Dida v Republic (Criminal Appeal E012 of 2025)
[2025] KEHC 18685 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E012 OF 2025

FR OLEL, J

DECEMBER 17, 2025

BETWEEN

GALAMA DIDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence dated 03.04.2024 delivered by Hon S.K Arome (PM) in Marsabit MCSO No E006 of 2024)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of attempted defilement contrary to provisions of section 9 (1),(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the 26th day of May 2024 in Marsabit Central sub county within Marsabit county, intentionally attempted to cause his penis to penetrate the vagina of DJ a child aged 8 years.

2. In the alternative, he was charged with the offence of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on the 26th day of May 2024, in Marsabit central sub county within Marsabit county, intentionally and unlawfully touched the vagina of DJ, a child aged 8 years with his penis.

3. The Appellant took plea and denied the charges faced. The prosecution called five (5) witnesses to prove their case.

B. Evidence At Trial

4. PW1 DJ, underwent voire dire examination and gave unsworn evidence. She confirmed that she was a PP2 pupil at [Particulars Withheld] Primary school and recalled that on 26.05.2024 she was at home

with her mother and other siblings and her mother later left to go visit her grandparents. At some point the appellant came to their home and sat next to her, before requesting her to do something with him. She told him that she would report him to her father, but this did not deter the appellant as he proceeded to hold her, made her lie on the sofa facing up, removed his pant, lifted her dress and proceeded to poured something which looked like mucus on her stomach.

5. PW1 confirmed that the appellant did not insert his penis into her body, but the experience had traumatized her and made her cry. When her mother came back, she reported the incident and showed her the stained dress, which she had removed. Her mother asked the appellant, what had happened but he had feigned his innocence insisting that what had poured on PW1 dress was porridge.

6. Under cross examination, PW1 confirmed that the appellant had come to their house, in the evening when it was already dark but they had solar light within the house which emitted enough light to enable her identify the Appellant. He was also a person known to her since he was their neighbour who lived about three houses away. She also confirmed that she had removed her dress immediately the appellant had poured something that looked like Mucus on it and the said dress was left at the police station, when they went to report the said incident.

7. PW2 EJ , PW1 mother confirmed that she was blessed with 7 children and recalled that on the material day at about 9.00pm, she had left her house to go borrow tobacco from her neighbour Lokho Dertu and when she came back, she found her last born daughter (PW1) crying. On inquiry she told her that the appellant made her dress wet and on closer examination she saw clear substance on her dress and stomach. She further confirmed that the appellant would take supper in their house and sleep in their kitchen.

8. On realising what had occurred, she did report the incident on the same night at Marsabit Police station and had PW1 examined at Guru -lukesa dispensary but was assured by the doctor that she was fine. Under cross examination, she confirmed that she had no disagreement with the appellant and was not present, when the attempted defilement had occurred, but PW1 had reported to her what had transpired and he had been arrested by her neighbours and re arrested by the police.

9. PW3 PC Rahama Kiaro Abdi confirmed that she was attached to GBV desk at Marsabit Police station and was assigned to investigate this case which had been reported by PW2. She had escorted the minor to hospital and thereafter recorded the relevant witness statements. She also sought for and received PW1 birth certificate, which confirmed that she had been born on 27.02.2015 thus was 8 years old at the time of the incident. She further confirmed that she had sent the minors dress and accused buccal swab to the government analyst for DNA analysis. She produced the said birth certificate and minors dress as Exhibits.

10. PW4 Dida Dika confirmed that she was a clinical officer based at Marsabit County referral hospital and was a qualified clinician with 8 years' experience. She had examined PW1 and confirmed that her hymen was intact, and that she did not have any bruise on her vigina. She also noted that her dress was stained and proceeded to fill in the P3 form and Post rape care forms which she produced as exhibits before court. Under cross examination she confirmed that PW1 dress was stained and did recommend that the same be forwarded to the government analyst for examination.

11. PW5 George Kakuta confirmed that he was a gazetted government analyst and did receive the exhibit memo form, a green flora dress in a Khaki envelop marked A and buccal swab from both the accused and the appellant with a request to have the said items examined. He confirmed that the dress was stained with semen and the same generated a DNA profile which matched at 99.9% with the appellants buccal swab. He produced his report as an exhibit before court.

12. The appellant was put on his defence, and opted to give sworn evidence. He stated that on the material night he was at his farm at around 9.00pm guarding his beans against antelope invasion, when three people came riding a motor cycle and after introducing themselves as policemen, proceeded to arrest him. He denied attempting to defile PW1 and also faulted the prosecution case for they had failed to call the area chief and the 8 people, who had purportedly arrested him. He also termed the government analyst report as faulty.

13. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of attempted defilement and, after mitigation, proceeded to sentence the Appellant to serve ten (10) years in prison.

C. The Appeal

14. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that;

    a. That the learned trial magistrate erred in law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubt.

    b. That the learned trial magistrate erred in law and facts by failing to note that the sentence passed was harsh and excessive in the circumstances.

    c. That the learned trial magistrate erred in failing to consider my mitigation.

    d. That the learned trial Magistrate erred in law and in fact in failing to consider the time spent in remand before melting the sentence

15. The Appellant prayed that his conviction and sentence be quashed and he be set free.

D. Analysis & Detrmination

16. The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno versus Republic (1072) EA 32, Pandya versus Republic (1957) EA 336) &Shantital M Ruwala versus Republic (1957) EA 570, where the court of appeal set out the duties of the first appellant court.

17. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant and the respondent Counsel and find that the following issues arise for determination;

    a. Whether the ingredients of the offence of attempted defilement were proved.

    b. Whether the sentence passed should be interfered with.

18. In criminal cases, the burden of proof lies with the prosecution and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, thus consequently have established their case and deserve to have judgment given in their favour. See Miller v. Ministry of Pensions (1947) 2 All ER, 372, Republic v Edward Kirui (2014) eKLR, and Murugan & Another v State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688

19. The offence of attempted defilement is premised under section 9 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.

(3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.

20. 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."

21. In Daniel Simiyu Wanyonyi V Republic (2019) KEHC 10487 (KLR) the court held that;

> " The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus rea which constitutes the overt act towards the execution of the intention. The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; they must prove age, of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed."

22. In Isaack Ali Isaack V Republic (2020) KECA 699 (KLR), the court of Appeal, while discerning the element of "actus reus" relied on the case of Francis Mutuku Nzangi v Republic (2013) Eklr, where it was held that;

> " .....if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfilment. It also matters not that circumstances did in fact exist, unbeknown to the person that would have rendered his success impossible."

23. Thus, the prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; they 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 where there was failed defilement, because there was no penetration.

i. Age

24. PW1 confirmed that she was a PP2 pupil at [Particulars Withheld] Primary School. PW3 produced her birth certificate, serial No 19xxx which confirmed that she was born on 27.02.2015, and was 8 years at the time of the incident.

ii. Identification.

25. On identification, PW1 and PW2 both knew the appellant and PW2 had left him to watch over her children as she dashed to the neighbours house to get tobacco. It is also noted that the appellant did not run away from the scene of crime and was arrested by members of the public immediately thereafter. This was therefore a case of recognition and thus identification was sufficiently proved.

iii. Whether "Actus Reus" was proved.

26. The evidence presented outrightly proved that the Appellant attempted to defile PW1. He did lay her on the sofa, lifted her dress, removed his trouser and proceeded to release his sperms on her stomach. PW1 reported this incident immediately to her mum (PW2) and her dress forwarded to the government analysist for examination. PW5 produced his report, which confirmed that the semen extracted from PW1 dress matched 99.9% with the appellants buccal swap.

27. The appellant's actions confirm that he conceives an idea or plan to commit an offence and set out to effectuate the intention by taking definite steps calculated to attain that objective as manifested by his open and discernible act. It is therefore my finding that the trial magistrate did err in his evaluation of the evidence adduced and correctly convicted the Appellant on the offence of attempted defilement.

iii Sentencing

28. The principles guiding interference with sentencing by the appellate court were properly set out in S v Malgas (1) SACR 469(SCA) at para 12, where it was held that;

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court.....however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

29. Similarly in Mokela v The State (135/11)(2011) ZASCA 166, the Supreme Court of South Africa held that;

> " it is well established that sentencing remains pre-eminently within the discretion of the sentencing court. The salutary principle is that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by the sentencing court. In my view, this includes the terms and conditions imposed by the sentencing court on how or when the sentence is to be served."

30. The appellant was sentence to serve a term of ten (10) years, which is the minimum sentence as provided for under section 9(2)of the *Sexual Offences Act*. In Republic v Joshua Gichuki Mwangi; Intiative for strategic litigation in Africa (ISLA) & 3 others (Amicus Curiae),{2024} KESC 34 (KLR) the Supreme court reiterated its decision in Muruatetu II that the sentences in the *Sexual offences Act* were legal and went on to overturn a reduction of sentence imposed by the Court of Appeal.

31. In Ndungu v Republic (Criminal Appeal No 57 of 2019),(2025)KECA 1094 (KLR), the court of Appeal held that;

> " The above provision falls into the category of statutory provisions which create mandatory maximum/minimum sentences. Undoubtedly, the legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum sentence is laid down, the sentencing court has no option but to impose a sentence, "not less than" that the sentence provides for. Therefore, the words, "not less than" must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 8(3) of the *sexual offences Act*, these words must be understood to mean the offence under Section 8(3) is punishable with a minimum of 20 years.

32. It has not been shown that the said sentence was excessive and/or harsh nor was there any misdirection by the trial court in handing down the same. But the said sentence, shall run from 27th May 2025 when the Appellant was arrested in line with the provisions of Section 333(2) of the Criminal Procedure Code.

Disposition

33. The upshot, having considered the entire record of Appeal and parties submissions, I do find that the Appeal as against conviction and sentence fails and is hereby dismissed.

34. Right of Appeal 14 days.

35. It is so ordered

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 17TH DAY OF DECEMBER 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th Day of December, 2025.

In the presence of:-

Present in court .....Appellant

Mr. Otieno .....For O.D.P.P

Mr. Jarso .....Court Assistant