



**Jillo v Republic (Criminal Appeal E044 of 2024)
[2025] KEHC 17118 (KLR) (19 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E044 OF 2024
JN NJAGI, J
NOVEMBER 19, 2025**

BETWEEN

TIMOTHY FRANKSOL JILLO APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original conviction and sentence by Hon. E. M. Kadima, PM, in Garsen
Principal Magistrate's Court Sexual Offence Case No. E011 of 2022 delivered on 31/7/2024)*

JUDGMENT

1. The appellant was convicted for 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 were that the 9th day of August 2022 at unknown time at [Particulars Withheld], Wema sublocation in Salama location in Tana Delta Sub County within Tana River County he attempted to insert his penis into the vagina of L.H. (herein referred to as the complainant/victim), a girl aged 14 years.
2. The appellant was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The appellant filed 15 grounds of appeal that can be summarized to:
 - 1) That the appellant was not accorded a fair trial in that he was not informed in advance of the evidence the prosecution was to rely on in the case contrary to Article 50(c) (i) (k) of *the Constitution* nor was he informed of the right to have an advocate assigned to him by the state contrary to Article 50 of *the Constitution*.
 - 2) That the trial magistrate erred in law and fact by failing to find that the ingredients of the offence of attempted defilement were not proved.



- 3) The learned magistrate failed to note that the prosecution case was full of glaring discrepancies and gaps.
- 4) That the trial magistrate erred in law and in fact in purporting to shift the burden of proof from the prosecution to the appellant.

Case for prosecution

3. The brief facts of the case are that the complainant is a primary school pupil. She was living with her mother, PW2. That on the night of the material day the complainant was sleeping in her bedroom at their house. Her mother was in her bedroom in the same house. That as she slept she felt somebody in her bed. She wanted to scream but the person blocked her mouth with his hand. He removed her panties and had by then removed his trousers. That he wanted to enter her behind before he inserted his penis into her vagina. Her mother who was in the house entered into the bedroom with a torch. Her mother switched on the lights. She saw the person who was in her bed as the appellant. Her mother confronted him. She came out of bed and her mother saw her panties on the bed. She told her mother that it is the appellant who had removed them. She said that the appellant had sex with her. They reported the matter to the chief and to the police.
4. The mother to the complainant, PW2, testified that she was on the material night sleeping in her bedroom. That it is her habit to wake up at night to check on her children. That on that day at midnight she woke up and went to check on the children. On getting to the room she switched on the lights. She saw the appellant coming out of the complainant's bed which was covered with a mosquito net. She asked him what he was doing in her daughter's bed. He denied doing anything. She asked her daughter whether he had defiled her. She denied it. She saw her daughter's panties on the bed and asked her daughter whether she had had sex with the appellant. She was afraid and was panting. They reported the matter to the chief.
5. Bennia Nagule Hiribae, PW3, testified that she was on 10/8/2021 summoned to go to the home of PW2 as there was a person who had defiled a girl. She went there and she was shown panties for the complainant and keys belonging to the appellant. They reported the matter to the chief who referred them to the police. They took the complainant to Garsen health centre where she was examined.
6. The area chief PW4 told the court that on the morning of 10/8/2023 the complainant, her mother PW2 and a witness PW3 went to him and reported that on the previous night Timothy had gone to the complainant's bedroom and removed her panties. He asked the girl whether Timothy had defiled her. She answered to the negative. He referred them to the police.
7. A clinical officer at Garsen health centre PW5 testified that the complainant went to their medical facility on 10/8/2023 with a complaint that she had been defiled by a person known to her. He examined her and found her with a missing hymen. There was nothing else significant. He completed her P3 form.
8. The investigating officer, David Kamunya, PW6 of Gamba police station testified that the complainant, her mother PW2 and a witness PW3 went to the police station and the complainant reported that she had been defiled by one Timothy Jillo. He issued her with a P3 form and referred her to Garsen health centre. He obtained the girl's birth certificate that showed that she was aged 14 years. After investigations were complete he charged the appellant with the offence.
9. During the hearing the investigating officer PW6 produced the complainant's birth certificate as exhibit, P.Exh.3. The clinical officer PW5 produced the P3 form and treatment notes as exhibits, P.Exh.



1 and 2 respectively. The investigating officer produced the complainant's birth certificate as exhibit, P.Exh.3.

Defence case

10. When placed to his defence the appellant stated in a sworn statement that he cast his vote on 9/8/2022 vote after which he went to a local drinking joint where he drunk beer up to 3pm. In the evening he joined his friends for a drink. That later he called the complainant's mother and borrowed Ksh.50/= from her. She referred him to her place. He went to her place. He continued drinking. He was served by the complainant. The complainant took water and went to bathe. Her mother quarreled her why she was bathing at night. Her mother then came with a phone with lights on and claimed that she had seen him emerge from the complainant's bed which was covered with a mosquito net. He denied it. He asked her why he would do such a thing at that time yet they had known each other for 8 years without such a thing happening. He went home as the girl went to hospital. On the following day he was arrested on charges of attempted defilement.
11. The appeal was canvassed by way of written submissions of the counsel appearing for the appellant and those of the counsel appearing for the respondent.

Appellant's submissions

12. Counsel for the appellant submitted that the charge against the appellant was attempted defilement but the evidence given by the complainant during the trial is that the appellant defiled her. That the complainant stated in her evidence that the appellant put his penis into her vagina and that during cross-examination she said that she told her mother that the appellant had had sex with her. Therefore, that the evidence reveals a charge of defilement and not attempted defilement. That the two charges cannot go together. That it was either defilement or attempted defilement.
13. The appellant cited the ingredients of the offence of attempted defilement as stated in the case of *Benson Musumbi v Republic* (2019) KEHC 8723 (KLR) where it was held that:

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. Attempt to commit an act is defined as 388 (1) where a person intending to commit an offence begins to put his intentions into execution by means adopted 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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention”
14. It was submitted that though the complainant gave evidence saying that the appellant defiled her, there was also evidence that she denied that the appellant defiled her. That her mother gave evidence that when she asked the complainant about it she denied it. That the chief gave evidence that he asked the complainant whether the appellant had defiled her and she denied it. That in face of these inconsistencies, the case was not proved beyond reasonable doubt. Counsel for the appellant urged the court to acquit the appellant of the offence.



Respondent's submissions

15. The respondent submitted that the age of the complainant was proved through the birth certificate that she was aged 14 years. That the appellant was a neighbor to the complainant and therefore his identity was proved. That there was evidence that the appellant entered the complainant's bedroom, removed her panties and covered her mouth. That it is at that moment that he was found on the complainant's bed by her mother. That had the complainant's mother not appeared the appellant would have penetrated the complainant. Therefore, that an offence of attempted defilement was proved.
16. On the defence offered by the appellant, the respondent submitted that the appellant admitted being in the house of the complainant at the material time but denied being in the complainant's bedroom. It was submitted that the defence was an afterthought that did not cast doubt on the prosecution's case.
17. In regard to the sentence, the respondent submitted that the appellant was given the minimum sentence as provided by the law. That the sentence was fair.
18. It was submitted that the appeal lacks merit and ought to be dismissed.

Analysis and determination

19. The role of this court in its capacity as the first appellate court in a matter is well settled. It was held in the case of *Okeno vs. Republic* (1972) EA 32 that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
20. The ingredients of the offence of attempted defilement are proof of the age of the victim, proof of identity of the accused and proof of the attempt itself.
21. The age of the complainant and the identity of the are not in dispute in the appeal. A birth certificate was produced to prove the age of the victim. The appellant admitted to have been at the time at the premises of the complainant. The issue is whether the attempt was proved against the appellant.
22. Attempted defilement is defined in sections 9(1) as read with section 9(2) of the [Sexual Offences Act](#) 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.
23. Section 388 of the Penal Code defines the term "attempt" as follows:
 388. Attempt defined
 - (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.

24. In *Karbanet HCCRA NO. 192 OF 2017 Kakurut Ngoletom Lesikiriatum v. R* of 25th February 2019, Muriithi J. discussed the law on attempt as follows:

“Principles of the law of attempt

8. In accordance with the definition of attempt in section 388 of the Penal Code, the test for attempt requires a demonstration of an intention to commit the offence and overt act towards the commission of the offence which is sufficiently proximate or immediately connected to the attempted offence. See *Mwandikwa Mutisya v. R* (1959) EA 18 and *Mussa Said v. R* (1962) EA 454.

9. In discussing the principles of law on attempt in the case of attempted larceny, Spry, J. (as he then was) in *Mussa s/o Said v. R* (1962) EA 454, 455 Letters C-D said:

“The principles of law involved are very simple but it is their application that is difficult. If the Appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence.”

10. In *Keteta v. R*, (1972) EA 532, 534, Madan Ag. CJ. (as he then was) put the matter succinctly as follows:

“A mere intention to commit an offence which is in fact not committed cannot constitute an attempt to commit it. There must also be an overt act which is immediately and remotely connected with the offence intended to be committed and which manifests the intention to commit the offence. A remotely connected act will not do.”

26. The complainant told the trial court that the appellant entered her bedroom, removed her panties and covered her mouth when she wanted to scream. He then inserted his penis into her vagina. That her mother then entered into the room.

27. The complainant further stated in cross-examination that she told her mother that the appellant had removed her panties and he had had sex with her. That her mother saw the panties on the bed as she came out of bed.



28. As far as that evidence is goes, it establishes an offence of defilement and not attempted defilement. It is clear that the evidence of the complainant was that the appellant penetrated her and not that he attempted to penetrate her. The proper charge that should have been laid out against the appellant is one of defilement.
29. Though the complainant gave evidence that the appellant penetrated her, it was the evidence of her mother that after she found the appellant on the complainant's bed she asked her daughter what the appellant had been doing on her bed and "she denied it". It was not clear what her daughter denied but it seems it was whether she had engaged in sex with the appellant.
30. It was further evidence of the complainant's mother that after she saw the complainant's panties on her bed, she asked her whether she had engaged in sex with the appellant but she did not answer her. That it is only at the chief's office where she came to know what the appellant had done but she did not state what it is that she had learnt at the chief's office. What can be deduced from her evidence is that her daughter never told her that the appellant had penetrated her.
31. It was the evidence of the chief PW 4 that upon receiving the report he asked the girl whether the appellant had put his penis into her vagina and she answered in the negative. Why then would the complainant have told the chief that the appellant did not penetrate her only for her to appear in court and claim the opposite - that the appellant actually did so? Was the complainant a credible witness?
32. The Court of appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, held the following on credibility of witnesses:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
33. The report which the complainant and her mother made to the police was on defilement. There was contradictory evidence on whether the appellant defiled the complainant or not. A witness who says one thing and says another thing on the same subject cannot be described as credible. The complainant was not a credible witness.
34. In attempted defilement the prosecution must prove that the accused did an overt act that manifested the intention to commit the offence as opposed to the mere preparation to commit the offence. See *Bungoma HC Cri. Appeal No. 176 of 2016* (supra).
35. The evidence of the complainant was that the appellant entered her bedroom, climbed into her bed and removed her panties. The act of entering the complainant's bedroom and climbing into her bed were acts that amounted to preparation to commit an offence of defilement. If the appellant removed the complainant's panties and did not commit the offence of defilement after the complainant's mother appeared in the room, that would amount to attempted defilement. But then why would the court believe the evidence of the complainant that the appellant removed her panties when she gave contradictory statements on whether the appellant penetrated her or not? It is to be noted that there was no mention of the said panties being taken to the police station. Why didn't the complainant and her mother take the panties to the police station yet they were critical exhibits in the case? Was the issue then a fabrication?
36. The complainant stated that the appellant had removed his trousers when he wanted to enter her from behind before he inserted his penis into her vagina. That her mother then entered into her room with



a torch. The complainant's mother stated that she switched on the lights upon entering the room. She never stated that the appellant did not have his trousers on when she entered into the room. The complainant never said that the appellant put on his trousers before her mother entered into the room. How come that the complainant's mother did not find the appellant without his trousers yet she entered into the room suddenly?

37. The appellant said in his defence that he was on that day drinking in the house the complainant's mother. That the complainant was in the sitting room while her mother was within the house. That her mother then alleged that he had seen him emerge from the complainant's bedroom.

38. The complainant when being cross-examined by the appellant stated the following the following:

“My mother came home at 9 pm. I cannot remember what my mother found you doing. I do not know what you talked with my mother.”

39. She continued to say the following in re-examination:

“We usually go for studies at the shopping centre. I went home. Frankson (the appellant) came after a while after we had dinner and I have taken a shower.”

40. The above statement confirms that the appellant was at the complainant's house on the evening of the material day. However, the complainant's mother seemed to deny that the appellant was at her house on that evening. She stated the following during cross-examination:

On 9/8/2022 I found (?) in my house (?) PW1 in bed. That was the first time I met you. That day.”

41. I get the mother to the complainant to be saying that she had not seen the appellant on the material day before she found him in her daughter's bedroom. This must have been a lie because her daughter confirmed the appellant's evidence that he was at their house on the evening of the material day. That the complainant's mother is lying that the appellant was not at her house on the evening of the material day creates doubt in her evidence that she found the appellant in her daughter's bedroom at midnight.

42. In view of the foregoing I am not satisfied that the charge of attempted defilement was proved beyond reasonable doubt. The appellant was entitled to benefit of doubt. The conviction is thereby quashed and the sentence set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 19TH DAY OF NOVEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Dulu for Appellant

Ms Mkongo for Respondent

Appellant: Present at GK Prison Malindi

Court Assistant: Ms Rahma

