Republic v Kilango (Sexual Offence 3 of 2019)
[2025] KEMC 288 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEMC 288 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

SEXUAL OFFENCE 3 OF 2019

YA SHIKANDA, SPM

NOVEMBER 27, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

COSMAS KISINGA KILANGO ..... ACCUSED

JUDGMENT

The Charge

1. Cosmas Kisinga Kilango (hereinafter referred to as the accused person) is charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. The particulars of the offence are that on 3/10/2019 at [Particulars withheld] village in Kibwezi Sub-county within Makueni County, the accused person intentionally and unlawfully attempted to cause his penis to penetrate the vagina of FM (name withheld), a child aged 8 years. The accused person faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that on the same date and place, the accused person caused his penis to touch the vagina of FM, a child aged 8 years. The accused person pleaded not guilty where after the matter was set down for hearing.

The Evidence

The Prosecution Case

2. The prosecution case was heard by two other Magistrates who were subsequently transferred. I took over the matter after the accused person had been placed on his defence. The record indicates that the prosecution called a total of four (4) witnesses in a bid to prove its case against the accused person. PW 1 FMM (hereinafter referred to as the minor) gave evidence upon affirmation, as per the record.

It is not clear to me whether by using the term affirmation, the court meant unsworn. I say so because following the voire dire examination, the court made the following finding:

> " Minor is intelligent enough but does not understand the meaning of taking an oath using the bible. She can be affirmed".

3. The voire dire examination reveals that the minor stated that she was a Christian and knew that the Bible was God's book. She even stated that she went to Church. This means that she associated herself with a certain religion which believes in the existence of God. As per the questions which were posed to the minor during voire dire examination, the only problem was that she did not know what an oath was. An oath is a solemn pledge that calls on God or a Supreme Being as a witness to its truthfulness, while an affirmation is a similar solemn pledge but is made on the individual's personal honour without any reference to a deity. Both oaths and affirmations have the same legal effect. An affirmation removes the religious element and is an option for those who object to taking oaths or have no religious beliefs.

4. Section 15 of the *Oaths and Statutory Declarations Act* provides:

> " Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken the oath."

Section 19(1) thereof provides:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section".

5. The voire dire examination of the minor herein was done pursuant to section 19 above. In my view, having found that the minor did not understand the meaning of an oath, the court ought to have directed that the minor gives unsworn testimony as opposed to being affirmed. An affirmation is technically an oath devoid of religious underpinning or made where religion does not allow the making of an oath. The circumstances of the case did not warrant an affirmation. I will leave it at that. PW 1 stated that on 3/10/2019 she was going to her Uncle's home when her grandfather, who is the accused person herein called her. That the accused person asked the minor to enter his house. The minor entered the house then the accused person followed her.

6. The minor further testified that when she entered the house, the accused person removed her clothes then used his hand to touch her "private part for urinating". After the accused person was done, the minor put on her clothes then went home. The minor informed her friend and her class teacher about the incident. The minor's parents were called to the school and informed. The minor was later taken to hospital for examination after the matter had been reported to the police. PW 2 ANM (name withheld) testified that the minor was her daughter. That on 7/10/2019 the witness left the minor at home together with the minor's younger sibling. It was the evidence of PW 2 that the accused person then

took the minor to his house and defiled her. That on 8/10/2019, the minor informed her fellow pupils at school. The pupils informed the teacher who then called PW 2.

7. PW 2 testified that she went to the school whereupon the minor informed her together with the teachers that the accused person had defiled her. That she took the minor to hospital and upon examination, it was established that the minor had been defiled. PW 3 Police Constable Margaret (second name not clear in the proceedings) testified that she took over the matter from the initial investigating officer. That the matter was reported to the police on 16/10/2019. The witness narrated what the minor has stated at the police station and produced in evidence, the minor's certificate of birth. PW 4 Doctor Blastus Kakundi testified and produced in evidence a P3 form filled on 16/10/2019 by another doctor.

The Defence Case

8. When the accused person was placed on his defence, he opted to give a sworn testimony and called one other witness. The accused person testified that on 3/10/2019 he was not at his home. That he left his home on 2/10/2019 and went to Kativani area to attend to a ceremony. The accused person stated that he stayed at Kativani area and returned home on 4/10/2019. The accused person explained that he was framed up by the complainant's mother. That the complainant's mother went to the accused person in the company of two men and demanded that the accused person gives out two acres of land. The accused person declined. It was the evidence of the accused person that the complainant's mother was his daughter in-law and that when he declined to give her the two acres, she left the home with all her children. The accused person denied having committed the offence. DW 2 Sammy Mutuku Masaku testified that the accused person was their clan Chairman. That he invited the accused person to a ceremony. The witness produced in evidence, the invitation letter together with the English translation. DW 2 stated that the accused person stayed at his home from 2/10/2019 to 4/10/2019 when he left.

Main Issues or Questions for Determination

9. Having considered the charges and heard the evidence, I find that the main issues for determination are as follows:

    a. Whether there was an attempt to defile the minor herein on 3/10/2019;

    b. If so, whether it was the accused person who attempted to defile the minor;

    c. If not, whether an indecent act was committed against the minor on 3/10/2019;

    d. If so, whether such indecent act was committed by the accused person.

Submissions on Behalf of the Accused Person

10. At the close of the defence case, counsel for the accused person filed written submissions. The defence submitted that for the offence of attempted defilement, the prosecution must prove beyond reasonable doubt the age of the complainant, the act of attempted penetration and identification of the assailant. It was submitted that the age of the complainant had been proven beyond reasonable doubt. The defence contended that the accused person was arrested first then the police looked for evidence to justify his arrest. That the accused person's arrest was fuelled by a land dispute. The defence argued that the investigations were flawed. The accused person relied on his evidence and the defence of alibi and submitted that the defence was raised in good time during cross-examination of the complainant.

11. The defence argued that the prosecution evidence was full of contradictions. That the medical evidence did not support the charge of attempted defilement. That the evidence merely created suspicion which

cannot form the basis of a conviction. It was submitted that the prosecution failed to call a witness who allegedly rescued the complainant. The defence urged the court to draw an adverse inference for failure by the prosecution to call the crucial witness. The defence submitted that the alibi had not been displaced by the prosecution. They urged the court to acquit the accused person.

Analysis and Determination

12. I have carefully considered the evidence on record the submissions by the defence as well as the applicable law.

13. Section 9 of the *Sexual Offences Act* provides in part as follows:

> "(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."

14. Section 2 of the same Act defines the term "child" as having the meaning assigned thereto in the *Children Act*. Under section 2 of the *Children Act*, a child is defined as any human being under the age of eighteen years. Section 2 of the *Sexual Offences Act* further defines penetration as meaning the partial or complete insertion of the genital organs of a person into the genital organs of another person.

15. From the above provisions, it is my considered view that the key elements of the offence of attempted defilement are:

    1. The accused person must have attempted to commit an act which would cause the partial or complete insertion of his or another person's genital organ into the genital organ of another person or the accused person's genital organ. In a nutshell, the prosecution must prove attempted penetration;

    2. The alleged victim must be below the age of eighteen years. The prosecution must prove that the alleged victim was below the age of eighteen years at the time of incident, that is, proof of age;

    3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the child.

Age

16. The particulars of the offence indicate that the minor was eight (8) years old at the time of incident. In the case of Moses Nato Raphael v Republic [2015] eKLR, the Court of Appeal pronounced itself thus:

> "On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually

the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability".

17. In Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000, it was held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

18. In view of the foregoing, it cannot be said that age for purposes of sexual offences can only be proved by documentary or medical evidence. Nevertheless, the prosecution produced in evidence a copy of the minor's certificate of birth. The same indicates that the minor was born on 11/4/2011. This implies that at the time of the alleged incident, the minor was about eight (8) years and five months old. There is no contrary evidence. In cases of defilement, as far as age is concerned, all that the prosecution needs to prove is that the alleged victim was below the age of eighteen years at the time of offence. I find that there is sufficient evidence to prove that the minor herein was below the age of eighteen years at the time of the alleged offence.

Attempted penetration

19. The only direct evidence in respect of the offence is that of the minor herself. The minor testified on 4/10/2021 at the age of 10 years and five months. The record indicates that the minor was affirmed because she did not understand the meaning of taking an oath using the Bible. An affirmation had the same legal effect as an oath. This implies that the complainant gave sworn testimony. Section 124 of the *Evidence Act* provides 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."

20. Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath, but that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.

21. The question of who is a child of tender years for purposes of evidence was settled by the Court of Appeal. In the case of Maripett Loonkomok v Republic [2016] eKLR, the Court of Appeal held as follows:

> " The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959

in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination."

22. In the authority of Fransisio Matovu v Republic [1961] E.A 260, it was held, inter alia that:

> "(1) the trial magistrate should question the child to ascertain whether the child understands the oath and;
>
> (2) If the court does not allow it and not to be sworn, it should record whether or not in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth."

23. However, in the authority of Maripett Loonkomok (supra), the Court of Appeal held that mere failure to conduct a voire dire examination does not vitiate the trial. The complainant herein gave testimony on affirmation. Her evidence does not therefore fall under the ambit of section 124 of the *Evidence Act*. This implies that the requirement of corroboration or giving reasons as to why the trial court is satisfied that the minor is telling the truth does not arise. I am guided by the authority of Johnson Muiruri v Republic [1983] KLR 445, in which the Court of Appeal held that:

> " In our view corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence".

24. The court however added that in such circumstances, the trial court should warn itself that it would be unsafe to convict without corroboration. Similarly, in the case of Kibageny Arap Kolil v R [1959] EA 82, the Court of Appeal for Eastern Africa held that:

> " But even where the evidence of a child of tender years is sworn (affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated without warning itself and the assessors if any of the danger of doing so.....In short we are of the view that, in law, evidence of a child of tender years given on oath after voire-dire examination requires no corroboration but the court must warn itself that it should in practice not base a conviction on it without looking for and finding corroboration for it."

25. The proviso to section 124 of the *Evidence Act* makes an exception for the requirement of corroboration of unsworn testimony of a child of tender years in criminal proceedings involving sexual offences where the only evidence is that of the alleged victim. The provision empowers the court to convict an accused person if, for reasons to be recorded, the court is satisfied that the alleged victim is telling the truth. In my considered view, one of the main reasons as to why a court would be satisfied that the alleged victim is telling the truth is the presence of corroborative evidence. Whether the testimony of the alleged victim of tender years is given on oath or not, the court must of necessity exercise great caution before convicting an accused person.

26. The question as to whether there is corroborative evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. In view of the foregoing, I hereby warn myself that although the complainant herein gave evidence on oath, it would be unsafe to convict the accused in the absence of corroborative evidence. I will seek to be satisfied that indeed, the complainant told the truth. I did not take the testimony of the complainant. The record indicates that the complainant stated in part as follows:

> " He removed my clothes and placed them on the bed.....He slept on me in his room. He touched me on the private parts for urinating. He used his hand. He used his right hand and told me not to tell anyone.....I felt pain when he touched my private part".

27. The gist of the complainant's testimony is that the accused person removed her clothes then touched her vagina using his hand. I will consider a few authorities on the subject of attempted defilement.

1. David Aketch Ochieng v R [2015] eKLR.

28. In this case, Makau J observed as follows on attempted defilement:

> " The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of *Sexual Offences Act* No. 3 of 2006. What is attempted defilement" It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement."

2. Daniel Ombasa Omwoyo v Republic [2016] eKLR.

29. In this case, evidence adduced by the complainant was that the appellant merely tried to remove her clothes, she screamed and members of the public came to her rescue. Okwany J held that the mere action of attempting to remove clothes by the appellant did not qualify to be attempted defilement.

3.Pius Arap Maina v Republic [2013] eKLR.

30. While dealing with the offence of attempted defilement, Kimondo J observed thus:

> " The evidence of the complainant did not disclose any element of the offence of attempted defilement. Attempted defilement is a failed defilement. That is why the intention to penetrate a minor is a key ingredient. In the complainant's words, all that the appellant did was to touch her on the waist and proclaim he loved her. She formed the impression that the appellant wanted to sleep with her. Neither the actus reus nor the mens rea for the offence were thus established. Even if one were to accept her version that the accused said he wanted to sleep with her, it would still be miles apart from an intention to penetrate a child. The ingredients of the offence were thus not proved beyond reasonable doubt."

31. The *Sexual Offences Act* does not define the term "Attempt." However, section 388 of the Penal Code defines "Attempt" as follows:

> "(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."

32. In Francis Mutuku Nzangi v Republic [2013] eKLR, the Court of Appeal explained the meaning of an attempt, as defined by section 388 of the Penal Code as follows;

> "Our understanding of this provisions is 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 fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

33. In my view, and being guided by the above authorities, for the offence of attempted defilement to be established, there must be evidence to show that the accused person did certain overt acts which clearly indicated his intention to penetrate the minor. In other words, there must be an overt attempt to penetrate as opposed to a mere intention to do so. The accused person must have taken steps to fulfil his intention or objective. From the testimony of the complainant, it is crystal clear that whoever violated her, if at all, did not make any attempt to penetrate the complainant's vagina. The P3 form which was the only medical evidence that was produced indicates that when the complainant was examined, her genitalia was normal. There was nothing out of the ordinary. If the testimony of the complainant is anything to go by, it would amount to an indecent act, but not an attempted defilement. The key ingredients of the offence of attempted defilement have not been satisfied.

Identification of the assailant

34. The evidence on record indicates that the complainant is the accused person's grandchild. The parties were well known to each other. The complainant was categorical that it was the accused person who had committed the act. On the other hand, the accused person stated that he was elsewhere when the offence was allegedly committed. The gist of the accused person's defence is two-fold:

    1. He was elsewhere at a ceremony when the incident happened. The accused person basically raised the defence of an alibi;

    2. He was framed up because of declining to give two acres of land to the complainant's mother.

35. In the case of Chabah & Another v Republic [1988] KLR 1, the Court of Appeal held that the onus is on the prosecution to displace the alibi after the defence raises it. In Wong'oribe v R [1980] KLR 149 Madan JA (as he then was) in delivering the judgment of the court at page 151 letter G & H stated:

36. The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. .....Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."

37. In Kiarie v Republic [1984] KLR 739, the Court of Appeal held thus:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable".

38. In the case of Karanja v Republic [1983] KLR 501, the Court of Appeal had this to say:

> "Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought".

39. In the case of Kossam Ukiru v R [2014] eKLR, the Court of Appeal held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and where, when weighed against all the other evidence, it is established that the accused person's guilt has been established. The court observed thus:

> "We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."

40. PW 3 testified that the report was made at the police post on 16/10/2019. This was after close to two weeks from the date of the alleged incident. No explanation was given as to why the report was made two weeks later yet the complainant and the accused person were well known and stayed in the same homestead. The complainant's mother stated that she was informed of the incident on 8/10/2019 when she went to the complainant's school. That she informed the area Assistant chief. It was the evidence of the complainant's mother that she recorded her statement after the accused person had been arrested. The record indicates that the accused person was arrested on 24/10/2019. This was after eight days from the time the report was made to the police and when the P3 form was filled. The evidence of PW 3 indicates that witness statements were recorded on 25/10/2019 after the accused person had been arrested. The sequence of events in this matter raises eyebrows.

41. It is not clear whether the police recorded any statement from the accused person. The accused person stated that he informed the police that he was not home on the day of the alleged incident. The police officer who investigated the matter was not called to testify. As far as the proceedings are concerned, the defence of alibi was raised for the first time during cross-examination of the complainant. As already stated, where an accused person raises the defence of an alibi, the prosecution has the duty to place the accused person at the scene of crime. The prosecution have a remedy under the provisions of section 212 of the Criminal Procedure Code which provide as follows:

> "If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter".

42. My view is buttressed by the authority of John Odero Omenda & another v Republic [2014] eKLR, in which Majanja J held as follows:

> "The defences raised by the appellants were plausible and although they were raised for the first time during the defence, the duty of displacing or rebutting that defence lay on the prosecution. Indeed, the law affords the prosecution such an opportunity in section 212 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)..... While the evidence of identification of the appellants by PW 1 and PW 2 may have sufficed, I am cautious to find that the prosecution satisfied the standard of proof in light of the appellant's defence which the trial court, respectfully, did not exhaustively weigh against the prosecution evidence to make a finding that it was displaced by it".

43. Similarly, the Court of Appeal in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR observed as follows:

> "But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence".

44. The provisions of section 309 of the Criminal Procedure Code are similar to those of section 212 save that the former applies to proceedings in the High court whereas the latter applies to proceedings in the Subordinate courts. The accused person does not have to establish that his alibi is reasonably true. All that he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts- see Uganda v Sebyala & Others [1969] EA 204.

45. As already observed, the investigating officer was not called to testify. With the kind of evidence on record, I find that the testimony of the investigating officer was key. It was thus not known why the investigating officer believed the complainant and not the accused person. Given the circumstances of the case, there was need for an explanation, particularly from the investigating officer, indicating that the accused person was at the scene at the material time and that he had the opportunity to commit the offence. Having charged the accused person, the prosecution had a duty to show that the accused person's defence was not plausible. That could only be done by proper investigations and evidence of the same to be tendered in court.

46. I have considered the accused person's defence bearing in mind that he is under no duty to prove his innocence. The accused person gave a probable version of what transpired on the material day. He even called a witness to verify that the accused person was elsewhere when the incident was said to

have occurred. I find it difficult to disregard his evidence given the pitfalls in the prosecution case. The prosecution must prove its case beyond reasonable doubt. This standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918).

47. Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. My opinion is that reasonable doubt has been cast in the prosecution case. As a matter of law, the doubt must be resolved in favour of the accused persons. What we have on record amounts to suspicion. Suspicion however grave, can never in law form the basis for a conviction. In the case of Joan Chebichii Sawe v Republic [2003] eKLR, the Court of Appeal held thus;

48. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence"

49. In view of the considerations made herein above, I find that the prosecution has failed to displace the defence of alibi and thus failed to prove its case against the accused person beyond reasonable doubt.

Disposition

50. Having made the above considerations, I find that the prosecution has failed to prove beyond reasonable doubt, the charge of attempted defilement contrary to section 9(1) as read with 9(2) of the *Sexual Offences Act*. The alternative charge of Committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* shall suffer the same fate for the same reasons. Consequently, I make the following orders:

    a. The accused person Cosmas Kisinga Kilango is found not guilty and is hereby acquitted of both the main and the alternative charges under section 215 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 27TH DAY OF NOVEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.