



REPUBLIC OF KENYA



**Ileri v Republic (Criminal Appeal 117 of 2019)
[2022] KEHC 10586 (KLR) (Crim) (29 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 10586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL 117 OF 2019**

DO CHEPKWONY, J

MARCH 29, 2022

BETWEEN

JAMES MUREITHI IRERI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant James Mureithi Ileri was charged with eleven (11) Counts of Attempted Defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. He was also charged with an alternative Count of Indecent Act with a Child contrary to section 11(1) of the same Act.

The particulars of the main Count are that:-

“On the month of April, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of LMM, a child aged 10 years”.

The particulars of the Alternative charge are that:-

“On the month of April 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of LMM, a child aged 10 years with his penis”.

2. The appellant was charged in Count 2 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 that:-

“On the month of October, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of SK, a child aged 8 years”.



He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of October 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of SK, a child aged 8 years with his penis”.

3. The appellant was charged in count 3 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 that:-

“On the month of September, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of IP, a child aged 8 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of September 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of IP, a child aged 8 years with his penis”.

4. The appellant was charged in count 4 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 that:-

“On the month of October, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of BA, a child aged 7 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of October 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of BA, a child aged 7 years with his penis”.

5. The appellant was charged in count 5 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 that:-

“On the month of September, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of BM, a child aged 9 years”.

He is also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of September 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of BM, a child aged 9 years with his penis”.

6. The appellant was charged in count 6 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 that:-

“On the month of January, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of OW, a child aged 6 years”.



He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of January 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of OW, a child aged 6 years with his penis”.

7. The appellant was charged in count 7 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 that:-

“On the month of November, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of DN, a child aged 7 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of November 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of DN, a child aged 7 years with his penis”.

8. The appellant was charged in count 8 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 that:-

“On the month of November, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of FB, a child aged 5 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of November 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of FB, a child aged 5 years with his penis”.

9. The appellant was charged in count 9 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 that:-

“On the month of November, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of SWR, a child aged 8 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of November 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of SWR, a child aged 8 years with his penis”.

10. The appellant was charged in count 10 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 that:-

“On the month of November, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of DM, a child aged 6 years”.



He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of November 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of DM, a child aged 6 years with his penis”.

11. The appellant was charged in count 11 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 that:-

“On the month of April, 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally attempted to cause his penis to penetrate the anus of SO, a child aged 6 years”.

He is also charged with an alternative charge of Committing an Indecent Act with a Child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars are that:-

“On the month of November 2016 at Sinai Slums in Industrial Area within Nairobi County, intentionally touched the buttocks and anus of SO, a child aged 6 years with his penis”.

12. The appellant was convicted and sentenced to serve Ten (10) years imprisonment for each of the eleven counts. He was aggrieved by the said conviction and sentence hence this appeal.

13. The appellant filed his appeal on May 27, 2019 and relies on the following grounds of appeal which are reproduced below:-

- i. That the learned Judge erred in law when he convicted and entered a sentence in the present case yet failed to find that the charges against him are defective;
- ii. That the learned Judge erred in law when he convicted him in the present case yet failed to find that the provisions of sections 99(3) of [Sexual Offences Act](#) No.3 of 2006 were not complied with;
- iii. That the learned Judge erred in both law when he convicted him in the present case yet failed to resolve material contradictions in favor of the defence;
- iv. That, the learned Judge erred in both law when he convicted him in the present case when relying on insufficient evidence, and thus unfair trial contrary to article 50 of [the Constitution](#).
- v. That the learned Judge erred in law when he dismissed his plausible defence.

14. At the hearing, both parties chose to canvass the appeal by way of written submissions and each party opted to rely on the same as presented to court.
15. In his written submissions, the Appellant has urged the court to find that he was wrongly convicted. In his view, the charge was not proved beyond reasonable doubt. In this submission, the appellant opined that the minors were coached in their testimonies since they had some similarities.
16. The appellant has further claimed that the medical evidence adduced did not support the charge since the medical reports from each of the complainants showed that nothing had happened to them. He has also submitted that the Investigating Officer had no power to tender in evidence a P3 - form prepared by the Government Doctor. Finally on sentence, the appellant has submitted that the sentence of ten (10) years imprisonment passed against him was a great injustice to a young man.



17. The appeal has been contested by the State on the ground that there is sufficient evidence on record to support the appellant's conviction and sentence. Also, the learned prosecuting counsel has submitted that the ingredients required for the offence of attempted defilement were proved by the prosecution beyond reasonable doubt. She has submitted that the evidence of the victims was clear and coherent and was not contradictory as claimed by the appellant. Further, it is her submission that there was no inconsistency in the medical evidence of the witnesses.
18. On sentence, she has submitted that the same was legal and stated that the appellant was a person in authority, entrusted to take care of the students and he broke that trust when he attempted to commit the crime against the complainant. She has thus urged the court to uphold the conviction and sentence of the trial court upon the Appellant and dismiss the appeal.
19. This is a first appeal. The duty of a first appellate court was stated in the case of *Kiilu & another -vs- Republic* [2005] 1KLR 174, where the Court of Appeal states that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.
20. I have considered the grounds of appeal and rival submissions filed by both parties. I have also read through the trial court's record, in line with the foregoing, and find that this court in determining this appeal is expected to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as required in law, beyond any reasonable doubt.
21. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this Judgment, this court shall consider whether each of them was proved beyond reasonable doubt.
22. Turning to the issue of age, the trial court stated as follows:-

“Although not all the boys brought birth documents, I was able to interact with them and they were all below the age of 18 years”.
23. From my re-appraisal of the evidence that was placed before the trial court, a pattern could be inferred from the victims whom the appellant targeted. They were all children of tender years below the ages of ten. I have no doubt in my mind that the victims who had no birth documents were also minors being that they were school going children who were all in lower primary. Therefore, in my opinion there was sufficient evidence on the age of the victims. Furthermore, the age of the victims was not disputed.
24. I shall now deal with the second ingredient which is penetration. 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 organs of another person”.



25. Upon perusal of the victim's testimonies, they all testified that the appellant would remove their clothes, make them lie on the bed facing down then he would climb them from behind and insert his penis in their anus.
26. The aforesaid testimonies indicate that the victims were subjected to penetration as defined by section 2 of the *Sexual Offences Act*. However, the same needed corroboration.
27. I have carefully gone through the evidence and exhibits produced by the prosecution. The medical document exhibits produced by PW22 revealed that upon the victim's examinations, their anal anatomy was normal and had no bruises nor lacerations. PW21 also produced medical documents by Barbara Salano which also showed the medical examination done on PW7 to be normal.
28. The appellant was charged and convicted with attempted defilement contrary to section 9(1) of the *Sexual Offences Act* No.3 of 2006. In my view, for a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove there was an attempted penetration. In my view, this may include bruises or lacerations from complainant's anus and/or bruises or lacerations.
29. In the instant case, the prosecution did not prove penetration but it proved the offence of committing an indecent act with a child. Indecent act is described as an unlawful intentional act which causes any act 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. This then would explain the negative results from the medical reports.
30. The last ingredient is identification. From the evidence before the trial court, the charge of attempted defilement was said to have occurred at the home of the Appellant. The appellant is no stranger to the locality where they live. In my view, the victims came out clearly on the essential features, surrounding, bed, playing games on the phone and place where the offence used to take place. It is also deposed by the victims the type of inducement and gifts he used to give them before undertaking the offence.
31. The victims also clearly identified the Appellant as their teacher, part cobbler and luggage carrier. The parents testified too that indeed the appellant was a cobbler and luggage carrier. However, the appellant attributed his arrest on a grudge about fetching water which in my opinion is implausible. The eleven victims who are children of tender years, would have no reason to plant the charges on the appellant. Neither would the parents of eleven children collude to fix the Appellant as he claimed.
32. In my view, there is sufficient evidence that the appellant was involved in the commission of the offence. However, based on the medical evidence, the charges on the main counts of attempted defilement were not proved, but there is sufficient evidence to support the alternative counts.
33. Therefore, the appellant's conviction on the main counts should be quashed and the sentences set aside and substituted with the conviction on alternative counts of committing an indecent act with a child.
34. On sentence, section 11(1) of the *Sexual Offences Act*, states:-

“ Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years”.
35. In my opinion, the Appellant committed very serious offences and taking into account the psychological impact such acts can have on the victims, the appellant was sentenced to serve ten (10) years imprisonment for each alternative count from the date of sentence in the trial court and the



sentences to run concurrently. This, as clearly indicated, was informed by his mitigation, pre-sentence report, period spent in custody during trial and period of sentence served.

36. In conclusion, the appeal is found to be without merit and is dismissed. The conviction and sentence are subsequently upheld.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person

M/S Ndombi counsel for Respondent

Court Assistant - Gitonga

