



**Agessa v Republic (Criminal Appeal 146 of 2023)
[2024] KEHC 11356 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 146 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

EDWARD KISANYA AGESSA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Maroro (P.M) on 31st August 2022 at Kibera Chief Magistrate's Court
Sexual Offences Case no. E027 of 2022 Republic vs Edward Kisanya Agessa)*

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same *Act*. After a full trial, he was convicted and sentenced to serve ten (10) years imprisonment on both the main count and the alternative count. Being aggrieved, he filed a petition of appeal challenging his conviction and sentence.
2. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
3. In his petition and amended grounds of appeal, he raised grounds which have been coalized as follows: The appellant contended that the charge sheet was defective. He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his defence. In addition, the sentence was illegal and amounted to double punishment.



4. The starting point would be to look at what the law states in regard to the offence in question. Section 9(1) (2) of the [sexual offences Act](#) provides that;

“(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”

5. The prosecution in an offence of attempted defilement must therefore prove the other ingredients of the offence of defilement except penetration. The prosecution called four (4) witnesses in support of their case. MB(name withheld) the complainant herein gave sworn testimony after voir dire examination. She testified that she was fifteen (15) years old. On February 14, 2022, while on her way to buy lunch, she met the appellant, her neighbour, whom she knew. The appellant invited her to his house, and she agreed. Inside the house, he asked her to undress, and when she didn't, he lifted her dress and removed her underwear. He made her lie on the bed, lay on top of her, and placed his penis on her vagina. She screamed, which startled him, causing him to ejaculate on the bed. He then gave her Kshs. 30 and told her to leave.

6. The next day, February 15, 2022, the appellant signaled her to come to his house again. When she did, he undressed her and repeated the act, placing his penis on her vagina until he ejaculated. The same events occurred on February 16, 2022.

7. On February 17, 2022, her mother asked her about her interactions with the appellant. Initially, she denied them but later admitted and explained what had happened. She emphasized that there was no penetration during the ordeal. The matter was reported to Muthangari Police Station, and she was taken to the hospital for examination and treatment.

8. In her testimony, PW1 gave clear and graphic testimony of the ordeal. PW1 remained steadfast that it was the appellant who placed his penis on her vagina until he ejaculated on three different occasions in February 2022. The victim maintained that she knew the appellant who was their neighbour and the identification was by recognition. I therefore hold that the Appellant is the one who committed the act alleged.

9. As discussed in the [Kenya Judiciary Criminal Procedure Bench Book 2018](#) paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).



96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
10. PW1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW1 was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
11. PW2, the mother of PW1, testified that she learned about the appellant's interactions with the complainant when the appellant sent her other daughter to give the complainant some money. She questioned the complainant about why she was receiving money from the appellant, but the complainant initially denied everything. PW2 also confronted the appellant, who denied any wrongdoing but insisted the complainant was innocent and should not be punished. Later, the complainant told her what had been happening at the appellant's house and explained why he had given her money. PW2 reported the incident to the police, and the complainant was taken to the hospital for examination and treatment.
12. PW3 John Njuguna a clinician gave evidence on behalf of Fred Siga who was on study leave but had examined the complainant at Nairobi Women's Hospital. He testified that the complainant was brought to the facility on 1st March 2022 after it was reported that she had been sexually assaulted by a person known to her. Upon examination, the following observations were made: the victim had no physical injuries, no genital injuries, no discharge, the hymen was intact, the victim was not pregnant, and had no sexually transmitted diseases. He concluded that there was no penetration. He produced the PRC and P3 forms which had similar findings.
13. On the age of PW1, the trial court considered the age assessment report produced by the investigating officer PC Judith Awino, PW4. The report dated 6th May 202 indicated that the victim was approximately seventeen (17) years old at the time of the offence. There is therefore no doubt that PW1 was a child.
14. In his defence, the appellant maintained his innocence denying the charges against him. The trial court considered the defence and found it to be baseless. In addition, PW1 had no reason to falsely accuse the appellant of attempted defilement. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that elements of the offence of attempted defilement were proved beyond reasonable doubt.
15. In his submissions, the appellant challenged the charge sheet as being defective. He asserted that the main count and the alternative count were duplex in nature contrary to the provisions of section 135(2) of the *Criminal Procedure Code*, Cap 75 Laws of Kenya. He argued that this was incurably defective. As such, the whole trial was a sham.
16. Section 135 of the CPC provides as follows:
- 135.
- (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.



- (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.
- (3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason, it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.
17. The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.
18. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.
19. From the record, there is no defect in the charge sheet as the appellant was charged with the offence of attempted defilement as the main charge and the offence of committing an indecent act with a child as an alternative charge. The ground of appeal consequently fails. In the end, the prosecution proved their case beyond reasonable doubt and the conviction by the trial court for the offence of attempted defilement is therefore affirmed.
20. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus: -
- “On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. –v- Republic*, Criminal Appeal No. 342 OF 2008, this Court held,
- “The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”
21. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of attempted defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.
22. That notwithstanding, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.



23. For the above reasons, I hereby affirm the sentence of ten (10) years imprisonment imposed on the main charge. The sentence on the alternative charge is set aside. The sentence shall run from 6th March 2022 the date of the appellant's arrest pursuant to section 333(2) of the *Criminal Procedure Code* having spent the entirety of the trial in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Maroro for the Respondent

Achode Court Assistant.

