



REPUBLIC OF KENYA



**Atito v Republic (Criminal Appeal E042 of 2023)
[2025] KEHC 7230 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E042 OF 2023**

DK KEMEL, J

MAY 30, 2025

BETWEEN

FREDRICK OCHIENG ATITO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. J.P. Nandi (SPM)
dated 13/09/2023 in Bondo SPMCR S.O. No. E020 of 2023)*

JUDGMENT

1. The Appellant herein, Fredrick Ochieng Atito, was charged at the lower court with the offense of attempted defilement contrary to section 9(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 21st April 2023 at about 1020 hours at [Particulars Withheld] village, Kanyadet Sub-location, Gem Sub County within Siaya County willfully and intentionally attempted to cause his penis to penetrate the vagina of J.A.A a child aged 11 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offense Act No. 3 of 2006*. The particulars were that on 21st April 2023 at about 1020 hours at [Particulars Withheld] village, Kanyadet Sub-location, Gem Sub-County within Siaya County willfully and intentionally touched the vagina of JAA, a child aged 11 years with his penis.
3. After a full trial, the Appellant was convicted and sentenced to 10 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant filed his Petition of Appeal dated 23rd September 2023, wherein he raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact in convicting the Appellant when the prosecution had failed to prove its case beyond reasonable doubt.



- ii. That the trial magistrate failed in law and in fact by convicting the offender with the offence of attempted defilement without proof of the mandatory elements of defilement. .
 - iii. The trial magistrate erred in law and fact in convicting the Appellant based on contradictory evidence.
 - iv. The trial magistrate erred in law and in fact in shifting the burden of proof to the Appellant.
 - v. The trial magistrate erred in law and in fact by failing to take the Appellant's evidence and submissions into consideration.
 - vi. That in the alternative, the trial magistrate erred in law and in fact by failing to exercise his constitutional discretionary powers and hand the Appellant a lighter reasonable sentence other than the mandatory one considering the circumstances of the case.
5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
6. The prosecution called a total of seven witnesses in support of its case.
7. Thomas Otieno Apiyo (PW1) testified that he is a businessman and that the Complainant is his granddaughter aged 11 years. He identified a baptism card which showed a date of birth as 3/10/2011 which was marked as MFI-1. He stated further that on 21/4/2023 at about 10.00 Am he sent his granddaughter (the Complainant) to Akala market to buy Omena and some vegetable and that he noticed that she was taking too long. That at about 11.00 AM, two ladies went to his house and informed him that the Complainant was at Akala police station as someone tried to defile her. That he rushed to the police station and found the Complainant being interrogated. He then recorded his statement. That the police issued him with a P3 form and escorted them to Akala health center for examination and treatment of the Complainant. He identified the treatment notes which were marked as MFI- 2, while the duly filled P3 form dated 21/4/2023 was marked as MFI- 3. That he was then shown the Appellant as the perpetrator. That he had known him as Fred and who lived about 500 metres from his home.
8. Jane Ashley Akinyi (PW2) (the Complainant/minor/victim) gave a sworn statement after a *voire dire* examination by the trial magistrate. She stated that she stays at Akala with her grandparents. That on 21/4/2023, her grandfather (PW1) sent her to the market to buy omena and while on the way he met with the Appellant who asked her to get him some mangoes from the bush. That she refused as there were no mangoes in the bush. That is when the Appellant tripped her and that she fall down whereupon he removed her pant and her dress and his underwear and then lay on her. That she screamed for help and that another person came and asked him why he was doing that to the Complainant. That the perpetrator started to run away but he was arrested. That they then went to Akala police station where the perpetrator was rearrested. That she was then taken to Akala health centre for examination and treatment. That she identified her black panty which was marked as Mfi-4. That the person who had held and attempted to defile her was the Appellant.
- On cross examination, she stated that her grandfather had given her Kshs 50/= to buy omena. That the perpetrator removed his underwear. That she does not know the person who rescued her. That the Appellant had a brown trouser.



9. Charles Odhiambo Ojenge (PW3) testified that he is a resident of Kanyadet sub location and a mason by profession. That on 21/4/2023 at about 10.00 AM as he came from Akala market heading home, he heard a voice of a child crying in a bush saying 'do not kill me'. That on moving closer, he found a child lying on the ground and a man was on top of her. That the man was using a jacket to cover the mouth of the child. That he shouted at him asking him what he was doing. That the man turned and started running away but he shouted and raised alarm and that one Jack who was weeding his land nearby managed to arrest the perpetrator. That he informed Jack that the assailant wanted to defile the child. That Eric likewise came and assisted them in arresting him. That Eric called the chief who directed them to take him to Akala police station.

He stated further that he did not know the Assailant before. That the Appellant had a red jacket which was marked as MFI -5. He identified the assailant as the Appellant in the dock.

On cross examination, he stated that the Appellant had a brown trouser and that he was using the red jacket to cover the mouth of the child.

10. Jack Ojuok (PW4) testified that on that fateful day he was weeding in his farm when he heard someone shouting "catch that person, he wanted to defile a child". That he stood up and found a man running away. That he ran towards him and arrested him. That he knew the person he had arrested as they came from the same area and that he was called Fred. That they took him to Akala police station. That he identified the said Fred as the Appellant in the dock.
11. Eric Ombe Otieno (PW5) testified that on that fateful day he was weeding his maize when he heard someone shouting "arrest him, arrest him". That he went to the scene and found Charles and Jack holding a person called Fred. That he interrogated Fred who confirmed that he was in the bush with the minor. That People came wanting to lynch him but he stopped them and called the chief who directed them to take him to Akala police station. That he had known Fred before and identified him as the Appellant in the dock.
12. No. 251195 Gladys Nashipai (PW6) testified that she is the investigation officer. That on 21/4/2023, while at the report office, Jack Odhiambo, Charles Ojongo and Erick Ombe went with one Fred Ochieng and the Complainant. That they reported that the Appellant had tried to defile the minor. That the minor claimed that at 1015 hrs she had been sent to Akala market to buy omena when she met a strange man, who requested him to help him get some mangoes from a certain tree. That the minor/ Complainant stated that there were no mangoes. That the Appellant gave her Kshs 10/= and promised to add her another Kshs10/= after he had defiled her. That he pushed the minor to the ground, removed her panty, inserted his fingers in the minor's vagina who screamed and that the Appellant covered her mouth with his red jacket. That the Appellant then unzipped his trousers while lying on her wanting to defile her. That is when a man came and shouted to the Appellant to stop what he was doing. That two other men came and arrested the Appellant who attempted to ran away. That the Appellant was taken to Akala police station together with the minor. That she produced baptism card of the minor as Exhibit 1, red jacket as exhibit 5 and black panty of the minor as exhibit 4.
13. Reyno Akoth (PW7) testified that she is a clinical officer from Akala Health Centre. That she had a P3 form in favour of the Complainant. That on examination, there were bruises on the labia minora and that her clothes were soiled and wet. That the bruise showed that there was attempted defilement. He produced the P3 form as exhibit 3, treatment notes as exhibit 2, PRC form as exhibit 6. On cross examination, he stated that he did not meet the Appellant and did not examine him.



14. Upon the close of the prosecution's case, the trial court established that a prima facie case had been made out against the Appellant to require him to make a defence. He opted to tender a sworn testimony.
15. Fredrick Ochieng Atito (DW1) testified that on the material date he was on the road eating mango when the complainant passed by and that she borrowed a mango and that he climbed onto a tree and got one for her only for some two people to arrive and who demanded to know what he was doing with the complainant and as he walked away, they attacked him. That he requested them to take him to the police station. That on arrival, he was placed in the cells. That he denied the allegations levelled against him.
16. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
17. The Appellant submitted that the prosecution did not prove the offence of attempted defilement beyond reasonable doubt as to warrant a conviction. It was submitted that the prosecution did not prove the ingredients inter alia; that the child is a minor; that there was an act of penetration which was not successful; that there was positive identification of the perpetrator. It was also submitted that the prosecution did not prove that there was complete or partial penetration and that no evidence that the Appellant was found in the act or that the complainant's genitalia or underpants had some spermatozoa. It was also submitted that the trial court was swayed by the evidence of the clinical officer who indicated that there were bruises on labia minora. It was also submitted that the sentence imposed was excessive and should be reduced.
18. I have considered the evidence tendered before the lower court as well as the submissions filed. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.
19. It is noted that the Appellant was charged under section 9(1) as read with section 9(2) of the [Sexual Offences Act](#) No. 3 of 2006 which stipulates 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.
20. The ingredients that must be proved in a case of attempted defilement were set out in the case of *Gatheru Wanyoike v. R* [2019]eKLR as follows: age of the complainant/victim who must be a minor, there was an act to cause penetration which was not successful, and the identity of the perpetrator.
21. On the element of age, the investigating officer (PW6) produced the baptism card of the minor as exhibit one. The same indicated that the minor was born on 3rd October 2011 thus, she was about 11 years old at the time of the offence. In the case of *Omuroni versus Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate was a prima facie proof of age; and it was sufficient as proof of age. (See also *Mwalango Chichoro vs. Republic MSA C. Appeal No. 24 of 2015*).

The baptism card produced herein showed that the complainant was aged 11 years old at the time of the incident and thus she was below the age of 18 years and a minor at that and who had no capacity to consent to the sexual intercourse which was not successful. I find this ingredient was proved by the prosecution beyond reasonable doubt.



22. On the element of an act to cause penetration which was not successful, PW2 stated that ‘That is when the Appellant caused her to fall down and removed her pant and her dress and his underwear and lay on her.’

The clinical officer (PW7) stated that ‘on examination, there were bruises on the labia minora and that her clothes were soiled and wet. He stated that the bruise showed that there was attempted defilement. He produced P3 form as exhibit 3, treatment notes as exhibit 2, PRC form as exhibit 6.’

I am satisfied that the 2nd element was articulately explained by PW6 and PW7 whose evidence corroborated that of the complainant (PW2). The fact that the Appellant removed the panty of the minor and his own panty then lay on top of the minor as stated by PW2 is proof that he was attempting to penetrate the vagina of the minor. I find that indeed there was an act to cause penetration which was not successful. Even though the Appellant’s counsel has challenged the issue of the injuries noted by the clinical officer and contended that the trial court was swayed by the medical notes, it is noted that the complainant herself stated that the Appellant first started using his fingers to touch and caress her genital organ before forcefully removing her underpants and also removing his and then laying on top of her. The clinical officer confirmed that the complainant’s dress was soiled and wet and that there were bruises on labia minora which confirmed an attempted defilement. From the evidence of the complainant and the clinical officer, it is clear that the Appellant was in the process of defiling the complainant and that he could have succeeded had the members of public not responded in good time.

It is noted that counsel for the Appellant has sought to rely on the description of attempted defilement under section 9(1) of the Act which states ‘‘ A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.’’ Indeed, the description aforesaid relate to actions or activities which would lead to defilement but does not succeed in the end. According to the Appellant’s counsel, there was no actions leading to defilement. However, it must be noted that the actions made by the Appellant in leading the complainant into a nearby bush and flooring her and then removing her underpants, touching her genital organ as well as unzipping his trousers and then lying on top of the complainant were actions meant to actualize the act of defilement but which were thwarted by members of public (PW3, PW4 and PW5) who rushed to the scene and apprehended him pronto. I find that had those witnesses not arrived in good time, the Appellant would have actualized his mission namely to defile the complainant. I am therefore satisfied that the ingredient of attempted defilement was proved by the Respondent beyond reasonable doubt.

23. On the element of identification, the evidence of the complainant, PW3, PW4 and PW5 clearly placed the Appellant at the scene of crime. The incident took place in broad day light at around 10.00 Am and that the Appellant was caught in the act (flagrant delicto). PW3, PW4 and PW5 had known the Appellant before and that they apprehended him and escorted him to Akala police station where he was later charged. The complainant had not known the Appellant before and thus there was no issue of a frame up. It is noted that had PW3, PW4 and PW5 not arrived in the nick of time, the Appellant could have succeeded in committing an act of defilement. As the act of penetration did not succeed, then the offence of attempted defilement was therefore committed by the Appellant. I find that this was a case of recognition because he was a person well known to the persons who came to the rescue of the complainant. I am therefore satisfied that the perpetrator was properly identified by the witnesses. The Appellant’s defense evidence did not cast doubt upon that of the prosecution which was overwhelming against him. I find this ingredient was proved beyond reasonable.



24. An analysis of the evidence as a whole leaves no doubt that the finding on conviction by the learned trial magistrate was quite sound and that the same must be upheld.
25. As regards the sentence, it is noted that the Appellant in his petition of appeal has challenged the aspect of the sentence. On the issue of sentence, it is noted that the Appellant was ordered to serve a sentence of 10 years' imprisonment which is the minimum mandatory sentence provided for under section 9(2) of the Act. The trial court received the Appellant's mitigation as well as the fact that he was a first offender. The sentence imposed, in my view was neither harsh nor excessive. I am guided by the Supreme Court's decision in Petition No. 18 of 2023 R Vs Joshua Mwangi Gichuki and Others [2023] eKLR which held that minimum sentences under the Sexual Offences Act No.3 of 2006 are lawful until the same is amended or declared unconstitutional. The action of the Appellant in waylaying a young and innocent must be deprecated. The Appellant was expected to protect vulnerable children but to stalk and prey on them. The incident has had the effect of psychologically scarring the complainant. The Appellant deserved a deterrent sentence and that the custodial rehabilitation will help to mould him into a better person before being released back to the society. It is noted that the Appellant posted bail and thus did not remain in custody during the trial and thus the application of section 333(2) of the Criminal Procedure Code does not apply and thus the sentence shall commence from the date of conviction.
26. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit and is hereby dismissed.

Orders accordingly.

Dated and delivered at Siaya this 30th day of May, 2025.

D. KEMEI

JUDGE

In the presence of :

Onsongo Wycliffe.....for Appellant

M/s Kauma.....for Respondent

Okumu.....Court Assistant

