**Okebe v Rebuplic (Criminal Appeal E009 of 2025)**
**[2025] KEHC 19069 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19069 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT THIKA**

**CRIMINAL APPEAL E009 OF 2025**

**FN MUCHEMI, J**

**DECEMBER 18, 2025**

**BETWEEN**

**WILLIS ONYANGO OKEBE ..... APPELLANT**

**AND**

**REBUPLIC ..... RESPONDENT**

***(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable O. Wanyaga (SRM), in Criminal (S.O) Case No. E107 of 2021 on 16th January 2024)***

**JUDGMENT**

**Brief Facts**

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Thika whereas he was charged and convicted of the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act* No. 3 of 2006 as well as with an alternative charge of committing indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. He was convicted of the principal charge and sentenced to ten (10) years imprisonment on 23rd January 2024.

2. Being aggrieved by the judgment, the appellant lodged this appeal citing eight (8) grounds which are hereby summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant the prosecution had not proved its case by discharging the required burden of proof;

    b. The learned trial magistrate erred both in law and in fact by convicting him on a defective charge.

4. Parties disposed of the appeal by way of written submissions.

**The Appellant's Submissions**

5. The appellant refers to the case of Ramkrishna Pandya v Republic [1967] EACA and submits that the trial magistrate relied upon inconsistent and contradictory evidence to convict him. Furthermore, the inconsistent and contradictory evidence was of diminished probative value and a court should not rely on it. The appellant submits that the complainant did not specify the time the incidents occurred or how he removed her panty before being sexually assaulted. For these reasons, he appellant claims there are inconsistencies on how he allegedly inserted his fingers into PW1's vagina. Furthermore, the charge indicates that the incident occurred on diverse dates between November 2018 and November 2019 whereas PW1 testified that the appellant assaulted her in December 2019. The appellant further argues that there was discrepancy between the particulars of the offence which provided that he caused his male organ penis to penetrate PW1's female genital organ while PW1, PW2 and PW5 testified that he touched PW1's breasts and kissed her.

6. The appellant further submits that there is a contradiction on the date of birth of PW1 and the age that was given in evidence. Relying on the cases of Elizabeth Watigeni Gatimu v Republic [2018] eKLR and Joseph Chirchir Kabutie v Republic [2019] eKLR, the appellant argues that the testimonies of PW1, PW2, PW3, PW4 and PW5 are contradictory and unsafe to convict him.

7. The appellant relies on the cases of Peter Ndoli Ndia v Republic [2018] eKLR and G.O.O v Republic [2019] eKLR and submits that the prosecution did not prove the ingredients of the offence of attempted defilement. The appellant argues that the prosecution failed to prove the actus reus and mens rea of the offence as the actus rea must be more than a mere preparation to commit the act. The appellant argues that in the instant case, there was no attempt to penetrate and thus the prosecution did not prove the ingredients of the offence. Furthermore, PW1 testified that there was no medical evidence that she was defiled.

8. The appellant argues that the charge was defective for being at great variance with the evidence tendered in court and for being drafted in a confusing and uncertain manner. The appellant submits that the charge indicated that he intentionally attempted to cause his male genital organ, penis, to penetrate PW1's female genital organ, vagina whereas PW1 testified that he would hug, kiss, touch her breasts and insert his fingers in her vagina. The appellant further argues that the charge indicated the minor was 17 years old while PW1 testified that she was 18 years old at the time of testifying and that she was born on 30/10/2004. Further, and PW5 testified that the minor was 16 years old and was born on 8/5/2004.

9. The appellant submits that the police and the prosecution witnesses manipulated the evidence because he was arrested on 19/11/2021 and the offence was said to have been committed in April 2018 and November 2019, almost one year after the incident occurred. The appellant further argues that there is no record on how the police tried looking for him for that duration.

10. The appellant refers to the cases of Mary Wanjiku Gichira v Republic Cr. Appeal No. 17 of 1998 and Michael Mugo Musyoka v Republic (2015) and submits that the evidence of PW1 did not implicate him since she failed to demonstrate that he unzipped his trousers or removed his underwear or her pant to insert his penis.

11. The appellant submits that he was arrested on 19/11/2021 and sentenced on 16/1/2024 which amounts to two years and two months in remand custody which the trial magistrate did not consider during sentencing.

**The Respondent's Submissions**

12. The respondent submits that there were no contradictions or inconsistencies hence all the prosecution witnesses corroborated each other.

13. The respondent relies on Section 9(1) of the *Sexual Offences Act* and the cases of Keteta v R (1972) EA 532, 534 and Douglas Mutunga Muthene v Republic [2018] eKLR and submits that the evidence of PW1 and PW2 disclosed the offence of attempted defilement. The evidence on record reveals that on diverse dates, the appellant would hug, kiss and touch the complainant's breasts. PW1 further stated that on one occasion, the appellant came back and found her sleeping and inserted his penis into her vagina. She felt pain and pushed him away.

14. The respondent submits that the appellant's defence did not shake the prosecution case. The appellant committed an overt act which was immediately and actively connected to the offence of defilement that was committed. Thus, the offence of attempted defilement was established and proved beyond reasonable doubt. Further, the cognate offence of attempted defilement was committed.

15. On the issue of identification, the respondent submits that it is not in doubt that the complainant knew the appellant prior to committing the offence. The case is one of recognition as opposed to identification as the appellant was PW1's step father and they lived together. On the issue of age, the respondent submits that it is not in dispute that the complainant was a minor at the time of the offence as she was 16 years old and a copy of the birth certificate was produced.

16. The respondent argues that the age as indicated in the charge sheet of 17 years does not make it defective. Further it is not fatal to the prosecution case and can be cured under Section 382 of the Criminal Procedure Code. Relying on the case of Thomas Aluga Ndegwa v Republic [2018] eKLR, the respondent submits that the substance of the charge and the particulars were read out to the appellant in a language he understood and he pleaded not guilty. The appellant was present during the trial and cross examined all the prosecution witnesses and thereafter presented his defence. Thus, the appellant fully understood the charge he faced. The wording respondent argues that the 17 years contained in the charge did not cause any prejudice to the appellant in the trial. The evidence by the prosecution witnesses and the documentary evidence proved that the complainant was a minor at the time of the commission of the offence. Thus the error is curable under Section 382 of the Criminal Procedure Code.

17. The respondent submits that the particulars of the offence were corroborated and put into perspective by the evidence of the prosecution witnesses who were found credible by the trial court. The prosecution therefore proved its case beyond any reasonable doubt outweighing the defence of the appellant.

18. The respondent argues that the circumstances of the arrest were clearly stated by the witnesses and is in the court record and as such, there are no inconsistencies in that regard. PW5, the investigating officer stated that the mother of the complainant confronted the appellant and he went to live in Naivasha where he was finally arrested.

19. The respondent submits that it discharged the burden of proof and the defence did not discredit any of the evidence tendered during cross examination.

**Issues for determination**

20. The appellant has cited 8 grounds of appeal which can be compressed into two main issues:-

a. Whether the charge was defective.

b. Whether the prosecution proved its case beyond any reasonable doubt;

c. Whether the sentence meted out against the appellant was lawful and reasonable.

**The Law**

21. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

22. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) EA 570). 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 finding 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, see Peters v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

**Whether the charge sheet was defective**

23. Section 134 of the Criminal Procedure Code provides:-

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

24. The appellant argues that the charge sheet was defective as the age of the minor differed from the evidence presented in court and further that the charge was drafted in a confused and uncertain manner.

25. The Court of Appeal in Bernard Ombuna v Republic [2019] eKLR addressed the issue of a defective charge sheet in the following terms:-

> In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

26. Similarly the Court of Appeal in Obedi Kilonzo Kevero v Republic [2015] eKLR (CA at Nairobi) per Koome, G.B.M Kariuki & Sichale JJA:-

> The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of J.M.A v R [2009] KLR 671, it was held inter alia that:-
>
> It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernible.

27. A perusal of the charge shows that the charges preferred against the appellant are known in law in that they were based on Section 9 and 11 of the *Sexual Offences Act*. The manner in which the charge sheet is framed clearly states the offence, and particulars which indicate the date, time and place when the offence was committed, the victim and the age of the victim. I have looked at the charge and in my view it contains the ingredients of the offence as well as all the particulars required under Section 9 of the Act. As such, the particulars of the charge were adequate to inform the appellant of the offence that he was charged with and to facilitate him in preparing for his defence.

28. Regarding the age of the victim, the discrepancy in age did not prejudice the appellant as PW5 produced the birth certificate of the minor which left no doubt that at the time of the incident, PW1 was a minor aged sixteen. Thus, no miscarriage of justice was occasioned as a result of the different evidence in age by the witnesses. It is noted that the appellant not only pleaded not guilty to the offence when the charge was read out to him but also fully participated in the trial. Thus, the appellant was not prejudiced in any way by the discrepancy in the age of the minor as it was clear on record that the charge against him was that of attempted defilement of a minor. Additionally, Section 9(2) of the Act provides for the penalty of the offence of attempted defilement against a child of ten (10) years. As such, it was clear from the evidence that the complainant was a child when the incident occurred. The defect between the charge and the birth certificate was corrected by the evidence as is curable under Section 382 of the Criminal Procedure Code.

29. Section 382 of the Criminal Procedure Code provides:-

> Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revised or altered on appeal or revision on account of an error, omission or irregularity in the complaint, proclamation order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error or omission or irregularity has occasioned a failure to justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

30. It is also important to reiterate that the difference in age in the charge sheet and birth certificate was not prejudicial to the appellant as he understood the charge facing him and participated fully in the trial. This confirmed that the appellant fully understood and appreciated the charge. Having pleaded not guilty to the charge and undergone the full trial without raising the issue is an affirmation that he had no problem with the charge. This issue was raised on appeal.

**Whether the prosecution proved its case beyond reasonable doubt.**

31. The appellant was convicted of the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act*. The section provides:-

A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

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.

32. The elements of attempted defilement are the same as those of defilement except that penetration does not occur in attempted defilement. This issue was addressed in the case of John Gatheru Wanyoike v Republic [2019] eKLR where it was stated:-

It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.

33. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo v Republic (2016) eKLR, the court in regard to proof the age of the victim in cases of defilement stated as follows:-

> "....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

34. PW1 testified that she was 18 years old at the time of testifying and that she was born on 30/10/2004. PW5, the investigating officer testified that the minor was 16 years old and was born on 8/5/2004. The investigating officer produced the minor's birth certificate as an exhibit. I have perused the birth certificate which indicated that the minor was born on 8th May 2004. Therefore the complainant was a minor at the time the offence was committed. The appellant argues that there is a discrepancy of age as the complainant gave the wrong date of birth. I have already discussed this issue earlier in this judgment. It is clear from the evidence that the birth certificate S/No. 33530 produced by the investigating officer cured the discrepancy in the evidence. It is my considered view that the age of the minor was conclusively proved by the prosecution.

35. Section 388 of the Penal Code has defined the term attempted as follows:-

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 extent as to commit the offence, he is deemed to attempt to commit the offence.

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.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

36. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> "The partial or complete insertion of the genital organs of a person into the genital organ of another person."

37. The prosecution must demonstrate that the accused person took steps to initiate an act of penetration but was unable to complete it either by their own choice or due to the intervention of another person. There must be clear evidence of the attempt but no actual penetration should have occurred. PW1 testified that while her aunt was in hospital the appellant would kiss her, hug her and touch her breasts. The minor did not tell anyone about it at first. When her aunt passed away, they went to Nairobi and the minor told her mother that she wanted to live with the headteacher but the appellant refused and so did her mother. The victim further testified that the appellant continued with his behaviour and on one night he found her sleeping and inserted his penis into her vagina. She felt pain and pushed him away. The appellant stopped his behaviours for sometime but returned to his habit. The minor further testified that she did her class 8 examinations and then went to live with her mother in Nairobi and the appellant later joined them in Nairobi. She described the actions of the appellant that he would kiss her, insert his fingers into her vagina when the minor's mother was away. The complainant further testified that during the holidays he would continually sexually assault her. PW2, the complainant's younger sister testified that they used to live with their aunt where the appellant do indecent acts on the complainant such as kissing her, on the mouth and touching her breasts. The witness testified that one night, the appellant came home from work and found the two children sleeping. He then went and lay on PW1 who started shouting and screaming. PW1 pushed the appellant from the bed and he fell on the ground. The witness further testified that the appellant continued with the same habit while they were living in Nairobi.

38. PW4, the Mpesa Foundation counsellor testified that on 22/9/2021 at around noon, she went to the washroom and found PW1 who seemed weak and was crying. The witness testified that she took the minor back to her office and inquired what was going on. The witness further testified that the minor informed her that during the period she lived with her aunt, the appellant used to send her sexual advances and on two occasions he had tried to force her into sex. The witness further testified that when the minor moved to Nairobi, the appellant also moved there and continued with his sexual molestation on the victim. As a result, PW4 testified that the minor had serious mental issues and was admitted in hospital for three weeks for treatment following the various sexual assaults.

39. It is from the evidence clear that the actions by the appellant are a series of overt acts that took place on diverse dates over a period of time and which demonstrate several attempts to defile PW1. Furthermore, PW2 was present and saw what was happening. The testimonies of PW1 and PW2 were cogent and corroborated. Further, the defence did not cast any doubt on the prosecution case.

40. On the issue of identification, PW1 and PW2 testified that the appellant was their step father whom they lived with before he married their mother. PW3 testified that the appellant was her husband but he was not PW1 and PW2's biological father. The appellant testified that he married PW3 on 19/8/2018 after the his wife died. He further confirmed that the children used to live with their aunt who was the wife of the appellant before she died. Thus the appellant was well known to the complainant according to the evidence of several prosecution witnesses. This was a case of recognition and not just identification. The appellant confirmed that he knew the complainant. Thus, the testimony of PW1 identifies the appellant at the perpetrator. It is thus my considered view that the appellant was positively identified as the perpetrator thus establishing the element of identification.

41. The appellant argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal

Tanzania of Dickson Elia Nsamba Shapwata & Another v The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

42. The issues raised by the appellant are not material discrepancies and do not relate to the actual attempted defilement. PW1 gave a consistent and cogent account of how the appellant attempted to defile her. It's important to state that PW1's evidence remained unshaken by the appellant during cross examination. It is thus my considered view that there were no material inconsistencies or contradictions that went to the root of the matter.

43. The appellant has further argued that the circumstances of his arrest were not proper. He said he was arrested on 19/11/2021 and the offence was allegedly committed in April 2018 and November 2019 yet he was living with the complainant's mother during that period. He was arrested one year down the line. The record shows that PW5, the investigating officer testified that the incident was reported on 23/9/2021 by the complainant and PW4. The investigating officer further testified that the minor told her that the appellant would touch her breasts, call her love names and kiss her in front of her younger sister on numerous occasions but she had no one to report to. The appellant thereafter moved to Nairobi to live with the complainant and her mother where he still continued sexually harassing her. The witness stated that the minor reported to her mother and the pastor but the mother and minor reported the matter on 21/9/2021. The investigating officer stated that she then summoned the complainant's mother who told her that she confronted the appellant but he denied the same and relocated to Naivasha. She further stated that upon being confronted, the appellant went to live in Naivasha where he was finally arrested. The witness stated that they were led to Naivasha by the mother of the complainant. From the record, it is evident that the investigating officer gave an account of how the minor was reluctant to report the matter but later she did and the arrest of the appellant took place. Due to the length of time that the sexual harassment and defilement attempts took place and that it took time for the minor to report the matter, this history explains the delay in prosecuting the appellant. PW1 explains that the minor and himself, were at first staying at Muhoroni in Nyanza with their aunt who fell sick and passed on. It is after this that the appellant started sexually abusing he minor. It went on for quite sometime. The children moved to stay with their mother in Nairobi and the appellant followed them there and continued with the same unlawful actions until the minor reported the mater. The delay and the length of time as well explained. The appellant alleged manipulation or coaching by the investigating officer or the other witnesses in to frame him but he did not give any plausible defence in that regard.

44. Having analysed the evidence on record, I am of the considered view that the prosecution proved all the elements of the offence of attempted defilement and that the conviction was based on cogent evidence. The magistrate did not err in finding the appellant guilty of the offence charge.

**Whether the sentence is harsh and excessive**

45. The Court of Appeal, on its part in Bernard Kimani Gacheru v Republic [2002] eKLR restated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that

the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

46. Section 9(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

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.

47. The appellant was given the minimum sentence as it is stipulated under Section 9 (21) of the Act. As such, it is neither harsh nor excessive and it was lawful. I find no reason to interfere with the sentence.

48. The appellant further argues that pursuant to Section 333(2) of the Criminal Procedure Code, the trial magistrate did not consider the two years and two months that he spent in remand during trial of his case. On perusal of the record, the appellant was arrested on 19/11/2021. Upon taking plea, he was granted bond of Kshs. 100,000/- with one surety of similar amount or cash bail of Kshs.30,000/-. The trial court rendered its judgment on 16th January 2024 and sentenced the appellant on 23rd January 2024. There is no evidence on record that the applicant was released on bond during the period of the trial. From the date of arrest on 19/11/2021, the court record is clear that the appellant spent two (2) years and two (2) months in custody. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing. However, the record is clear that this period was not taken into account. This court has power to correct the said omission on appeal.

49. Accordingly, the conviction is hereby upheld in this appeal.

50. As for the sentence, this court hereby orders that the sentence imposed by the trial court of Ten (10) years imprisonment shall commence from the date of arrest, that is the 19th November 2021.

51. This appeal is partly successful.

52. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 18TH DAY OF DECEMBER 2025.**

**F. MUCHEMI**

**JUDGE**