Kiarie v Republic (Criminal Appeal E015 of 2025)
[2025] KEHC 18089 (KLR) (Appeals) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18089 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

APPEALS

CRIMINAL APPEAL E015 OF 2025

KW KIARIE, J

DECEMBER 3, 2025

BETWEEN

STEPHEN NDUNG'U KIARIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E012 of 2023 of the Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala–Principal Magistrate)

JUDGMENT

1. Stephen Ndung'u Kiarie, the appellant herein, was convicted of the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. In count two, he was convicted of 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.

3. The particulars of the offences were that on the 22nd day of May 2023, at [particulars withheld], within Kinangop in Nyandarua County, he intentionally touched the breasts of GWW, a girl thirteen years old. On the same day place and time, he attempted to cause his penis to penetrate the vagina of KWW, a girl aged thirteen years.

4. The appellant was sentenced to seven years' imprisonment in the alternative charge to count one, and ten years' imprisonment in count two. The sentences were ordered to run consecutively. He has appealed against the conviction. He was in person and raised the following grounds of appeal:

    a. The learned trial Magistrate erred in matters of law and facts by convicting me, whereas failing to have the sentences run concurrently.

b. The learned trial Magistrate erred in matters of law by convicting on inadequate evidence.

c. The learned trial Magistrate erred in matters of law and facts in failing to prove that the prosecution's case was not proved beyond a reasonable doubt.

d. By merits of the case and other emerging jurisprudence, a 20-year imprisonment term is harsh and inappropriate under the circumstances of the case.

5. The state did not file grounds for opposing the appeal or provide its submissions.

6. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] EA 32 to guide my decision-making process.

7. Section 9 (1) of the *Sexual Offences Act* provides 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.

8. An attempt to commit a crime is defined in the *Oxford Concise Law Dictionary* (2nd Edition) as:

> Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.

9. For an attempted offence to be committed, the actions complained of must pass the "but for" test. *Black's Law Dictionary*, on the other hand, defines the word attempt as follows:

> The fact or an instance of making an effort to accomplish something, esp. without success.
>
> Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.

10. In *Benson Musumbi v Republic* [2019] eKLR, the court considered what needed to be proven regarding the elements of the offence of attempted defilement. It stated 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.

11. An attempt is generally considered an inchoate offence. According to *Black's Law Dictionary*, a key feature of this crime is that it can occur even if the substantive offence is not fully completed.

12. An offence of attempted defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

a. The age of the complainant;

b. The overt act committed; and

c. Positive identification of the assailant.

13. These are the ingredients the prosecution must prove against an accused person.

14. GWW (PW1) testified that she was on her way to school at about 6 a.m. The appellant began to touch her breasts and told her that he wanted to have sexual intercourse with her. When he started to push her into a bush, she screamed. He then left and went to KWW (PW2), who was behind her. He grabbed KWW (PW2) and removed a pair of trousers. He also unzipped his trousers. She screamed, and some three men came and arrested the appellant.

15. KWW (PW2) testified that the appellant held her and knocked her down. He tried to remove her trousers but was held back, and PW1 was called to help. The appellant then knelt and exposed his penis. PW1 screamed, prompting some men to chase and catch him when he attempted to flee.

16. Stephen Ndung'u Kiarie, the appellant, argued that the girls insulted him by calling him *fala*. He held the two complainants, and the two screamed. This defence was clearly an afterthought. He did not confront the two complainants with these facts. The same was rightly dismissed.

17. I find the evidence from the two complainants believable. The appellant was a stranger to them, and I see no evidence or record indicating he was falsely implicated.

18. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nelson vs Republic* [1970] EA 599 as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members 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 Rex* (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. *R v Shershewsity* (1912) CCA 28 TLR 364.

19. Section 9(2) of the *Sexual Offences Act* provides:

> 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.

20. Section 11 (1) of the *Sexual Offences Act* provides:

> Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

21. The appellant was sentenced to the minimum prescribed term for count two, whereas in the alternative to count one, he received a shorter period than the minimum. As there was no application or notice for an enhancement, I will not disturb the sentences.

22. The two offences were committed in the same transaction. I therefore quash the order of the sentences to run consecutively and substitute it with an order for the sentences to run concurrently. The appeal has succeeded only to that extent.

DELIVERED AND SIGNED AT NYANDARUA, THIS 3RD DAY OF DECEMBER, 2025

KIARIE WAWERU KIARIE

JUDGE