REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. E011 OF 2025

DAVID GITONGA NJUE……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

(Appeal arising from the decision of Hon. J.W. Gichimu CM in the Runyenjes MCSO No. 9 of 2020 delivered on 21st September 2022)

JUDGMENT

Background: The Charge

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. Particulars are that on 20th June 2020, at Karurumo sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PMN, a child aged 5 years.
2. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, whose particulars are that on 20th June 2020, at Karurumo sublocation in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of PMN, a child aged 5 years.
3. The appellant pleaded 'not guilty' to the charge and after the full hearing, the trial court found that the evidence did not prove defilement but it proved attempted defilement contrary to section 9 of the Sexual Offences Act. He was convicted of this attempted defilement charge and sentenced to 10 years imprisonment.

The Appeal

4. Dissatisfied with the decision of the trial court, the appellant, filed a petition of appeal dated 15th February 2025 seeking that the appeal be allowed, conviction be quashed, sentence be set aside and that he be set at liberty.

5. The appeal is premised on the following grounds:
    1) That the honorable sentencing court erred in law and facts by imposing a harsh and excessive sentence upon the appellant without taking into consideration that the allegations were based on infringement;
    2) That, the honorable sentencing court erred in law and facts by failing to take into cognizance that the prosecution failed to prove its case beyond reasonable doubts as stipulated by law;
    3) That the honorable sentencing court erred in law and facts by failing to note that the prosecution's case was full of inconsistencies and contradictions hence discrediting the prosecution witnesses;
    4) That the learned trial magistrate still erred in both matters of law and facts by failing to critically and judiciously evaluate the evidence adduced by the prosecution witnesses and find out that there was glaring evidence of set up, frame up and wanting to settle personal vendetta using the court process in order to inflict pain upon the innocent appellant;
    5) That the learned trial magistrate still erred in both matters of law and facts by failing to realize that the Medical Report (P3) did not link the appellant with the charges he is convicted of;
    6) That the learned trial magistrate still erred in both matters of law and facts by applying Section 180 of the Criminal Procedure Code and Section 9 of the Sexual Offences Act without consideration of the appellant's defense;

Summary of the Evidence at the Trial

6. PW1 was the victim who stated in a *voire dire* examination that she was six years old. She testified that on the day of the incident, she was playing with her 2 friends at home when the appellant called her. The appellant was grazing cows and he told her to accompany him to a maize plantation. She left her friends and accompanied the appellant to the maize plantation which was some distance from her home. When they reached the plantation, the appellant removed her trouser and underwear and made her lie down facing up. He then lay on top of her and she felt pain on her genital area.
7. PW1 raised alarm and called her mother who came to the scene and found her naked. By that time, the appellant had already run away. Her mother took her to

the police station. In cross-examination, she stated that the incident took place during the day and it was the appellant who removed her clothes.

8. PW2 was the victim's mother. She produced the child's birth certificate showing that the minor was born in 2015. She stated that on 20/06/2021 [sic] the day of the incident, she returned home at around 8pm from her usual place of business selling roast maize. She did not find PW1 at home. She had left PW1 with her 2 friends but when she asked them PW1's whereabouts, they did not know. However, one of them told her that they had left her with her uncle the appellant. she asked around if anyone had seen PW1 and she was informed that she had been seen entering the maize plantation with the appellant. She knew the accused as a casual labourer in the area.
9. While searching for PW1 at around 9pm, she heard someone calling "mum" from the maize plantation. When she went to check, she found PW1 without her trouser and underwear. The appellant ran away leaving his phone and slippers at the scene, which items were handed over to the police. PW1 told her that the appellant blocked her mouth when she tried to scream. She checked PW1's genital area and noticed that there were bruises. She took the child to the hospital where it was confirmed that there was an attempt to defile the child. The following day, the appellant was arrested and taken to the police station.
10. PW3 was Scoria Wamalwa an egg hawker. At around 8.40pm on 20/06/2020 PW2 came to her and asked her to help look for PW1. She stated that as they searched PW1 called out for help from a nearby maize plantation. When they found PW1, she was undressed from the waist down. PW1 told them that the appellant was there but he had ran away when he heard them approaching the scene. They found a phone and slippers at the scene. They then reported the matter to the police.
11. PW4 was Nazaria Wanjira, the Assistant Chief. She stated that PW2 informed her that the appellant had defiled PW1 the previous day. PW2 had already reported the matter to the police and she needed help arresting the appellant. PW2 accompanied her to the appellant's home where they found him and took him to the Karurumo Police Post. When later re-called, PW4 stated that the accused's phone was recovered from the scene.

12. PW5 was Dennis Mwenda a graduate Clinical Officer. He stated that the victim was referred to him from Karurumo Police Post. Upon examining PW1, he observed that there were no injuries on her private parts. He produced a P3 form (P. Exhb2) which he had signed on 22/06/2020.

13. PW6 was PC Stephen Ochieng', the investigating officer. He stated that the victim was brought to the police station on 20/06/2020 by members of the public who reported that the appellant had attempted to defile her. The appellant was also arrested by members of the public who, in addition, brought a pair of slippers, a vest, a trouser, a pull neck sweater and a phone recovered from the scene. They reported that they had heard a child crying from a maize plantation and they found out it was the victim, whom they rescued. At the time, the appellant had already run away.

14. DW1 was the appellant who, when placed on his defense, denied in a brief statement, having committed the offence.

Parties' Submissions on the appeal

15. In his submissions, the appellant discredited the prosecution's evidence and stated that the burden of proof had not been discharged. He stated that the victim testified that the incident occurred during the day but all the other witnesses said that it occurred at night, a great contradiction. He relied on the cases of **Benard Kebiba v Republic [2000] eKLR, Elizabeth Waithiegeni Gatimu v Republic [2015] KEHC 1136 (KLR), Machira v Republic [2024] KEHC 2712 (KLR)** and **Chacha v Republic [2022] KEHC 16360 (KLR)**.

16. The respondent submitted that even though the evidence adduced failed to prove the offence of defilement, it was enough to prove the offence of attempted defilement for which the appellant was convicted. It relied on section 9(1) & (2) of the Sexual Offences Act and section 388 of the Criminal Procedure Code. It argued that the ingredients of the offence were satisfied and it relied on the case of **Moses Kabue Karuoya v Republic [2016] KEHC 2729 (KLR)**. Further reliance was placed on the cases of **Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR)** and **Joseph Lutangala v Republic [2013] KEHC 4735 (KLR)**. It argued that there is no legal basis for setting aside the sentence imposed by the trial court since the appellant

was convicted of an offence under the law. Reliance was further placed on the case of **Republic v Tama [2024] KEHC 14786 (KLR)**.

Issues for Determination

17. The issues for determination are as follows:

1) Whether or not the offence was proved beyond reasonable doubt, and
2) Whether or not the conviction and sentence should stand.

Analysis and Determination

18. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. That is the role of the appellate court as held in the case of **Kiilu & Another v. Republic [2005]1 KLR 174**, where the Court of Appeal stated thus:

> **"*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*."**

19. 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. Ultimately, the trial court found that the evidence adduced proved the offence of attempted defilement under section 9 of the Act. The trial court convicted him of the offence of attempted defilement, under Section 9 of the Sexual Offences Act (S.O.A) which provides:

> ***"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."

20. Section 388 of the Penal Code defines "attempt" as:-

"(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."

21. For the offence of attempted defilement to stand, the prosecution ought to have proved through evidence that the appellant had the intention to penetrate the victim. In the case of **Pius Arap Maina v Republic [2013] KEHC 1762 (KLR)**, the court held:

"Attempted defilement is a failed defilement. That is why the intention to penetrate a minor is a key ingredient…"

22. In the case of **Otieno v Republic (Criminal Appeal E006 of 2022) [2022] KEHC 10559 (KLR)** the court stated:

"The two main ingredients of an attempted offence are the intention (mens rea) and the execution of the intention (actus reus). The prosecution must thus among other things, prove the steps taken by the accused to execute the defilement which did not succeed."

23. PW1 stated that the appellant took her to a maize plantation and lay on top her then she felt pain around her genitals. PW2 testified that she saw bruises

around the victim's genitals and she took her to hospital. However, the Clinical Officer PW5, stated that when he examined the victim, he did not see any injuries on her genitalia. This leaves doubt as to whether or not there was an attempt to penetrate.

24. The identity of the appellant was proved through the testimony of PW1, the victim. Her testimony was that she knew the accused. That was enough to prove the identity of her assailant and there was no contest on identification. This does not require any corroboration according to the proviso at section 124 of the Evidence Act as follows:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***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."*** *[Emphasis added]*

25. From the foregoing, it is probable that the appellant was indeed with the victim on the material day. However, nothing else proves that he attempted to penetrate her as the medical examination failed to establish this. That is to say, a*ctus reus* was not firmly established. Given the missing evidence of attempted penetration beyond reasonable doubt, this means that the charge of attempted defilement cannot stand firmly against the appellant.

Conclusions and Disposition

26. In addition, PW1 clearly stated that she was with the accused at 4.00 p.m on the material day; that she had been playing with her friends when the accused called her as he was grazing his cows; that he then took her to a plantation where

he lay her on the ground and took off her clothes; and that the offence took place during the day. If PW1 could be believed for some of the evidence, she could be believed for all of it. That evidence was contradictory.

27. The trial court resorted to the charge of attempted defilement after failing to find all the elements of the offence of defilement. As stated earlier herein, PW5 found that there was no proof of penetration that he observed. Indeed, the charge under sections 8(1) and 8(2) of the Sexual Offences Act was not proved beyond reasonable doubt. From the same evidence, it is also not possible to firmly establish that the appellant committed the offence in the alternative charge under Section 9 of the Sexual Offences Act.

28. All in all, I find that the conviction was unsafe on the strength of the available evidence, and it must be set aside.

29. Accordingly, I find that the appeal has merit and it is hereby allowed. The conviction is hereby quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

30. Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 3RD DAY OF DECEMBER, 2025, pursuant to notices issued on 24th and 26th November 2025, as to electronic delivery.

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R. MWONGO
JUDGE