



REPUBLIC OF KENYA



KENYA LAW
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**Kironda v Republic (Criminal Appeal E049 of 2024)
[2025] KEHC 10666 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E049 OF 2024
WM KAGENDO., J
JUNE 26, 2025**

BETWEEN

MZEE ATHMAN KIRONDA ALIAS SAFARI APPELLANT

AND

THE REPUBLIC RESPONDENT

(Appeal against the conviction and sentence of 35 years in Count 1 & 10 years in Count 2 in Sexual Offence Criminal Case No. E115 of 2022 for the Offence of Defilement by CM'S Court at Mombasa before Hon. R. Orora SRM dated and delivered on 22nd August 2024)

JUDGMENT

1. The appellant was charged with the following charges – Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. After the trial he was convicted in Count 1 and sentenced 35 years imprisonment and in Count 2 where he was sentenced to serve 10years imprisonment.
3. Being dissatisfied he lodged his appeal and subsequently he filed some amended grounds of Appeal. These are:-
 - i. That the learned trial Magistrate erred in law and fact by failing to see that the charge of defilement was not substantially proven.
 - ii. That the learned trial Magistrate erred in law and fact by failing to see that the charge of attempted defilement was no proven beyond reasonable doubt.
 - iii. That the learned trial Magistrate erred in law and facts by allowing the admission of evidence of PW 1 and PW 3 whereas the same was contradictory.



- iv. That the learned trial Magistrate erred in law and fact by unjustly dismissing my defence evidence entirely.
4. He filed his submissions. The respondent did not file any submissions.
5. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

Whether the prosecution established its case against the defendant beyond reasonable doubt?

6. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)
7. Section 8(1) of the *Sexual Offences Act* provides as follows:
8. “8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Section 8(1) of the *Sexual Offences Act* provides as follows:

“8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

...

- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

...

- (5) It is a defence to a charge under this section if –
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.

9. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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 Age

10. The Investigating Officer PW 7 produced the Birth Certificate No. xxx which shows that PW 1 was born on 7/7/2011. The Appellant seems to challenge this document and states that the author ought to have been called. The Appellant did not challenge the Production of the document in the trial court. He did not mention that he doubted its origin. He did not even cross examine on the same. The child stated that she is 11 years old and in class 4. The treatment booklet, the PRC form and the P3 all show her age as 11 years.
11. As regards the submission that PW 4, the child's mother, did not know her age, I have looked at her evidence at pages 13-14 of the record, and there is no such evidence. The court also conducted a *voire dire* upon the child before taking down the evidence and noted that she was a minor. In any event the Appellant did not produce anything to the contrary. As such, I find that the age was sufficiently proved.

Peneration

12. PW 1 and PW 2 narrated to the court how the Appellant took PW 1 into his Kibanda, told her to remove her under pant upon the promise of being given Kshs.20. That he then put his dudu (here) pointing at her vagina. The dudu he uses to pee and this dudu removed milk and he wiped her. That he then gave her Kshs.20/- to buy chapatti. That she was with K.
13. This K testified as PW 2 and she said the Appellant did *tabia mbaya* to her. That they both did not have their clothes on and he put his 'dudu' his susu. Pointing at her private part. PW 2 added that, that was not the first time for the appellant to put his dudu in the susus of other children. It is this PW 2, aged only 5 years old who reported the issue to PW 1's mother.
14. The Appellant was then arrested. The medical notes show that the minor had bruises on the labia at the 3' o'clock and 9' o'clock. The hymen was not intact.
15. Under Section 2 of the *Sexual offences act* in partial penetration suffices. Accordingly, the 2nd element was proved.

Identification

16. On the identification, the appellant was well known to the minors. He was a neighbour and consequently it was not possible that this case was a case of mistaken identity.
17. Accordingly, I find that the trial court properly analyzed the evidence in Count 1 and came up with the correct determination.

Count 2 - This was the Charge of attempt of defilement of PW 3.

18. The offence of attempted defilement is premised under section 9 of the *Sexual Offences Act* as follows: -
19. Attempted defilement

- (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
 - (3) The provisions of section 8(5), (6), (7) and (8) shall apply *mutatis mutandis* to this section.
- 19.The term attempt is defined by section 388 of the *Penal Code* as follows:



1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence. 2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
 3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”
20. The ingredients of the offence of attempted defilement were outlined by Kemei J. in the case of Benson Musumbi vs. Republic [2019] eKLR as follows: -“The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration.”
21. From the definition above, it follows for a charge of attempted defilement to stand, the Prosecution must prove beyond reasonable the age of the complainant; that the overt act (attempted penetration) was committed; and the positive identification of the assailant. The age of the complainant

Age

22. In the present case, the birth certificate was produced. The other medical records also show the age to be 5 years. The record shows that this was a child of tender ages who could not even be sworn. Accordingly the challenge to the age fails.

Penetration

23. The minor testified that:
- “That day Safari called me twice I refused. He pulled my hand. I was alone. He said I take 10 shillings he does tabia to me. He put saliva on his dudu he then put his ‘dudu’ he uses his dudu to urinate. He then put it her. (points at her private part) I felt painful.... Safari kneeled when doing tabia mbaya”
24. PW’s mother, PW 5 testified that the child appeared stressed. That when she examined PW 3 she noted the private part was watery. The PRC form and the P3 form show that there were no tears, nor lacerations or bruises on the child’s genitalia. The hymen was also intact. The child testified that the dudu was inserted into her susu. There were however no cut or lacerations.
25. This was a child of tender ages and she had no reason to lie. Accordingly, I find that the offence of an attempted defilement was proved.

Sentence

26. Section 8(2) of the Sexual Offence Act provides for a life sentence and following meant jurisprudence form the apex at this is the only correct sentence. However, since I did not warn the Appellant, I will not enhance the sentence and the current sentence is upheld.



27. Accordingly, the Appeal falls on all grounds. It is dismissed, the two convictions and sentence upheld.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 26TH DAY OF JUNE 2025**

HON. LADY JUSTICE W. K. MICHENI JUDGE

In the presence of: - Appellant

Mr Sirma for the state Bebora court Assistant

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

MOMBASA HIGH COURT

HIGH COURT CRIMINAL

DATE: 2025-06-26 20:04:19

