



**KOO v Republic (Criminal Appeal E060 of 2024)  
[2025] KEHC 11647 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E060 OF 2024  
JN ONYIEGO, J  
JULY 30, 2025**

**BETWEEN**

**KOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence from the judgment in the Chief Magistrate’s Court at Garissa in Criminal Case No. S.O. No. E037 of 2022 delivered on 16.12.2024 by Hon S.O Otuke – R. M.)*

**JUDGMENT**

1. The appellant KOO was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 29.10.2022 at around 0400hrs at [Particulars Withheld] in Garissa Township within Garissa County, he attempted to cause his genital organ namely penis to penetrate the genital organ namely vagina of SNO, a girl aged 11 years old.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He denied the charge and the matter proceeded to full trial with the prosecution calling four witnesses. Consequently, the court found him guilty, convicted and sentenced him to 20 years imprisonment.
3. Being aggrieved by his conviction and sentence, the appellant filed the instant memorandum of appeal (sic) raising the following grounds:
  - i. The trial magistrate erred in fact and law by finding that the appellant was guilty yet the prosecution did not prove its case beyond reasonable doubt.
  - ii. The learned magistrate erred in fact and law by failing to consider his defence together with his mitigation.



- iii. The trial magistrate erred in fact and law by relying on the prosecution's evidence which was marred with inconsistencies and contradictions.

### **Submissions**

4. The appeal was canvassed by way of written submissions.
5. The appellant filed his submissions in person dated 25-4-2025 contending that the requisite elements of the offence herein were not proved beyond any reasonable doubt. That the identification and proof of attempt were not proved to the required standard as required of a criminal offence.
6. It was urged that identification of an accused person must be scrutinized with utmost care and should only be accepted and acted upon if the court is fully satisfied that it was positive and free from the possibility of error. In support of the foregoing, reliance was placed on the case of *Kariuki Njiru & 7 Others vs Republic*, Criminal Appeal No. 6 of 2021 where the court held that it is imperative that the testimony of a single witness in a sexual offence be free from ambiguity and suspicion.
7. It was argued that the central question is whether the appellant was the one who attempted to defile PW1 noting that the time in question was at night and in the absence of lighting hence PW1 couldn't credibly be believed. That the circumstances under which the alleged act occurred made positive identification doubtful.
8. On proof of attempt, the appellant submitted that the prosecution failed to establish any tangible evidence to connect the appellant with the charge. That the medical report disclosed no indication of penetration nor discharge suggestive of attempted penetration. To that end, the appellant relied on the case of *Mwikamba vs Republic* [2024] KEHC 981 (KLR) where the court held that:

'It must be proved that the...acts of the appellant were capable of causing penetration if successful.'
9. It was argued that the circumstances of the case herein at best if at all committed discerned the offence of indecent act under section 11(1) of the *Sexual Offences Act* hence not the offence herein. Thus the appellant submitted that the offence charged was not supported by the evidence adduced by the prosecution.
10. On sentencing, the trial magistrate was faulted for meting out a sentence that was severe in the given circumstances. That even if the charge of attempted defilement had been established, the trial court was still obligated to consider mitigating factors under section 216 and 329 of the *Criminal Procedure Code*. It was urged that the appellant was not only a first offender but also, a youth and therefore, he ought to have benefitted from the least sentence as envisaged under article 50(2)(p) of *the constitution*. To that end, the appellant urged that his appeal be allowed as prayed.

### **Respondent's submissions.**

11. The respondent filed submissions dated 19.06.2025 urging that the prosecution proved its case beyond reasonable doubt. That the appellant did not direct this court to any specific flaw in the evidence presented by the prosecution as he chose to offer a mere and general denial which the trial court found unsatisfactory. The learned prosecutor stated that it was expected of the respondent to prove age of the victim, an act to cause penetration that was unsuccessful and identification of the suspect. To that end, it was urged that the evidence of the complainant was determined to be 11 years; on the second element, it was contended that PW1 undoubtedly described the specific acts taken by the appellant



to commit the offence and lastly, that identification was free from error as the appellant was a person well known to PW1.

12. On sentence, counsel urged that the trial court considered the aggravating circumstances of the matter and meted out a sentence that according to him was commensurate with the offence charged. This court was urged to uphold the finding by the trial court and dismiss the appeal herein.

### **Analysis of the evidence before the trial court**

13. This being a first appeal, the duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See *Okeno vs Republic* [1972] EA 32.
14. PW1, SNO testified that on 28.10.2022, she was asleep at night when she felt somebody remove her trouser. That she wanted to scream but instead, the person blocked her mouth. According to the witness, the person had already removed his clothes and had started inserting his penis into her vagina. It was her evidence that the person warned her of dire consequences should she tell her mother of the incident. She recalled that upon reaching morning, she woke up to drink water. That when she greeted her mom, her mom asked her why she had urinated on herself. That she told her mother that the same wasn't urine but vegetable oil. With that information, her mother called her aunt who advised her to take PW1 to the hospital for medical examination.
15. That upon reaching Garissa County and Referral Hospital, she was examined and later, the matter was reported to the police. According to her, the person who attempted to defile her was the appellant herein. As if that was not enough, she stated that this was the second time that the appellant had attempted to defile her.
16. PW2 EN, mother to PW1 stated that the appellant was her husband in as much as their union wasn't blessed with a child. That on the material date at around 05.47 a.m., she woke up and went to wash her caretaker's clothes thus leaving PW1 and her brother aged 9 sleeping. Upon PW1 waking up, she went to greet her and that's when she realized that PW1's trousers were wet. That upon asking her, PW1 informed her that the same was cooking oil and that she got the same from the bed.
17. At that point, she called her aunt, RN and explained to her the incident thus R told her to take PW1 to the hospital. She further stated that PW1 told the doctor that the appellant had applied some cooking oil on her. That together with the minor, they left for the police station to report and consequently, the police arrested the appellant at his place of work. She stated that PW1 was 11 years old as she was born on 21.12.2012 while the appellant was her husband for 4 years. Upon being recalled, she produced a birth certificate as Pex1 which showed that PW1 was born on 21.12.2012.
18. PW3 Shaffie Omar, a medical officer recalled examining PW1 on 31.10.2022 at the GBV Centre. It was his evidence that upon conducting a general examination of the complainant, he observed no trauma on the head, thorax and abdomen, upper and lower limb. On genital examination, the same had normal external genitalia, a whitish sticky glue like discharge on the labia minora was observed and that the hymen was intact as there was no discharge in form of bleeding. According to the history and examination made, he opined that he diagnosed an attempted penetration. That the whitish sticky discharge was not tested as it needed DNA profiling and given that they did not have the capability to do so, nothing much followed. On cross examination, he stated that PW1's vagina was reddish and tender to touch in as much as the hymen was intact.
19. PW4 Hawa Ahmed No. 95xxx, the investigating officer stated that on the material day, PW1 accompanied by PW2 reported a case of defilement. That a 10-year-old girl had been defiled and



therefore, he accompanied them to Garissa County and Referral Hospital for medical checkup and treatment. According to her, the doctor confirmed that the victim had tenderness and pain on the vagina but the hymen was intact. She returned to the station and recorded statements before carrying out investigations and eventually arresting the appellant and charging him. She produced an age assessment report as Pex 3.

20. DW1, in his sworn testimony denied committing the offence. He stated that he used to live at Windsor and eked a living as jua kali worker. He denied knowing PW1 and PW2 as he claimed that he had never seen them in his entire life. It was his evidence that on 29.10.2022, he left home looking for casual work at 7.00 a.m. That when he knocked a certain gate seeking for work, he found some casual labourers who told him to wait for the boss. As he was waiting for the said boss, he saw people approach him and proceeded to arrest him. On cross examination, he stated that he used to live with his brother who went to Nairobi and that he used to pay for his rent in as much as he had nothing to prove.

### **Determination**

21. I have considered the trial court's record, grounds of appeal and submissions by the appellant. The issue for determination is whether the case against the appellant was proved beyond reasonable doubt. In other words, were the ingredients of the offence of attempted defilement proved?
22. Section 9(1) and 9(2) of the Sexual Offence Act provides that:
  - “9(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”
23. From the definition of the offence, prosecution is under obligation to prove salient elements which are; the attempt to commit an act; that act should be capable or geared towards causing penetration into the genital organ of a child and; identification of the perpetrator. In the case of *Benson Musumbi vs Republic* [2019] eKLR the court stated as follows on the ingredients of the offence of attempted defilement:
  - “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.”
24. From the above, it follows thus in determining this appeal, this court has to establish the following elements if the offence of attempted defilement were proved beyond reasonable doubt:
  - i. Whether the age of the complainant was proved.
  - ii. Whether there was an act to cause penetration, which was not successful.
  - iii. Whether the appellant was positively identified by the minor as her assailant.
  - iv. Whether the sentence meted out was harsh and severe.



25. On the first element of proof of age, in *Charles Nega vs Republic* Criminal Appeal No. 38 of 2015 [2016] eKLR Mrima J stated that:

“I however wish to further state that from the wording of Section 9 of the *Sexual Offences Act* (and unlike in the offences of defilement and rape where the exact age of the victim must be proved bearing the weight it has in sentencing), in an attempted defilement charge the prosecution only has to tender evidence that the victim was below the age of eighteen years and not necessarily the specific age. Needless to say if the specific age is availed to a trial court it equally has a bearing in sentencing upon conviction.”

26. In the instant appeal, I find that the age of the complainant was proved by the testimony of PW1 who stated that she was 11 years old. The same was further corroborated by the testimony of PW2 who produced the complainant’s birth certificate marked and produced as Pex1. The birth certificate showed that the complainant was born on 21.12.2012 and therefore was 10 years 10 months and 28 days old at the time the alleged offence took place. It was thus established beyond reasonable doubt that the complainant was a minor.

27. As to whether there was an act to cause penetration that was not successful, Riech J in the case of *Daniel Simiyu Wanyonyi v Republic* [2019] eKLR held that:

“...when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved’.

28. Similarly, in the case of *Benson Musumbi v Republic* [2019] eKLR], it was stated that:

“In order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence.”

29. From the above cases, it is thus clear that for the respondent to succeed in proving the case against the appellant, it had to prove that the appellant possessed the intention and he started the execution of the intention that he harboured.

30. Further guidance is drawn from the determination of the case of *David Ochieng Aketch vs Republic* [2015] eKLR where Makau J observed that:

“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.”

31. The appellant has contested the manner of identification and as such, a review of the evidence herein thus becomes necessary even in determining whether the essential elements of the offence herein were proved.
32. Mativo J (as he was then) in the case of *Watuku vs Republic (Criminal Appeal 08 of 2020)* [2022] KEHC 4 (KLR) had this to say:

Evidence from eyewitnesses plays an important role in all contested cases. However, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices.
33. From the above, it follows that the positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process and the same must be properly tested to ensure that justice is served to both parties. Additionally, it is not lost to this court that a properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. While testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances were favourable to facilitate proper identification.
34. Therefore, to determine whether identification is not only proper but also truthful, the court must evaluate the believability of the witness who made the identification in question. Additionally, it is clear that it is competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. It is also trite that there is no particular number of witnesses required for proof of any fact. [See Lord Widgery, CJ comments in the case of *Republic vs Turnbull* [1976] 3 ALL ER 549 at page 552] and *mwangi v Republic* (2024) e KLR
35. PW1 testified that while she was asleep, she felt somebody remove her trouser and at the same time, pour on her vegetable oil. That she wanted to scream but instead, the person blocked her mouth. According to the witness, the person had already removed his clothes and had started inserting his penis in her vagina. Additionally, that the person who attempted to defile her was the appellant herein her step father and that previously, he had also tried the same act. In the same breadth, PW3 also on cross examination stated that PW1's vagina was reddish and tender to touch in as much as the hymen was intact.
36. From the above evidence, in as much as the appellant denied knowing PW1 and PW2, it was not demonstrated as to why the complainant would want to frame him and not any other person. Equally, in as much as no evidence was placed before the court in relation to visibility in the house or lighting conditions in the house at the material time, the appellant was a step father to the complainant and the only adult man in that house at the alleged time who could possibly have poured something resembling oil.
37. Additionally, the complainant and the appellant spoke during the material time. In the circumstances, the appellant cannot deny that he was not the complainant's perpetrator. The appellant was someone she was familiar with the voice notwithstanding. In the same breadth, it was not demonstrated that there was someone else in the said house apart from the appellant who could have attempted to sexually assault the complainant. The foregoing was corroborated by the evidence of the medical officer who testified that in as much as PW1's hymen was intact, her vagina was reddish and tender to touch.



38. The trial court properly warned cautioned itself as to the tRfulness of the complainant. Under Section 124 of the evidence Act, a trial court can convict based on the testimony of the evidence of a single witness in asexual offence as long as the court is satisfied that the witness is tRful. See Ismael Nyambo Mwadine v Republic (2021) e KLR where the court held that;

“Under section 124 of evidence Act, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence”

39. I have no doubt, the trial court properly cautioned itself and applied Section 124 of the evidence Act. I do not believe in the defence story where the appellant denied knowledge of pw1 and pw2. Why would the two frame up a case against a stranger? Therefore, there is no doubt from the testimony of pw1 and pw2 that the appellant did attempt to defile the complainant while in their house and the act constituting attempt is manifested in the medical evidence thus corroborating pw1’s testimony.

40. From the evidence, it is clear that the appellant did not only prepare but also attempted to defile PW1. Considering this evidence and the case law cited above, I find that the appellant’s conviction was safe.

41. On sentence, it is trite 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. From his mitigation in seeking leniency, he pleaded that he is a first offender and has a youthful family which depends on him. In my view, he ought to have benefited from a less harsh sentence pursuant to article 50(2) of the constitution.

42. To that end, it is my finding that the 20-year sentence meted out by the trial magistrate was not only harsh but also severe in the given circumstances. As such, it is only mete that this court interferes with the same.

43. Consequently, I uphold the conviction but set aside the 20-year sentence and substitute the same with that of 10 years to start running from the time of sentence by the trial court. In doing so, I have considered the period spent in remand custody which was properly considered by the trial court.

ROA 14 days

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF JULY 2025**

.....

**J. N. ONYIEGO**  
**JUDGE**

