wajir SPM's Court in S.O Case No. E004 of 2024)

JUDGMENT

1. The appellant was charged with 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. The particulars of the offence being that on 28.09.2024 at xxxxx in xxxxx location, xxxx Sub County of Wajir county, he intentionally attempted to cause his penis to penetrate the vagina of HM, a child aged 13 years.

2. The appellant pleaded not guilty to the charge and the case proceeded to full trial.

3. PW1, HMH a 13year old girl stated that on the material day at about 0930p.m. after prayers, the appellant in the company of some men drove to their compound. That the men told her to prepare for them tea which she did as her mother was resting inside the house. The said men allegedly asked her of her father's whereabouts. As she served them tea, they engaged into a conversation. Thereafter, her mother directed her to go in and sleep.

4. At 0420hrs, the appellant allegedly entered the room where the other men were sleeping and eventually entered the room where she was sleeping and by use of a razor blade, he slit her under garments. That upon waking up, she saw the appellant naked as her mother had already shone light from her torch. She further stated that her mother held the appellant via his collar while screaming. That the screams attracted people who eventually arrested the appellant who had attempted to run away. That her uncle called the police who consequently arrested the appellant.

5. PW2, KSM , PW1's mother testified that on the material night, the appellant in company of other men appeared in her compound while driving. That PW1 told her that the men wanted tea and so, she directed PW1 to prepare some tea which she later served upon the visitors. That she thereafter, went to sleep with pw1. It was her testimony that at 4.20 a.m, the appellant entered into her house and started touching the complainant. That using light from her torch, she spotted the appellant half naked while the complainant was also screaming. She testified that she screamed thus alerting people who eventually arrested the appellant and consequently handed him over to the police.

6. PW3, OLG , a 76-year-old herdsman residing in xxxx , testified that on the material day at around 4:20 a.m., he was woken up by some commotion outside the house. Curious about the source of the noise, he stepped out of his house and proceeded to the scene where he found that a man had already been apprehended. Upon making inquiries, he was informed that the accused had attempted to defile the victim. He stated that the accused had been arrested by the victim's mother and was later taken to the police station.

7. It was his evidence that he saw the victim's pants, which were torn and further noted that the accused was in possession of a knife, which he had allegedly used to cut the victim's clothes. He further confirmed that he was able to identify the accused in court. During cross-examination, the witness clarified that he had gone to the victim's house after hearing the noise and found the accused already under arrest.

8. PW4, HM testified that the victim was his brother's daughter. He stated that on the 28. 09.2024, at around 4:20a.m. in the morning, while he was asleep, he was awakened by screams coming from the victim's mother. According to him, the accused had entered the victim's house, prompting both the victim and her mother to scream. He said the accused fled the scene, dropping a razor blade. Hassan added that upon inspecting the victim's clothing, he noticed that her pants had been cut. He further stated that the accused was apprehended while attempting to escape. During cross-examination, he confirmed that the accused dropped the knife at the time of his arrest.

9. PW5,Police Constable Muktar Ibrahim, the investigating officer recalled that on 28.09.2024, a report was made at Sarif Police Post by a minor identified as H.M.H, who was accompanied by her father. According to the report, the incident occurred earlier that same morning at approximately 4:20 a.m. That the minor had been sleeping in her mother's manyatta, in the same room but on a separate bed.

10. He explained that the accused allegedly entered the room stealthily and approached the bed where the minor was sleeping. He reportedly sat beside her and attempted to remove her trousers but was unsuccessful. The accused then allegedly drew a knife and used it to cut the trousers at the crotch area. At that moment, the minor woke up and screamed for help. Her mother, who was in the same room, immediately switched on her torch, illuminating the space thus revealing the identity of the accused. Upon being discovered, the accused fled the scene.

11. The officer further stated that the mother pursued the accused while raising an alarm, which drew the attention of nearby village elders. The elders responded swiftly, surrounded the accused and apprehended him. He was then escorted to Sarif Police Station. PC Ibrahim confirmed that he recorded statements from the minor and other witnesses. Both the accused and the victim were taken to hospital for medical examination and treatment. The accused was subsequently charged in connection with the incident.

12. He clarified that although the accused had initially been arrested by members of the public, he personally rearrested the suspect and took over the case for formal processing.

13. DW1, Abdhir Mohamed gave sworn evidence stating that he had been arrested in Sariff and charged with the offence herein, a charge he denied. He explained that there had been a longstanding conflict between himself and the complainant's family, which he believed led to him being framed for the offence. Although he had sustained injuries from an assault by the victim's family, he admitted that he had never formally reported the incident.

14. He recounted that on the day of the alleged offence, he had travelled from Dadaab Refugee Camp and arrived at the complainant's home by car. He claimed he was unaware that he had landed in a family with whom they had a grudge. That he was surprised when, around midnight, he was questioned about why he had gone to a home where there had been prior conflict. He maintained that his arrest was related to a previous fight and that the current charges were fabricated.

15. During cross-examination, he stated that the grudge between him and the complainant's family had originated approximately two years earlier, around 2022, when the victim was about ten years old. He clarified that on the material day, he had been in the company of his employer hence did not realize they were visiting the home of the family with whom he had a dispute. He said that the family recognized his voice, shone a torch on him while he was chewing miraa and began screaming, which drew the attention of others. He explained that the original disagreement had stemmed from a dispute over a water point and emphasized that he bore no grudge against the victim personally save for him family.

16. In a judgment delivered on 07.03.2025, the appellant was convicted on the charge and sentenced to ten (10) years' imprisonment.

17. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal dated 26.05.2025 in which he raised the following grounds of appeal;

    i. That the trial magistrate erred in law and fact in convicting him by relying on flawed evidence.

    ii. That the trial magistrate erred in law and fact in convicting him while relying on the contradictory and inconsistent evidence of the prosecution.

    iii. That the trial magistrate erred in law and fact by convicting yet the prosecution did not prove its case to the required standard.

    iv. That the trial magistrate erred in law and fact in convicting him without considering his defence and mitigation.

18. The appeal was canvassed by way of written submissions.

19. The appellant in his submissions dated 30.05.2025 urged that noting the nature of the offence herein, the court failed to inform him of the need to have an advocate. That the prosecution did not prove the elements of the offence herein to warrant the court convict him. He contended that it was not proved that there ensued a struggle or that the complainant sustained some bruises or injuries during the process. That the ingredients of attempted defilement must be proved conjunctively and not disjunctively.

20. He contended that there was no evidence that was produced before the court to determine that the complainant was 13 years when the alleged offence occurred. On sentence, the appellant urged that the same was harsh given the circumstances herein. He argued that the offence established herein if at all ought to be that of indecent act. He urged the court to allow the appeal as prayed.

21. The learned prosecutor, Mr. Owuor, opposed the appeal by arguing orally that the matter was proved beyond reasonable doubt and therefore, the appeal was unmerited. That all the elements of the offence

charged were proved to the required standards and therefore, the appellant was rightly convicted. He urged that the court also considered the defence of the appellant and the same was found to be a sham. On sentence, counsel urged that noting the provision of the section under which the appellant was charged, the same was not only proper but also within the law.

22. As a first appellate court, I am duty bound to reconsider and re-valuate the evidence in the court below to arrive at an independent conclusion while bearing in mind that I did not hear nor see the witness. The Court of Appeal in the case of Kiilu & Another vs Republic, [2005] 1 KLR 174, set out the duties of a first appellate court as follows: -

> " 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. 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."

23. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court and the written submissions filed by the parties. I have also read the judgment of the trial court resultant which I find that the issues for my determination are as follows:

i. Whether the age of the complainant was proved.

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

iii. Whether the appellant was positively identified by the minor as her assailant.

iv. Whether the sentence meted out was harsh and severe.

24. The appellant was charged and convicted on the offence of attempted defilement, contrary to Section 9(1) of the *Sexual Offences Act*. The Section provides 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."

25. Time and again, courts have held that elements of attempted defilement are the same as those of defilement, except that penetration does not occur in attempted defilement. The case of John Gatheru Wanyoike vs Republic [2019] eKLR addressed the elements of an attempted defilement charge and made the following determination:

> " 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."

26. The prosecution called five witnesses, including the complainant, her mother, two neighbors and the investigating officer. The complainant (PW1) gave a detailed account of the events of the night, stating that the appellant, a person she came to know that day, entered her room at around 4:20 a.m., cut her undergarments with a razor blade and proceeded to touch her. Her mother (PW2) corroborated this account, stating that she found the appellant half-naked in her daughter's room and raised an alarm that led to his arrest. The neighbors (PW3 and PW4) confirmed hearing the commotion and seeing the torn clothing and the knife allegedly used in the assault. The investigating officer (PW5) testified to receiving the report, collecting exhibits, and formally charging the appellant.

27. The defence on the other hand urged that the offence was not proved as it was not demonstrated that there ensued a struggle or that the complainant sustained some bruises or injuries during the process. That the ingredients of attempted defilement must be proved conjunctively and not disjunctively. Additionally, he argued that there was no evidence that was produced before the court to determine that the complainant was 13 years when the alleged offence occurred.

28. On the first element of proof of age, in Charles Nega vs 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."

29. The case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, is explicit on proof of age of a sexual victim as hereunder:

> "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 birth certificate, the victim's parents or guardian and by observation and common sense..."

30. What emerges from the above authority is that age may be proved through certificate of birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.

31. In the instant appeal, I find that the age of the complainant was proved by her very own testimony as she stated that she was aged 13 years. The same was further corroborated by the ruling of the trial court who not only saw but also after interacting with the said minor stated as follows;

> 'minor understands the questions and answers the correctly..."

32. As such, I find that the complainant herein was aged 13 years thus it was properly established beyond reasonable doubt that the complainant was a minor. Even from her physical appearance the court made similar observation that she was a minor.

33. On identification, it is trite that the same must be proper and positive. And for identification to be proper and also truthful, the court must evaluate the believability of the witness who made the

identification in question. Additionally, it is clear that it is competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. It is also trite that there is no particular number of witnesses required for proof of any fact. [See Lord Widgery, CJ comments in the case of Republic vs Turnbull [1976] 3 ALL ER 549 at page 552].

34. PW1 testified that while she was asleep, the appellant entered the room where she was sleeping and by use of a razor blade, slit her under garments and then proceeded to touch her. That upon waking up, she saw the appellant naked as her mother flashing light from her torch.

35. Additionally, PW5 in his investigations corroborated the complainant's testimony. The appellant also in his testimony did not deny not knowing the complainant together with his family in as much as he stated that the charge herein was a mere fabrication. He claimed that there existed a grudge between him and the family of the complainant. From the foregoing, it was clear that indeed, identification was proper as the appellant and the complainant were people who were well known to each other. In any event, the appellant does not deny being at that home on the material night.

36. As to whether there was an act to cause penetration that was not successful, guidance can be drawn from the case of Daniel Simiyu Wanyonyi v Republic [2019] 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'.

37. From the above cases, it is thus clear that for the respondent to succeed in proving the case against the appellant, it had to prove that the appellant possessed an intention and he started the execution of the intention that he harboured.

38. Further guidance can be drawn from the determination of the case of David Ochieng Aketch vs Republic [2015] eKLR where Makau J. observed that:

> " 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 culprit's 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."

39. The appellant contested the allegation that the offence of attempted defilement was proved. He stated that prosecution did not in any way prove that there ensued a struggle or that the complainant sustained some bruises or injuries during the process. According to him, the offence of indecent act with a child was more pronounced than the offence charged.

40. In the case of Benson Musumbi vs Republic [2019] eKLR], it was stated that:

> " 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."

41. A review of the evidence before the trial court, in my humble view denotes a mere intention and preparation to commit the offence. The same did not depict an attempt to commit the offence. In fact, the appellant had only managed to cut the undergarment and did nothing beyond that. At this stage, the offence of defilement, attempted defilement or indecent assault had not crystallized to prefer any of those charges. The appellant did not manage to touch the victim's body.

42. To that end, I am in agreement with the appellant that the offence preffered was not proved to the required standard. It is also curious under what circumstances the victim's family received strangers in their home yet no attempt was made to explain who the appellant and other strangers were to the family and the purpose of their visit. That notwithstanding, the evidence on record was not sufficient to convict the appellant.

43. On the issue of contradictions, the court finds that the testimonies of the prosecution witnesses were consistent on material facts. Minor discrepancies in timing or sequence are natural and do not go to the root of the case. However, the evidence as tendered did not establish the offence preferred nor a lesser charge under that provision.

44. Regarding the appellant's claim that the court failed to inform him of his right to legal representation, the same is not mandatory unless shown that an injustice was likely to occur. He actively participated in the proceedings and cross-examined witnesses. As such, there was no miscarriage of justice manifested in the case herein.

45. On sentence, the same is moot having arrived at the decision that the offence was not proved to the required degree. In a nut shell, it is my holding that the appeal is merited and the same is upheld. The conviction herein is quashed and the sentence thereof set aside. The appellant is set fully unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF NOVEMBER 2025

.....

J.N.ONYIEGO

JUDGE.