



**SHORA v Republic (Criminal Appeal E010 of 2024)
[2024] KEHC 13091 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E010 OF 2024
JN ONYIEGO, J
OCTOBER 31, 2024**

BETWEEN

MOHAMED HASSAN SHORA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. M. Kimani in Sexual Offences Case No.006 of 2020 in the PM's Court at Mandera delivered on 17.11.2020)

JUDGMENT

1. The appellant herein filed the petition of appeal herein challenging his conviction and sentence by the trial court which convicted and sentenced him to 10 years imprisonment in respect of the offence of attempted defilement contrary to section 9(1) as read together with Section 9(2) of the [Sexual Offences Act](#) No. 3 of 2006. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [sexual offences Act](#) to which he was discharged after convicting on the main count.
2. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as here below:
 - i. That the Honourable magistrate erred in both matters of law and facts by failing to properly analyze the matter before him.
 - ii. The learned trial magistrate erred in both law and facts by not realizing that the prosecution case was full of contradiction and inconsistencies which rendered the prosecution witnesses unreliable.
 - iii. That the Honourable magistrate erred in both matters of law and facts by meting out a harsh and excessive sentence.



- iv. That the Honourable magistrate erred in both matters of law and facts by rejecting the appellant's defense without giving cogent reason for the same.
 - v. The learned magistrate erred in both points of law and facts by not taking into cognizance that the prosecution did not prove its case beyond reasonable doubts as required by law.
3. To canvass the appeal, parties elected to rely on their written submissions.
 4. The appellant through his submissions dated 24-05-2024 submitted that the evidence adduced before the trial court could not lead to a conviction. It was contended that the trial court failed to consider the contradictions and inconsistencies that riddled the prosecution evidence hence arriving at an unsupported determination. That the evidence of PW1, PW2 and PW3 was substantially different and the same notwithstanding, the trial court failed to consider his defence which was cogent. It was his argument that the charges herein were brought about by the fact that there existed a grudge between him and PW2. In the end, it was prayed that this appeal be allowed.
 5. The appeal was opposed by Mr. Kihara, the learned prosecution counsel who orally submitted that the appeal is devoid of merit and thus should be dismissed. The respondent submitted that all the ingredients of the offence of attempted defilement were proved. That the complainant was a minor which was proven vide the notification produced in court.
 6. On identification, it was submitted that the appellant was positively identified as he was a person well known to PW1 and PW2. In conclusion, it was submitted that prosecution properly proved its case beyond reasonable doubt and thus conviction and sentence were lawful and as such, the same should be upheld.
 7. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is on both conviction and sentence wherein the appellant contends that his conviction was not safe and as such, he should be set at liberty.
 8. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno vs Republic* [1972] E.A. 32 and re-stated in *Kiilu and another vs R* [2005] 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereafter the court should draw its own conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles. [See *Gunga Baya & another vs Republic* [2015] eKLR].
 9. PW1, ZAH testified that she was at the material time aged 13 years in as much as she did not know when she was born. In addition, she stated that she was taken to the hospital for age assessment which report indicated that her real age was 14 years old. She stated that on 30.01.2020 at 6.00a.m., the appellant entered into the house she was sleeping and tried to remove her panty. It was her evidence that the appellant held her by her neck and further caressed her breasts in an attempt to defile her. That she raised alarm thus attracting the attention of people among them her father.
 10. It was her testimony that the appellant having realized that the complainant had raised alarm, he attempted to run away but unfortunately, he was arrested by pw2 and some school going children. She stated that the appellant was a person well known to her as he used to frequent her home prior to the occurrence of the incident herein.
 11. She told the court that she identified the appellant using lamp light and natural light from outside given that she was sleeping in a semi-permanent house with no door in place.



12. PW2, AHA, the complainant's father stated that they lived in a traditional Somali house which had no door but simply a curtain. That on the fateful day, he heard the complainant scream and upon responding to the screams, he encountered a stranger running away. The complainant then informed him that the appellant had tried to defile her.
13. That together with other family members, they chased the man and upon apprehending him, he sought for forgiveness and not to mention that his trouser fly was open. Subsequently, police were called and the appellant handed over while the complainant was taken to the hospital for medical checkup. On cross examination, he stated that the appellant was a person well known to him as he used to chew miraa in the said plot.
14. PW3, Ali Maalim, a clinical officer stated that he attended the complainant when she was presented to the hospital. He stated that he examined the complainant who looked sick but generally, on physical examination, there was nothing significant noted. On genital examination, he found no injuries as the hymen remained intact. In the end, he concluded that there was a defilement attempt on the complainant. He thus filled the P3 Form which he produced as Pex 2 in the court.
15. PW4, No. 1666864 PC Kibet Tirop, the investigating officer testified that the matter herein was minuted to him after a defilement case had been reported. He averred that he conducted investigations and thereafter recorded witness statements wherein it was narrated how the appellant attempted to defile the complainant on the material day. He also stated that the appellant was apprehended by the public before being rearrested by the police. It was his case that he rightly charged the appellant with the offence after completion of his investigations.
16. DW1, Mohamed Hassan Shora upon being placed on his defence denied the charges arguing that on the day in question, he was at Bulla Kuna chewing miraa and drinking alcohol. He stated that he met PW2 at the said venue wherein he requested him to buy him food but instead, he gave him Kes. 50/- to buy bread.
17. On the following day, he again met PW2 but told him that he had miraa for a single person. According to him, the charges herein were simply a fabrication. On cross examination, he stated that he was at the complainant's home chewing miraa as he had gone to visit PW2. That indeed, he was at the locus quo.
18. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the case against the appellant was proved beyond reasonable doubt.
19. On the ingredients of the offence of attempted defilement, the court in the case of *Benson Musumbi vs Republic* [2019] eKLR held;
 - “21. 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.”
20. The question which needs to be answered is whether the above underlined elements were proved to the required standards?
21. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This principle was well buttressed in the cases of *Woolmington vs DPP* 1935 AC 462 and *Miller vs Minister of Pensions* 2 ALL 372-273.



22. In the case of Edwin Nyambaso Onsongo vs Republic (2002) eKLR, in which the court cited the case of Mwolongo Chichoro Mwanjembe vs Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that:

“...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, guardian or medical evidence among other forms of proof...”

23. The birth assessment document produced in court as Pex 1 indicated that the complainant was 14 years at the time of examination while the alleged offence took place on 30.01.2020. In the same breadth, PW1 and PW2 also narrated the complainant was a minor in as much as there was no birth certificate at the time the alleged offence was committed. The document and the oral testimonies were never controverted or challenged by the defense. It is my view that the prosecution was able to prove that the victim was a child. Section 2(1) of the Sexual Offences Act adopts the definition of a child as used in the Children Act which defines a child as a person under the age of 18 years. The complainant was therefore a child at the time of the commission of the alleged offence.

24. As to whether the appellant was positively identified, it was PW1 and PW2’s evidence that the appellant was a person well known to them as he used to frequent their homestead. Therefore, the identity of the appellant was not in doubt as the appellant himself conceded to the fact that he was at PW1 and PW2’s homestead. [See the case of Wamunga vs Republic (1989) KLR 424 at 426].

25. In regards to whether there was an act of penetration which was not successful, Section 2 of the Sexual Offences Act defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another. [See the Court of Appeal decision in the case of Erick Onyango Ondeng vs Republic (2014) eKLR; Mark Oiruri Mose vs Republic [2013] eKLR].

26. Section 388 of the Penal Code defines attempt in the following terms:

- (1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some overt act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.
- (2) It is immaterial, except so far as regards punishment, whether the offender does all that of necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention 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.

[See Abdi Ali Bare vs Republic (2015) eKLR].

27. Section 124 of the Evidence Act (Cap 80 Laws of Kenya) provides that evidence of a minor needs no corroboration in sexual offences. I have considered the evidence adduced by PW1 and PW2 which pointed to the fact that the appellant had attempted to defile the complainant. PW2 corroborated the complainant’s testimony that he heard the complainant scream and when he went to find out what was happening, the appellant attempted to run away before he was apprehended by the public. That his zip was open meaning he was ready to execute his intentions.



28. The appellant himself did not deny being in locus quo on the very day that the incident herein happened. From the evidence of pw1, the appellant did not get his genital organ get into contact with her genital organ. He only attempted to remove her panty and caressed her breasts. For the offence of attempted defilement to stand, the genital organ of the victim must be touched. In my view, the evidence available can only support the offence of indecent assault against a child and not attempted defilement as the appellant only touched her breasts. For avoidance of doubt, indecent act is defined as follows;

“indecent act” means an unlawful intentional act which causes-

- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- b. Exposure or display of any phonographic material to any person against his or her will.

29. In the circumstances, I would substitute the conviction on attempted defilement to a lesser charge of committing an indecent act against a child pursuant to section 179(1) of the CPC.

30. The appellant submitted that his defence was not considered thus this court should review the trial court’s decision and quash the conviction and sentence meted out on him. The court record shows that the appellant herein was given a chance to present his side of the story and in the impugned judgment, the trial court considered the same but found that the prosecution evidence outweighed the appellant’s defence. As such, there is no merit that his defence was not considered.

31. On the allegation that the prosecution evidence was marred with contradictions and inconsistencies, nothing was presented before this court to support the same and therefore, the ground is found to be baseless. The fact that pw1 did not know his name but was familiar with him as a frequent visitor in their compound is not a material discrepancy. Similarly, knowing the appellant by his nick name does not make pw2’s evidence contradictory.

To that extent that ground fails.

32. On sentence, the legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owoura vs Reginum (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., (1950) 18 E.A.C.A 147:

“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewky, (1912) C.C.A. 28 T.L.R. 364.”

33. The appellant having been found guilty of the offence of indecent act to a child, the minimum sentence provided is 10 years just like attempted defilement.



34. In my view, the sentence imposed despite being harsh, according to the appellant, was within the law and within the discretionary powers of the court. This court cannot interfere with the exercise of the said discretion as the appellant did not justify the need to. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

35. In view of the foregoing, I find that the appeal has no merit and I hereby dismiss the same in its entirety.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE

