

KENYA / JUDGMENT

Guyo v Republic [2026] KEHC 13701 (KLR)

[2026] KEHC 13701 (KLR)**COURT**

High Court

BEFORE

FR Olel

CASE / FILE NUMBER

Criminal Appeal E007 of 2026

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Guyo v Republic (Criminal Appeal E007 of 2026) [2026] KEHC 13701 (KLR) (16 September 2026)
(Judgment) Neutral citation:

[2026] KEHC 13701 (KLR) Republic of Kenya In the High Court at Marsabit Criminal Appeal E007 of 2026 FR Olel, J September 16, 2026 Between Abdi Guyo Appellant and Republic Respondent (Being an appeal arising from the conviction and sentence dated 18.11.2025 delivered by Hon. S.K. Arome (PM) in Marsabit MCSO No. E008 of 2025)

Judgment

A. Introduction 1. The Appellant 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 of the offence were that on the 3rd day of June 2025 at [Particulars Withheld], in Marsabit Central sub-county within Marsabit county, he intentionally attempted to cause his penis to penetrate the vagina of S.I, a child aged 14 years. 2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the 3rd day of June 2025 at [Particulars Withheld], in Marsabit Central sub-county within Marsabit county, he intentionally and unlawfully touched the vagina of S.I, a child aged 14 years, with his penis. 3. The Appellant took plea and denied the charges faced. The prosecution called six witnesses to prove their case. B. Evidence At Trial 4. PW1 S.I.G, a minor aged 16 years, testified on oath that on 03.06.2025 at around 10.00 p.m., she left her aunt K's house and went to sleep at her grandmother's house. Upon arrival, she found the Appellant, Abdi Guyo, in the sitting room chewing miraa alongside PW5 who was just seated. She proceeded to her bedroom to sleep. At around 2.00 a.m., she woke up and found the Appellant on her bed. The Appellant held her throat, removed his trousers, and completely removed her light blue trousers. 5. She screamed for help, which prompted PW5 to enter the room and inquire on what the Appellant was doing. The Appellant claimed he was picking a bedsheet and immediately fled the scene. In the morning, neighbors assisted in apprehending the Appellant and escorting him to Marsabit Police Station, while she was taken to the hospital for medical examination. PW1 identified her light blue trousers, her birth certificate

(produced as Exhibit 2), the P3 Form, and the Post-Rape Care (PRC) Form. Under cross-examination, PW1 reiterated her earlier evidence that PW5 came into the room in time and saved the situation. 6. PW2 Qabale Talicha testified that on 04.06.2025 at about 1.00 a.m., she was woken up by PW5 and they went to her mother's house. She found PW1 naked on her lower body, crying, and holding her trousers. PW1 narrated to her what had happened, by which time, the Appellant had already fled the scene. She later accompanied PW1 to Marsabit Police Station the following morning to report the incident. During cross examination, confirmed that she did not see the Appellant that night. 7. PW3 Cpl Rahma Kiano Abdi, the investigating officer attached to the Gender Desk at Marsabit Police Station, testified that on 04.06.2025, she received a report of an alleged attempt to defile a minor, at which point the Appellant had already been arrested and placed in the police cell. She escorted the complainant, PW1, to Marsabit County Referral Hospital for medical examination and treatment. She recorded witness statements and In addition, recovered and produced the complainant's light blue trousers as Exhibit 1 and her birth certificate indicating her birth date as 02.06.2009 as Exhibit 2. Under cross-examination, she stated that she did not witness the Appellant attempting to defile PW1 and or tear her trouser. 8. PW4 Dida Dika Halo, a registered clinical officer stationed at Marsabit County Referral Hospital, testified that on 04.06.2025, he examined PW1 who was escorted to the hospital by police officers from Marsabit Police Station. Upon physical examination, he observed tenderness on palpation along her neck and a small abrasion on her left labia majora, while noting that her hymen was intact. PW1 complained of pain on her left breast on palpation, and he also noted that her blue trousers were torn. He produced the P3 Form as Exhibit 3 and the Post-Rape Care (PRC) Form as Exhibit 4. Under cross-examination, PW4 admitted he was not sure or aware if the trouser had been torn by another person before being brought to court. He also confirmed that while a genital swab showed white discharge (which was sent to the lab), there were no sperms found and he also did not examine the Appellant. 9. PW5 BTB, PW1 grandmother testified that on 03.06.2025, she was sick, took medication, and slept at 8.00 p.m. in the sitting room on a sofa. Before sleeping she directed her son -Kulu to go chew miraa at his house, and he in turn requested to remain at the main house for three hours then he retires to his house. She also noted that her son was chewing the said Miraa with the Appellant, who was his friend and he too requested to be allowed to spent the night sleeping on the other sofa within the sitting room. 10. Later that night, she was awoken up by her granddaughter screams. She rushed to PW1's room, switched on the electric light, and found her sitting and crying, while the Appellant passed her on his way out of the bedroom. The Appellant claimed he had gone into the bedroom to pick a blanket, but when she asked PW1 what transpired, she narrated to her that the appellant had attempted to rape her and had forcefully removed her sweat pants and strangled her so that she could not scream. Under cross examination she confirmed that the Appellant was present in her house that material night. 11. PW6 KTG testified that on 03.06.2025, he was at his mother's (PW5) home situated at Guyo Tedeke at 9:00 p.m. when the Appellant arrived and requested for a place to sleep. Since, he was his friend, they allowed him to sleep on the other sofa set in the sitting room while the complainant, who was his niece slept in another room. He further testified that he left them at 11:00 p.m., but later in the night heard screams emanating from his mother's house, and rushed to see what was happening. He met the Appellant running away, while his

mother was asking him why he had done that act. 12. Under cross-examination, PW6 stated that the Appellant came to their home at about 11:00 p.m. and he later left him in the house at around 12:00 midnight. He later heard screams emanating from the main house and rushed back to assist PW1, who he found had sustained scratch wounds on her neck and saw his mother (PW5) holding her. He then locked the Appellant inside the house and ran to call his sister, but before they arrived back, the Appellant had managed to open the door and had run away. He was certain of his evidence and the same could be corroborated by PW2, who also saw the Appellant on the material night. 13. The appellant was put on his defence, and opted to give sworn evidence. He testified that he went to his house at about 9:00 p.m. to sleep and was arrested the following morning at 8:00 a.m. when PW2 woke him up and requested him to follow her to his uncle Somo Guyo Tendeke's place, where he was first informed of the allegation that he had allegedly tried to defile PW1. He emphasized that no one found him attempting to defile PW1 and maintained that he did not commit the offense he was charged with. 14. He also urged the court to note that the witnesses who testified had contradicted themselves. PW1 had indicated that the offense took place at 2:00 a.m., PW2 stated that it occurred at 1.00 a.m, while PW6 stated it occurred at about 12:30 p.m. He further observed that local elders and the area chief were unaware of the case, and all prosecution witnesses belong to the same family. Under cross-examination, the Appellant maintained that he did not touch PW1 and had no romantic relationship with her. He further stated he was taking tea with PW5 while PW6 chewed miraa. He thus urged the court to acquit him of the charges faced. 15. The learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of attempted defilement and, after mitigation, proceeded to sentence the Appellant to serve ten (10) years in prison. C. The Appeal 16. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal that; a. That, the learned trial magistrate erred in law and fact by holding that the complainant was a minor without proper corroboration. b. That, the learned trial magistrate erred in law and fact by finding that attempted penetration was proved despite medical evidence showing intact hymen and no sperm c. That, the learned trial magistrate erred in law and fact by relying on inconsistent and contradictory testimonies of prosecution witnesses. d. That, the learned trial magistrate erred in law and fact by relying on the sole testimony of the complainant without proper corroboration, despite inconsistencies and lack of independent witnesses. e. That, the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence of ten (10) years imprisonment without due regard to mitigating circumstances and sentencing policy guidelines. D. Analysis And Determination 17. An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. See *Gitobu Imyanyara & 2 Others -vs- Attorney General* [2016] Eklr, *Pandya versus Republic* (1957) EA 336) & *Shantital M Ruwala versus Republic* (1957) EA 570. 18. This court has carefully reviewed the grounds advanced in the appeal and given due consideration to the submissions made by both the appellant and counsel for the respondent. From this evaluation, the following issues emerge for determination: a. Whether the ingredients of the offence of attempted defilement were proved. b. Whether the sentence passed

should be interfered with. Whether the ingredients of the offence of attempted defilement were proved. 19. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This is founded on the maxim that he who alleges must prove. Since the burden of proof lies throughout on the state, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. 20. The above position was settled in the case of *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372, *Republic Vs Edward Kirui* (2014) eKLR, and *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the Courts held that In criminal cases, the burden of proof lies with the prosecution and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, thus consequently have established their case and deserve to have judgment given in their favour. 21. The offence of attempted defilement is anchored in Section 9 of the Sexual Offences Act, which provides 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. (3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section. 22. The concept of an attempted crime is set out in Section 388 of the Penal Code in the following terms: 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.” 23. The elements constituting the offence of attempted defilement were articulated in *Benson Musumbi v. Republic* [2019] eKLR, where the court held that: 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. The above position was underscored in *John Gatheru Wanyoike v. Republic* [2019] eKLR, with the court holding that; It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler. 25. Accordingly, in considering this appeal, the court must examine whether proof was adduced regarding the complainant’s age, whether the appellant was clearly identified by the minor as the assailant, and whether there was an attempt to penetrate that did not materialize. 26. To establish the threshold requirement of age under the Sexual Offences Act, the prosecution called the complainant, PW1, who testified on oath and explicitly stated that she was a grade 9 student at St Peters Junior Secondary School and subsequently

produced her birth certificate as Exhibit 2. This evidence was corroborated by PW3, Corporal Rahma Kiano Abdi, the investigating officer. The said birth certificate recorded PW1's date of birth as 02.06.2009. 27. In challenging these findings, the Appellant pointed out an apparent inconsistency on record, noting that while the charge sheet described the complainant as 14 years old, PW1 testified under oath that she was 16 years old. Relying on the Court of Appeal decision in *Charles Wamukoya Karani v Republic* [2014] eKLR, the Appellant contends that age is a critical ingredient of the offense that must be proved beyond reasonable doubt and that the prosecution ought to have called additional evidence such as school records, a baptismal certificate, or testimony from a registrar of births to reconcile this contradiction. 28. Having carefully re-evaluated the evidence on record against the Appellant's submissions and settled legal principles, this Court finds that PW1's the date of birth recorded on Exhibit 2 was 02.06.2009. PW1 had turned 16 years old on 02.06.2025, exactly one day before the alleged offense occurred on 03.06.2025. This evidence perfectly matches PW1's sworn testimony regarding her age. The reference in the charge sheet describing her as 14 years old was a minor typographical error that caused no prejudice to the Appellant, as both 14 and 16 years fall squarely below the statutory threshold of 18 years. See *Benard ombuna Vs Republic*, where the court of Appeal addressed the issue of a defective charge sheet in the following terms; "In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence." 29. Furthermore, a valid birth certificate carries a statutory presumption of regularity, and in the absence of any evidence suggesting it was forged or belonged to another person, the prosecution was under no legal duty to adduce secondary evidence such as baptismal certificates or school records to prove age. This element was thus sufficiently proved. 30. The second element to be proved was that of positive identification of the accused person. In criminal cases, where a conviction rests on the identification of an accused person, the court must satisfy itself that the evidence of identification is reliable, unassailable, and free from the possibility of error or mistaken identity. 31. At the trial, the prosecution established the identity and presence of the Appellant through the testimony of three key witnesses who knew him prior to the incident. PW1 testified on oath that she recognized the Appellant, a known neighbor, when he entered her bedroom at night, grabbed her neck, and attempted to defile her. Her immediate cries for help brought PW5, her grandmother, into the room, who switched on the electric light and saw the Appellant passing her on his way out of the bedroom, claiming he had only entered to pick a blanket. PW6 likewise testified that he met the Appellant at the scene and locked him inside before he managed to escape. 32. In challenging these findings, the Appellant highlights material discrepancies in the sequence of time, noting that PW1 stated the incident occurred at 2:00 a.m., PW5 stated she heard screams at 12:00 midnight, and PW6 testified that it occurred at 12:30 a.m. He further points out that PW2 admitted she did not see the Appellant that night, PW3 and PW4 did not witness the alleged act, and the prosecution failed to call independent witnesses such as the local chief or neighbors, thereby warranting an adverse inference against the State. He relied on *Bukenya & Others v Uganda* to emphasis this point. 33. Having undertaken a thorough

reassessment of the record, this Court finds that the identification of the Appellant was that of unmistakable recognition of a known neighbor under adequate lighting conditions. The minor variances in time estimates between 12:00 midnight and 2:00 a.m. are non-fatal discrepancies typical of lay witnesses in rural areas and do not erode the solid, uncontradicted evidence placing the Appellant inside PW1's bedroom. Reliance is also placed in the landmark decision of *Anjononi & Others v Republic* [1980] KLR 59, the Court of Appeal established that; This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. 34. As to whether there was attempted defilement, it is this court's finding that, the prosecution demonstrated the overt attempt primarily through the evidence of PW1, who testified that the Appellant entered her bedroom at 2:00 a.m., sat on her bed, pinned her down by her neck with his right hand, removed his own trousers, and completely removed her light blue trousers before being interrupted by PW5. Medical evidence adduced through PW4 (the clinical officer) who examined PW1 on 04.06.2025 corroborated this violent struggle, revealing tenderness along her neck on palpation, pain in her left breast and a small fresh abrasion on her left labia majora. While PW4 confirmed that PW1's hymen remained intact and no spermatozoa were present in the genital swab, his physical findings documented recent blunt force trauma and localized genital contact. 35. In challenging these findings, the Appellant contends that attempted penetration was not proved beyond a reasonable doubt because the medical evidence explicitly showed an intact hymen and an absence of sperm. He argues that the trial court erred in finding that attempted penetration took place when the medical findings were inconclusive and failed to connect him directly to the physical injuries. 36. However, this Court finds that the prosecution fully proved the essential ingredients of attempted defilement. Gaining entry into a 16-year-old child's bedroom in the dead of night, restraining her by the throat, removing his own clothes, and stripping her and leaving her lower body naked constitute direct, unequivocal overt acts manifesting an intention to cause penetration. The intact hymen and absence of semen merely confirm that full penetration was successfully averted when PW1 raised the alarm and PW5 entered the room. The fresh labial abrasion and neck tenderness observed by PW4 provide strong medical corroboration of the assault described by PW1. 37. Consequently, the learned trial magistrate correctly held that attempted defilement was proved beyond reasonable doubt. The Appeal against conviction thus fails. Whether the sentence passed should be interfered with 38. Under Section 9(2) of the Sexual Offences Act, a person convicted of the offense of attempted defilement is liable to imprisonment for a term of not less than ten (10) years. The law governing appellate review of sentencing is well settled; as articulated in *Bernard Kimani Gacheru v Republic* [2002] eKLR, an appellate court will not ordinarily interfere with a sentence imposed by the trial court unless it is evident that the court acted on wrong principles, considered irrelevant matters, failed to take into account relevant factors, or imposed a sentence that is manifestly excessive or illegal. Furthermore, under the Judiciary Sentencing Policy Guidelines, while sentencing remains a matter of judicial discretion, that discretion must be exercised strictly within the statutory bounds established by Parliament. 39. Following the finding of guilt by the trial court, the pre-sentence report was filed, and the trial magistrate duly accorded the Appellant

an opportunity to mitigate and he was sentenced to serve a sentence of ten (10) years as is statutorily provided for under Section 9(2) of the Sexual Offences Act . 40. The learned trial magistrate was bound by statute and possessed no legal authority to pass a custodial sentence below the statutory floor provided. The sentence imposed was thus entirely lawful, proportionate, and properly tailored to suit the facts of the case and law. Consequently, there is no legal basis or misdirection to justify appellate interference with the sentence passed. E. Disposition 41. The upshot, having considered the entire record of appeal and parties' submissions, I do find that the Appeal as against conviction and sentence fails and is hereby dismissed. 42. Right of Appeal 14 days. 43. It is so ordered. JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 16 TH DAY OF SEPTEMBER 2026. FRANCIS RAYOLA OLEL JUDGE DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16 TH DAY OF SEPTEMBER, 2026. In the presence of:- Appellant
.....For O.D.P.P Court Assistant

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Prepared on 28 October 2026 · Esheria