Ochieng alias Jakajiel v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 17085 (KLR) (12 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E033 OF 2023

OA SEWE, J

NOVEMBER 12, 2025

BETWEEN

JARED OCHIENG ALIAS JAKAJIEL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Kendu Bay Magistrate's Court Sexual Offenses Case No.17 of 2022 passed by Hon. C.A. Okore, PM)

JUDGMENT

1. The appellant, Jared Ochieng, was arraigned before the lower court in Homa Bay Senior Principal Magistrate's Sexual Offence Case No. 17 of 2022: Republic v Jared Ochieng alias Jakajiei, on 21st June 2022. He was charged with one substantive count of attempted defilement contrary to Section 9(1) and (2) of the *Sexual Offences Act*, No.3 of 2006. The particulars of the charge were that on the 20th June 2022 in [Particulars withheld] Center in Rakwaro North Sub county within Homa Bay County the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vaginal of AA, a child aged 13 years.

2. In the alternative, the appellant was charged with indecent act with a child, contrary to Section11(1) of the *Sexual Offences Act*, that on the 20th June 2022 at [Particulars withheld] Center in Rachuonyo North Sub county within Homabay County, he intentionally and unlawfully touched the vagina of AA, a child aged 13 years with his penis.

3. The appellant denied those allegations and the matter was fixed for trail before Hon. C.A. Okore, Principal Magistrate. Ultimately, the appellant was found guilty and convicted of attempted defilement in a judgment delivered on 16th May 2023. He was consequently sentenced to 15 years' imprisonment.

4. Being dissatisfied with the decision of the trial court, the appellant filed this Appeal on 8th June 2023 citing the following grounds:

    a. That the trial magistrate erred in law and fact by failing to find that the investigation conducted by the Police was shoddy; which led to a miscarriage of justice.

    b. That the trial magistrate erred in law and fact by failing to observe that the medical report was inconclusive, inadequate and inconsistent; and therefore could not be used in a court of law to sustain a conviction for the offence of attempted defilement.

    c. That the trial magistrate erred in law and fact by failing to consider that this was a case of fabrication against the appellant due to the grudge between the appellant ant the mother of the alleged victim.

    d. That the trial magistrate erred in law and fact by failing to observe that the evidence adduced by the prosecution was inconsistent and contradictory; and therefore lacked probative value to warrant conviction.

5. Accordingly, the appellant prayed that the appeal be allowed, the conviction quashed and the sentence set aside.

6. The court issued directions on 6th February 2025 that the Appeal be canvassed by way of written submissions. The respondent complied and filed written submissions dated 4th March 2025. By 3rd April 2025 when the Appeal was reserved for judgment, the appellant had not filed his written submissions.

7. In the respondent's submission, the substantive charge of attempted defilement was proved beyond reasonable doubt against the appellant. The respondent set out the ingredients of the offence, namely the complainant's age, attempted penetration and identification of the offender. The respondent submitted that credible evidence had been presented before the lower court to prove that the complainant was aged 13 years at the time of the incident; having been born on the 15th September, 2008. The complainant's Certificate of Birth was produced as the Prosecution's Exhibit 5.

8. On penetration, the respondent made reference to the complainant's evidence, namely, that on the 20th June 2022 at around 2:00 pm the appellant sent her to fetch drinking water and upon giving the water, he placed it on the table and grabbed her, undressed her, pulled down his trousers and inner wear before attempting to insert his penis inside her vagina; at which point the complainant raised alarm and she was rescued. The respondent also relied on the testimony of PW4, a neighbor of the parents of the complainant whose evidence was that she heard the complainant shouting "you are hurting me"; as well as the evidence of PW5, the clinical officer who corroborated the complainant's testimony that she was subjected to attempted defilement, although her hymen was intact and genitalia was normal.

9. The respondent further submitted that the appellant was positively identified as the complainant's neighbor, having resided within the same rental premises for about one year; and that the appellant was apprehended at the scene by other neighbours who found him in the act. The respondent also pointed out that, in his own testimony, the appellant conceded that he knew the complainant as his neighbour.

10. It was therefore the respondent's case that the Prosecution adduced credible evidence which was consistent and well corroborated; and therefore the appellant's conviction and sentence were lawful as per the provisions of Section 9(2) of the *Sexual Offences Act*.

11. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the Court is duty bound to re-evaluate the evidence on record and arrive at its own independent conclusions,

while bearing in mind that I did not have the opportunity to see or hear the witnesses testify. (see Okeno v Republic [1972. EA 32).

12. The complainant testified as PW1 and proceed to state that she was in grade 4 at [Particulars withheld] Primary school. At the material time she was staying at [Particulars withheld] with her parents. She testified that the accused was a neighbor who on 20th June 2022 asked her to fetch drinking water for him from the tap. PW1 further stated that when she entered his house, the appellant took the water and placed it on the table and pushed her on the bed and quickly undressed her and pulled down his trouser and under pants. She further stated that the appellant laid her on the bed and lay on top of her and tried to insert his penis inside her vagina. She screamed for help and people came to her rescue. The appellant reacted by pushing her through the window before she could fully dress herself.

13. The complainant further stated that the appellant was apprehended by neighbors and escorted to the Rakwaro Police Station. She stated that she also accompanied them to the police station, where she recorded her statement before being taken to hospital for medical examination.

14. The complainant's mother testified as PW3 and told the lower court that on the 20th June 2022 at about 3:30pm she was away selling food at the lakeshore when she received information that her daughter had been defiled. She went home and was told the complainant had already been taken to Kamwala Health Center while the accused had been escorted to Rakwaro Police Station. She confirmed that, upon examination, the doctor found that the accused had attempted to defile her daughter. She also confirmed that the complainant was born on 15th September, 2008.

15. The complainant's sister FAO (PW4) testified that while she was in the house breastfeeding her baby, she heard screams and rushed outside. She found the complainant screaming inside the accused's house and immediately raised alarm, attracting neighbors. Before the neighbors arrived, the accused pushed the complainant through a window upon hearing her cries for help. She further stated that she heard the complainant shouting, "you are injuring me". The accused was thereafter apprehended by members of the public and taken to Rakwaro Police Station.

16. Moses Juma, a clinical officer working at Miriu Sub-County Hospital, testified before the lower court as PW5. He confirmed that he examined the complainant and noted that her pants had white stains. No blood stains were seen and her hymen was intact. PW5 further noted that there were no bruises on the complainant's labia and that whitish discharge seen in her genitalia was normal. His conclusion was that an attempt had been made to defile the complainant. PW5 also testified that he examined the accused and found that he had a whitish discharge with the smell of semen.

17. PC Felistine Cheruto (PW6) was then attached to Rakwaro Police Station. She testified as the investigating officer and stated that while on duty, the complainant and the accused were brought to the station by the Chairman of Rakwaro Market Area, who reported a case of attempted defilement. She further testified that upon visiting the scene, she confirmed that the accused resided in a rental plot adjacent to the complainant's. According to her investigations, the appellant had pushed the complainant into his house and attempted to defile her, but she screamed and was rescued.

18. Upon being placed on his defence, the appellant gave an unsworn statement. He stated that on 20th June 2022 he was residing in his rented house at Rakwaro Center. He acknowledged knowing the complainant, a girl aged about 13 to 14 years, together with her parents with whom he had no differences. He stated that on the material day he requested the complainant to fetch drinking water for him as he had not purchased any. He denied attempting to defile her, stating that after he received the water, the complainant left.

19. I have given careful consideration to the evidence presented before the lower court as well as the written submissions filed by the respondent. For purposes of the substantive charge, with which the appellant was convicted and sentenced to 15 years' imprisonment, Section 9 of the *Sexual Offences Act*, stipulated that:

    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 not less that ten years.

20. In the circumstances, and as correctly observed by learned counsel for the State, the prosecution had the onus of proving beyond reasonable doubt the essential elements of the offence, namely:

    a. Age of the complainant

    b. Attempted penetration of the complainant

    c. Identity of the complainant

21. In addition to the above issues, the Court will consider the Grounds of Appeal presented herein and whether they are tenable. Since the appeal also impugned the sentence imposed by the lower court, I will consider whether or not sufficient basis has been shown for the court to interfere with the sentence of 15 years imposed by the lower court.

A. Age of the Complainant:

22. The charge sheet indicated that at the time of the attempted defilement, the complainant was 13 years old. The record of proceedings of the lower court shows that, as at 20th September, 2022 when her evidence was taken, the impression formed by the lower court was that the complainant was a minor and therefore had vior dire administered before her evidence was taken. The complainant also mentioned that she was in Grade 4 at [Particulars withheld] Primary school.

23. More importantly, the complainant's mother (PW2) produced her Certificate of Birth as the prosecution's exhibit No.7. It gives the complainant's date of Birth as 15th September, 2008. The appellant did not contest the complainant's age. On the contrary, in his defence he acknowledged that he knew the complainant was a child, estimating her age at about 13 to 14 years.

24. It is manifest therefore that the Prosecution proved beyond reasonable doubt that the complainant was a child for purposes of Section 9 of the Sexual Offenses Act.

B. Attempted penetration:

25. Section 388 of the Penal Code defines an attempt to commit a crime 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 intentions 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.

26. In the case of Michael Lokomar v Republic [217] KEHC 5408 (KLR) held:

> "In... an attempt to commit an offence the prosecution must prove the mens rea which is the intention and the actus reus which constitute the avert 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 preparation mere preparation to commit an offence and attempting to commit an offence (see Abdi Ali Bore – vs- Republic (2015) EKLR..."

27. In this regard, the only evidence was that of the complainant. She testified that the appellant sent her to fetch drinking water for him from the tap outside the rental premises; and that when she took the water to the appellant, he took the water and placed it on the table and then pushed her to his bed. He then undressed her and attempted to insert his penis in her vagina. PW1 added that she screamed and their neighbors quickly responded to her distress. The appellant reacted by pushing her out through the window.

28. The appellant challenged the credibility of the complainant's evidence. Indeed, Section 124 of the *Evidence Act* provides:

> Notwithstanding the provisions of section 19 of the *oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall no be liable to be convicted on such evidence unless it is corroborated by other materials evidence in support thereof implicating him.

29. However, the proviso thereto is equally explicit. It states:

> "Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".

30. In this case, the complainant's evidence was corroborated by that of PW4 who was the first responder. She stated that she heard the complainant screaming inside the appellant's house saying "you are injuring me". She found the door closed and she therefore raised alarm which attracted other neighbours. She was therefore standing outside the appellant's house when he pushed the complainant out through the window. She further stated that the appellant was immediately arrested by members of the public and taken to Rakwaro Police Station.

31. The complainant's evidence was further corroborated by the evidence of the Clinical Officer, PW5. He examined both the complainant and the appellant only a few hours after the incident. He observed that her hymen was intact. PW5 further noted that there were no bruises on the complainant's labia, and that whitish discharge seen in her genitalia was normal. In his opinion an attempt had been made to defile the complainant. As for the appellant, PW5 testified that he examined and found that he had a whitish discharge with the smell of semen. PW5 produced P3 form (Exhibit 1), the complainant's treatment notes (Exhibit 2), Lab notes (Exhibit 3), PRC Form (Exhibit 5) appellants' treatment notes (Exhibit 6).

32. Although the appellant impugned PW5's evidence in one of his grounds of appeal, contending that the trial court erred both in law and in fact by failing to appreciate that the medical report was inconclusive, inadequate, and inconsistent, and therefore incapable of sustaining a conviction, he failed to state in what exact manner PW1's report was inconclusive; granted that this was a charge of attempted

defilement. Moreover, in Kassim Ali v Republic [2006] KECA 156 (KLR) the Court of Appeal pointed out that:

> "...the commission of a sexual offence can be properly corroborated by circumstantial evidence (see Ongweya v. Republic [1994] EA 129).
>
> So the evidence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

33. The appellant also contended that the trial magistrate failed to appreciate that the case was a fabrication arising from grudge between himself and the complainant's mother. It is noteworthy however that, during cross examination, PW2 confirmed that they had been good neighbors with the appellant for the past three years. This was consistent with the appellant's own unsworn evidence, in which he acknowledged being on good terms with PW2 as his next door neighbour. He stated that they related well, had never disagreed and that he bore no grudge against the complainant or his mother. There was therefore no basis for the complainant and her mother to frame the appellant. In the premises, the Prosecution proved attempted penetration beyond reasonable doubt.

C. Whether the appellant was positively identified as the perpetrator of the alleged offence:

34. The evidence before the trial court, which was not disputed, established that the appellant was a neighbor to the complainant. This fact was consistently corroborated by the testimonies of PW1, PW2 and PW4, and was further acknowledged by the appellant himself. The incident occurred at about 2.00p.m. in broad daylight. The appellant conceded that they were next door neighbours with the complainant's mother; and that they related well. He further conceded that he had sent the complainant for drinking water. Here was therefore no question of mistaken identity.

35. Upon re-evaluation of the evidence presented by the prosecution before the lower court, I am satisfied that the burden of proof beyond reasonable doubt as regards the identity of the appellant as the person who attempted to defile the complainant. I am therefore satisfied that the trial court did not err in convicting the appellant for the offence of attempted defilement. The appeal against conviction is without merit and is hereby dismissed.

D. A comment on the sentence imposed by the lower court:

36. It is trite law that sentencing is a matter of discretion; and that an appellate court ought not to interfere with the discretion of the trial court unless certain factors exist. Hence Ogalo s/o Owuora v Republic [1954] 21 EACA 270, it was held that:

> "The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case".

37. The penalty for attempted defilement is prescribed in Section 9(2) of the Sexual Offense Act. The provision states:

(2) A person who commits an offence of attempted defilement with a child is liable on conviction to imprisonment for a term of not less than ten (10) years.

38. This court observes that the appellant lured the minor into his house with the intention of defiling her which were only thwarted by her screams. He was the complainant's next door neighbor. He conceded that they used to relate well with both the complainant and her mother. In the circumstances, 15 years' imprisonment is not excessive and there is not reason for interfering with the sentence imposed by the trial court.

39. Nevertheless, Section 333(2) of the Criminal Procedure Code provides that:

> Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

40. Upon perusal of the trial court's record, it is evident that the appellant was arrested on 20th June 2022, arraigned on 21st June 2021 and remained in remand until his conviction. The trial court's decision reflects that it considered the fact that he was a first offender, his mitigation in which he sought forgiveness, and the period spent in remand. However, the court did not specify the date from which the sentence was to commence.

41. In Ahmad Abolfathi Mohammed & Another Criminal [2018] eKLR the Court of Appeal held:

> "...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentence. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spend in custody. It must be remembered that the provision to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2022..."

42. Accordingly, it is hereby ordered hat the sentence be computed from 20th June 2022, being the date of the appellants arrest.

43. In the result, the Appeal is dismissed in its entirely. The sentence of 15 years, is hereby upheld to be reckoned from the 20th June 2022.

It is so ordered.

DATED AND SIGNED THIS 14TH DAY OF OCTOBER, 2025

OLGA O. SEWE

JUDGE

DATED AND COUNTERSIGNED AND DELIVERED THIS 12TH DAY OF NOVEMBER, 2025