



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Republic (Criminal Appeal 102 of 2019)
[2023] KEHC 1895 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 102 OF 2019
PJO OTIENO, J
FEBRUARY 28, 2023**

BETWEEN

HABERT MAINA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon
F Makoyo SRM in Butere Criminal Case No 173 of 2018)*

JUDGMENT

1. The Appellant was arraigned before the Senior Resident Magistrate at Butere in Criminal Case No 173 of 2018 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 are that on March 14, 2018, in Khwisero sub county within Kakamega County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of GO a child aged 10 years.
2. The Appellant pleaded not guilty and the case proceeded to full trial with the prosecution calling a total of six witnesses whose evidence can be summarized as follows: -
3. PW1 after *voire dire* examination and the court being satisfied on her ability to tell the truth testified that she was a class three student and that the appellant pinned her on a wall, opened his trouser and removed something and that he ran away after some women found him. PW2 and PW3 testified on March 14, 2018 at about 3PM they saw the accused with an erect penis trying to defile PW1 and after screaming a crowd gathered and PW1 ran away. PW4, father to the complainant stated that after receiving information that the appellant had tried to defile his daughter, he confronted him and he asked him for forgiveness saying that his wife had denied him conjugal rights hence the act. PW5 the investigating officer testified that he interrogated PW1, PW2 and PW3 who confirmed that the appellant attempted to defile PW1. PW6, a clinical officer testified that on March 15, 2018 she



- received PW1 at Khwisero Hospital for medical examination. She stated that PW1 informed her that the appellant warned her not to scream then removed his clothes but was rescued before he could defile her.
4. The court ruled that a *prima facie* case had been established and the accused person was put on Defence.
 5. The appellant in an unsworn testimony denied the charges levelled against him.
 6. Judgment was subsequently delivered and the accused person sentenced to ten years' imprisonment.
 7. The grounds of appeal as raised by the Appellant are: -
 - a. That I pleaded not guilty to the appended charge.
 - b. That I was accorded unfair trial contrary to article 50(2)(c)(g)(h)(j)(K) as read with article 50(4) of the Constitution of Kenya, 2010.
 - c. That the learned trial magistrate erred in law by convicting the appellant herein in the evidence that arose from a defective charge sheet of section 214(1) and 134 of the CPC.
 - d. That the learned trial magistrate grossly erred in law and facts by failing to make a finding that the case was not proved beyond reasonable doubt despite glaring contradicting evidence.
 - e. That the learned trial magistrate erred in law and facts in finding that the appellant had attempted to defile the minor without evidence corroborating the complainant's testimony.
 - f. That the learned judge erred in law and facts by failing to interrogate manifestly contradictory testimonies by the complainant and other prosecution witnesses
 - g. That the finding of the learned trial magistrate was against the weight of the available evidence on record.”
 8. The parties have filed their respective submissions by which the Appellant says very little on conviction but stresses that the sentence imposed was harsh since he is an old man aged 60 years and that he was the family bread winner. He states that he has since reformed and avoids other immoral activities. Those submissions seem not to challenge conviction but that alone does not negate on the courts obligation and mandate to reappraise and reexamine the entire evidence afresh with a view to coming with own independent conclusions.
 9. For the Respondent it is submitted that the prosecution proved the ingredients for the offence of attempted defilement that is, the age of the victim, the identification of the suspect and the intention to commit an act of defilement. It is argued that the complainant's baptismal card was produced to show that the complainant was aged 10 years. On identification of the appellant, the respondent submits that it was by way of recognition since the appellant was a village elder and known to the complainant. On the ingredient of the appellant's attempt to defile the complainant, the respondent states that PW1 explained how the appellant pinned her against the wall, unzipped his trouser and removed something which testimony is confirmed by PW2 and PW3.

Issues and determination

10. The court notes that the grounds of appeal and the submissions by the appellant address different issues. Nonetheless, taking into account the documents on records, this court identifies the issues for determination to be; whether the prosecution proved the offence of attempted defilement against the appellant beyond reasonable doubt and, if the appellants request to for re-sentencing is merited



Whether the prosecution proved the offence of attempted defilement against the appellant beyond reasonable doubt

11. Section 9(1) (2) of the [sexual offences Act](#) provides as follows on the offence of 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”

12. The ingredients for the offence of attempted defilement were set out in the case of [Patrick Ndoli Adisa v R](#) (2018) eKLR to be; 1) the age of the complainant, 2) identification of the accused and; 3) the steps taken by the accused to execute the defilement which did not succeed.

13. On the age of the complainant, it was the testimony of PW4, father to the complainant that she was 10 years old and produced a baptismal card in this regard. On the identification of the accused, the Appellant was known to the complainant and the complainant in her testimony referred to her as Maina. To determine the steps taken by the appellant to defile the complainant, Section 388 of the [Penal Code](#), CAP 63 Laws of Kenya defines the term attempt as follows: -

- “(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill 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 fulfillment 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.”

14. The Court of Appeal in [Francis Mutuku Nzangi v Republic](#) [2013] eKLR elaborated the meaning of attempt as follows: -

“Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.”



15. In a case of attempt, it is pertinent for the prosecution to demonstrate intention and an action aimed at committing the offence as observed in the case of *Benson Musumbi v Republic* [2019] where it was held as follows: -

“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.”

16. The evidence on attempted defilement must go beyond preparatory stages and should be inclined more towards the commission of the offence as observed in *Charles Nega v Republic* [2016] eKLR where it was held;

“.....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.”

17. The distinction between mere preparation to commit the offence and attempting to commit the offence was explained in *Daniel Simiyu Wanyonyi v Republic* [2019] eKLR where it was 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.”

18. PW1, PW2 and PW3 all stated that they saw the appellant having pulled out his penis and standing next to the complainant. The complainant stated that the appellant pinned her against the wall but did not remove her clothes. I am convinced that the appellant had the intent to defile the complainant but did not commit an act that was immediately connected with the offence intended to be committed. With the testimony of PW1 that the appellant did not remove her clothes and she also did not mention that the appellant had any contact with her sexual organs, the court finds that attempted defilement was not proved beyond reasonable doubt.

19. I thus find that the prosecution failed to prove the offence of attempted defilement against the requisite standards. Accordingly, for the reasons set out above, this appeal succeeds in that the conviction is quashed and sentence set aside. Let the appellant be set free and released from custody forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2023.

PATRICK J O OTIENO

JUDGE

In the presence of:



Appellant in person in prison

Ms Chala for the prosecution

Court Assistant: Polycap

