



**Roswe v Republic (Criminal Appeal E059 of 2024)
[2026] KEHC 2412 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E059 OF 2024
KW KIARIE, J
FEBRUARY 27, 2026**

BETWEEN

ROSWE MAROA ROSWE APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case NO. E036 of 2022 of the Senior Principal Magistrate's Court at Kehancha by Hon. M.O. Obiero—Senior Principal Magistrate)

JUDGMENT

1. Roswe Maroa Roswe, the appellant herein, was convicted of the offence of attempted rape contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 10th day of August, 2022, at Particulars withheld sub-location, Ntimaru sub-County within Migori County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of P.N., a woman with mental disability, without her consent.
3. The appellant was sentenced to five years' imprisonment. He was aggrieved and filed this appeal against both the conviction and the sentence. He was represented by Nelson Jura & Company Advocates. He raised grounds of appeal as follows:
 - a. The learned magistrate erred in law and fact when he convicted the appellant based on evidence which did not meet the threshold of proof required in such cases.
 - b. The learned trial magistrate erred in law and fact when he disregarded the appellant's defence and instead went ahead to convict and sentence the appellant.
 - c. The learned trial magistrate erred in law and fact when he sentenced the appellant to serve a term of imprisonment of 5 years in total disregard of the appellant's mitigation and the full circumstances of the case at hand.



4. The respondent opposed the appeal through Elizabeth Kogos, learned counsel. She argued that the appeal lacked merit. did not file any grounds of opposition to the appeal.
5. This is a first appellate court. As expected, I have re-analysed and re-evaluated all the evidence presented before the lower court, and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. 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.

The accused in this case is charged with an offence of attempted

7. For an offence to be considered an attempt, it must meet the “but for” test. This is what I will endeavour to establish if the prosecution had proven.
8. M.R. (PW4) visited her grandmother’s house and went into the kitchen. There, she saw the appellant and P.N. on the floor. The appellant’s trousers were pulled down to his thighs, and he was lying on P.N., who was on her back. She quickly alerted her grandmother, who then closed the door and called for help.
9. G.M.M. (PW1) testified that she hurried home and verified the report. She locked the door from outside and called for help. A police officer arrived, opened the door, and took the appellant out of the house. The complainant was holding her pants in her hands. She stated that the complainant is mentally challenged and does not speak. The medical report confirmed that the girl had not been defiled and that she does not talk.
10. Roswe Maroa Roswe, the appellant, argued that he was arrested at PW1’s home, where he had gone to inform her about a funeral. He stated that someone closed the gate from the outside. He denied committing the offence.
11. This defence amounted to mere denial, and the trial magistrate was justified in dismissing it.
12. When PW1 found the appellant in the kitchen, the circumstances show that this was beyond mere preparation. The interruption by PW1 prevented the act from being completed. The “but for” test was proven.
13. I find that the conviction of the appellant was based on sufficient evidence.
14. The appellant contended that the 5-year prison sentence overlooked their mitigation and the case's full details. The appellate court generally only intervenes in the trial court’s decisions when specific conditions are satisfied. These conditions were clearly outlined in *Nillson vs Republic* [1970] E.A. 599, as outlined below.

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 Vs. 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 Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.

15. Section 4 of the *Sexual Offences Act* provides as follows:

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

16. The appellant was sentenced to five years' imprisonment. This is the minimum prescribed sentence for the offence. This court has not been shown that the learned trial magistrate acted on any incorrect principle or overlooked any material factor. I have no grounds to interfere with the sentence. I therefore dismiss the appeal.

DELIVERED AND SIGNED AT MIGORI, THIS 27TH DAY OF FEBRUARY 2026

KIARIE WAWERU KIARIE

JUDGE

