Mutai v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 15690 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E008 OF 2024

JK NG'ARNG'AR, J

NOVEMBER 4, 2025

BETWEEN

AMOS KIPLANGAT MUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case Number E033 of 2021 by Hon. Kimutai B. M in the Senior Principal Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 31st July 2021 in Konoin Sub-County within Bomet County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MC, a child aged 4 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 31st July 2021 in Konoin Sub-County within Bomet County, the Appellant intentionally touched the vagina of MC, a child aged 4 years with his penis.

3. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case while the Appellant testified and closed his case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

4. At the conclusion of the trial, he was convicted on the charge of attempted defilement and sentenced to serve ten (10) years in prison.

5. Being dissatisfied with the Judgment of the trial court, the Appellant appealed against his conviction and sentence.

6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in Njoroge vs. Republic (1987) KLR 19 where it held: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (see Pandya V. R [1957] E.A 336, Ruwalla vs. R. [1957] E.A 570)."

The Prosecution's/Respondent's case.

7. It was the Prosecution's case that the Appellant defiled MC on 31st July 2021. Erick Kipchirchir (PW2) testified that he found the Appellant and the victim's trousers pulled down halfway and the victim lay on the bed. PW2 further testified that when he asked the Appellant what he was doing, the Appellant asked for forgiveness.

8. Kipkoech Ruto (PW3) testified that he was a clinical officer at Chebagany Health Centre and when he examined the victim, he found bruises on her vaginal wall and an intact hymen. PW3 further testified that the bruises were over a week old. PW3 concluded that there could have been attempted defilement.

9. Through their written submissions dated 10th July 2025, the Respondent submitted that the Appellant had prepared to commit the act of penetration. That PW2 found the Appellant with his trouser pulled down half way his legs.

10. It was the Respondent's submission that they proved the age of the victim by producing the Age Assessment Report. It was the Respondent's further submission that his identity was proved beyond reasonable doubt. That he was found in the sitting room with the victim.

11. The Respondent submitted that the minimum sentence provided under section 9(2) of the *Sexual Offences Act* was 10 years and that the sentence meted out was legal and proper.

The Appellant's case.

12. The Appellant, Amos Kiplangat Mutai testified that on the material day, while in his house, Erick (PW2) came and told him that he was to be arrested. The Appellant further testified that he was later arrested and told that he tried to defile a young girl.

13. In his written submissions dated 15th May 2025, the Appellant submitted that the court erred in convicting him as the Prosecution witnesses' testimonies were inconsistent and contradictory. That the clinical officer's testimony cast doubt on the age of the victim's bruises. The Appellant submitted that the Prosecution did not prove the offence of attempted defilement. He relied on Njau v Republic (Criminal Appeal E028 of 2020) (2022) KEHC 14123 (KLR) (Crim) (11 October 2022) (Judgement) and Maina v Republic Criminal Appeal E010 of 2020 (2024) KEHC 3870 (KLR) (18th April 2024) (Judgement).

14. I have gone through and given due consideration to the trial court's proceedings, the Record of Appeal dated 30th January 2025, the Appellant's written submissions dated 15th May 2025 and

the Respondent's written submissions dated 10th July 2025. The following issues arise for my determination: -

i. Whether the Prosecution proved the offence of attempted defilement to the required standard.

ii. Whether the Defence places doubt on the Prosecution case.

iii. Whether the Sentence preferred against the Accused was fair and just.

Whether the Prosecution proved the offence of attempted defilement to the required standard.

15. The offence of attempted defilement is premised under section 9 (1) of the *Sexual Offences Act* as follows: -

> A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

16. The term attempt is defined by section 388 of the Penal Code as follows: -

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

17. The ingredients of the offence of attempted defilement were outlined by Kemei J. in the case of Benson Musumbi v Republic [2019] [2019] KEHC 8723 (KLR) as follows: -

> " 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."

18. The same was reiterated by Odunga J. (as he then was) in Stephen Mungai Maina v Republic [2020] KEHC 10005 (KLR), where he stated that: -

> " .....since the appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the *Sexual Offences Act*, the prosecution must prove the ingredients of defilement (age, positive identification) except penetration and the steps taken by the Appellant to execute the defilement which did not succeed."

19. Thus, for a charge of attempted defilement to stand, the Prosecution must adequately prove beyond reasonable doubt the following: -

i. The age of the complainant

ii. Positive identification of the assailant

iii. The overt act (attempted penetration) was committed

20. The importance of proving the age of a victim in a defilement case has been restated in several authorities. The Court of Appeal in Hadson Ali Mwachongo v Republic [2016] KECA 521 (KLR) held thus: -

> " 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 victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;
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> "....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).?"

21. It is now an established principle that the age of a victim can be proven in several ways. I agree with the sentiments of Aburili J. in the case of JOA v Republic [2019] KEHC 466 (KLR) where she stated as follows: -

> " It is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim."

22. In the instant case, No. 24xxx PC Caren Koech (PW4) produced aa Age Assessment Report as P. Exh 3. The Report indicated that the victim, MC's age was approximately 5 years old. The authenticity of the Age Assessment Report or its production was not challenged during the trial. I find the Report and based on its contents, find that the time of the commission of the offence, MC was aged 5 years old.

23. Regarding identification, Erick Kipchirchir (PW2) testified that he found the Appellant and the victim together in the house. This testimony was uncontroverted upon cross examination. Further, when the Appellant was cross examined, he testified that he knew the victim and was with her on the material day.

24. There is no doubt in my mind that the Appellant was positively identified. This was evidence of recognition and there was no room for mistaken identity. It is my finding therefore that the aspect of identification was clear and adequately proven.

25. The Prosecution had to prove whether the overt act of attempted penetration was committed by the Appellant. Penetration is defined under section 2 of the *Sexual Offences Act* as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

26. It follows then that in a case of attempted defilement, the Prosecution must demonstrate that an Accused took all the necessary steps to begin an act of penetration but was unable to complete the same either at his own volition or through the intervention of another. There must be no penetration but

only evidence of its attempt as held by Makau J in David Ochieng Aketch v Republic [2015] KEHC 679 (KLR) as follows: -

> "....For a successful prosecution of an offence of an 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."

27. Penetration or attempted penetration is proved by the victim's own evidence and corroborated by the medical evidence or any other evidence. In the present case, the victim did not testify. Medical evidence was tendered by Kipkoech Ruto (PW3) a clinical officer at Chebagany Health Centre. PW3 testified that he found bruises on the victim's vaginal wall and that the bruises were over a week old. PW3 further testified that the victim's hymen was intact and that his conclusion was attempted defilement. PW3 produced a P3 Form, PRC Form and treatment notes as P. Exh 1, 2 and 3 respectively. The findings contained in the exhibits were that the victim had not been penetrated.

28. The only other evidence was the testimony of Erick Kipchirchir (PW2) who testified that he found the Appellant with his trouser pulled half way down his legs. PW2 further testified that the Appellant had pulled down the victim's trousers as the victim lay on the seat. It was PW2's testimony that after questioning the Appellant, the Appellant asked for forgiveness. This testimony was uncontroverted upon cross examination.

29. Flowing from the above, it is clear that there was no evidence of penetration. It is also clear that based on PW2's uncontroverted testimony, the Appellant was found with his trousers pulled down halfway his legs and the Appellant also pulled down the victim's trousers. This to me indicated that the Appellant was preparing to penetrate the victim and was only stopped by the PW2. The Appellant's guilty conscience came into play when he sought for forgiveness from PW2. It is my finding therefore that the overt act of pulling down his trouser and the victim's trousers fell within the ambit of the provisions of section 388 of the Penal Code.

30. Having established the age of the complainant, proof of identification and proof of the overt act of attempted penetration, it is my finding that the Prosecution proved its case against the Appellant beyond reasonable doubt.

Whether the Defence places doubt on the Prosecution case.

31. The Appellant's defence was aptly captured earlier in this Judgment. The Appellant described how he was arrested and taken to the police station on the material day. The Appellant (DW1) further testified that the charges were false and that the victim only screamed in fear as they watched the television.

32. Having gone through and considered the Appellant's defence, it is my finding that the Appellant's defence was insufficient and it did not place any doubt on the Prosecution's case.

Whether the Sentence preferred against the Accused was fair and just.

33. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle. The above position was

enunciated by the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, (1954) EACA 270, where it pronounced itself on this issue as follows: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

34. The penal section for the offence of attempted defilement is found in section 9(2) of the *Sexual Offences Act* which states that: -

> 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.

35. The trial court after considering the Appellant's mitigation sentenced him to serve 10 years imprisonment. Having considered the circumstances of the case and the Appellant's mitigation, it is clear to me that the sentence issued by the trial court was the minimum sentence it could have issued. The sentence was not harsh but was legal and commensurate to the offence. There is no reason for this court to interfere with the trial court's sentence.

36. In the final analysis, the Appeal does not have merit and the same is dismissed.

37. In the end, I uphold the conviction and sentence passed by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 4TH DAY OF NOVEMBER, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Ms Koech for the Respondent

Appellant present in person