



REPUBLIC OF KENYA



KENYA LAW
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**Huka v Republic (Criminal Appeal E059 of 2021)
[2022] KEHC 11739 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E059 OF 2021
EM MURIITHI, J
APRIL 28, 2022**

BETWEEN

MOHAMMED HUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Maua Chief Magistrate's Court Sexual Offences Case No. 21 of 2017 delivered on 14/3/2019 by Hon. Oscar Wanyaga, SRM)

JUDGMENT

1. The appellant who had been charged with the offence of defilement contrary to sections 8(1) as reads with 8 (3) of the *Sexual Offences Act* with the particulars of the offence being that the accused had “on the 8th day of February 2019 at Garfosa location in Garbatulla Sub-County within Isiolo County, intentionally caused his penis to penetrate the vagina of TA a child aged 15 years” was convicted of attempted defilement under section 9(1) of the Sexual Offences Act and sentenced to imprisonment for ten years on 14/3/2019. The accused had also faced an alternative charge of indecent act with a child c/s 11(1) of the *Sexual Offences Act*.
2. On appeal, the appellant urged his grounds of appeal primarily based on sufficiency of evidence to prove the charge by written submissions dated 2/11/2021 as follows:

“SUBMISSIONS

My lord, the appellant was charged with one count of defilement contrary to Section 8(1) (3) of the Sexual Offences Act and an alternative count of Indecent Act with a child contrary to Section 11(a).



The trial took nineteen (19) days to be concluded and the appellant was acquitted on the charges he was charged with. Instead he was found guilty of attempted defilement Contrary to Section 9 of the [Sexual Offences Act](#) and was sentenced to ten (10) years imprisonment.

GROUND ONE

My Lordship, Article 50(2) of [the Constitution](#) of Kenya 2010 states as follows:-

- c. To have adequate time and facilities to prepare the defence
- e. To have the trial begin and concluded without unreasonable delay.

In this case the appellant took plea on 23rd February 2019, all the Prosecution witnesses testified on 27th February, 2019, the appellant gave his defence on 28th February 2019 and the trial court delivered its Judgment on 19th march, 2019.

Please note that the appellant hails from the Nomadic Communities within the country and had no prior experience of the Law and is unable to read and write.

In the case of John Kagiri Vs- Republic (2016) Justice John Mativo held that:-

“A trial process should be fair, not too fast to be rushed unconsidered justice and neither too slow to almost grind to a halt. It should be just right.”

Considering the above, the appellant had his right to a fair trial and due process violated because the trial magistrate for some strange and unknown reason did not proceed at the speed of lighting. The appellant did not know what had hit him and proceeding with the flow turned out to be detrimental for him.

GROUND TWO

Article 45 of [the Constitution](#) of Kenya 2010 states as follows:-

- 2. Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
- 4. Parliament shall enact legislation that recognizes
 - (a) Marriage concluded under any traditional or system of religion, personal or family law,
And
 - (b) Any system or personal and family law and any tradition adhered to by persons professing a particular religion to the extent that any such marriages or system of law are considered with this Constitution.

My Lord, in this instant case it seems that the appellant is being punished for following norms of his community, the nomads, for who the man is the master of the home and where the girl child is married at a young age to a man who is old enough to be her father, or even older. The law in Kenya does not allow a person under eighteen (18) years of age to engage in consensual sex but who has the right to interfere in the conduct of such communities whose tradition and practices have been going on for years and years, furthermore if it were not for the



advancement of civilization these practices would go on forever untouched.

On page 6 line 11 to 15, the Investigating Officer stated that the complainant was betrothed to the appellant. The complainant also stated on page 3 and 4 in her evidence that she and the appellant had engaged in Sexual intercourse multiple times, that she loved the appellant and at no time did the appellant force her to engage in sexual intercourse with him.

A question here is, yes it is wrong in the eyes of the word for a grown man to engage in Sexual intercourse with a minor but if the practice is so engrained in his culture that no one within the community gives it a second thought who are the law enforcement officers to punish the appellant.

GROUND THREE

My Lord, if you were to observe the appellant, it is pretty obvious that his comprehension of Kiswahili is rudimentary at the best and that he does not understand English.

Article 50(2)(m) of *the Constitution* of Kenya 2010 states as follows:-

Every accused person has the right to a fair trial which includes the right to:-

3. To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

From the trial record, it can be seen that the appellant took plea in Kiswahili, but the evidence adduced in court by PW1 was not translated to a language understood by the appellant hence he did not cross-examine PW1.

Conclusion

My Lord this case is complicated in its own sense but as said earlier, the appellant is being punished for doing something that is normal in his community.

We humbly request that this Hon. Court acquits the appellant and also issue an order for Parliament in all its wisdom to revisit the *Sexual Offences Act*.

KMS/539/2019/LS

Mohamed Huka.”

3. For the DPP, Prosecution Counsel Ms. Nandwa filed written submissions dated 29th October 2021 contended that the charges had been proved overwhelmingly and urged that the court to dismiss the appeal as there was overwhelming evidence as follows:

“ Introduction

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The appellant was further tried found guilty with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*.



Brief facts of the case are that on the 8th day of February, 2019 at Garfosa Location in Garbetulla Sub- County within Isiolo County, intentionally caused his penis to penetrate the vagina of T. A. a child aged 15 years.

My lord in the Appeal I wish to respond to all the grounds of Appeal together as follows:

The Law and analysis of the evidence

The Appellant was convicted with the offence of attempted defilement under section 9(1) as read with section 9(2) of the *Sexual Offences Act* which provides as follows-

9(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"

In Michael Lokomar v Republic [2017] eKLR The court stated:

"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, the positive identification of the accused and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, failed because there was no penetration. Attempt to commence an act is defined under Section 388 of the Penal Code as:

- (1) where a person intending to commit an offence begins to put his intentions into execution by means adopted 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 is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention"

1. Age of Victim

Kaingu Elias Kasomo vs Republic [2010] eKLR the Court held:

"Age of the victim of a sexual assault under the *sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape or defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"

My Lord the prosecution did prove the age of the Victim PW1 to be 15 years. PW3 testified that the complainant was born on the 3/6/2004. This proves that at the time of committing the offence the complainant was 15 years. This was collaborated by the production of the birth certificate by PW5 as Prosecution Exhibit 4.



Joseph Kiet Seet Versus Republic 2014 EKLK. "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni - Versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

"In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

Identification of the Assailant

In ANJONONI and OTHERS Vs REPUBLIC [1989] KLR the Court of Appeal held that

"..... 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"

The question to be answered is whether the appellant was identified by the complainant as the individual who attempted to defile her. The answer to this question is to the affirmative. PW1 in her statement provided that she knew the appellant very well and that they had started having sex since 2017. It was her evidence that they had fallen in love and that it was the Appellant who asked her to love him and she agreed. It was also her evidence that the Appellant had asked her to go for family planning which she did. This was corroborated by PW1 a clinician who testified that there was a history of sexual intercourse on several occasions and added that the hymen wasn't intact.

Steps taken by the Appellant

The court in Abdi Ali Bere - vs - Republic (2015) EKLK held;

"In the prove of an attempt to commit an offence the prosecution must prove the mens rea which is the intention and the actus reus which constitute the avert 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 preparation mere preparation to commit an offence and attempting to commit an offence.

It was the evidence of PW2 in cross examination that on the material day that they were caught they were about to have sex when her father arrived. This was corroborated by PW3 who testified that he found his daughter in the house of the Appellant and she was on his bed naked.

Conclusion

Based on the above analysis, it is clear that this appeal lacks merit and it is our humble submission that it be dismissed in its entirety, the conviction and sentence be upheld because it is lawful."

Issues and duty of the court

4. As a first appellate court, this court is required to re-evaluate the evidence before considering whether to affirm or quash the conclusions of the trial court (*Okeno v. R (1972) EA 32*), and the issue to be determined is whether the elements of the offence defilement, or in the alternative the indecent act, have been proved against the accused.



The Evidence

5. PW1, is a clinical Officer on examination of the complainant (PW2) found that her “labia majora and minora were intact. There were no bruises...hymen was not intact.... There was evidence that the girl was sexually active.”
6. PW2 testified that the accused was the husband to the sister of her mother and that they had started having sex with him in 2017 when, after she had gone to visit her aunt, they fell in love. On the facts of the material day she said –

“On 08/02/2019, I went to accused's home at about 3.00a.m. I woke up to prepare breakfast. He was alone with his children. His wife had gone on a safari. He opened the door for me, I entered and he locked the door. We undressed and had sex and then my father came. We had made love many times. My father called neighbours who came. My father beat me up. He went home and left me there. When we started sex in 2017, accused was married. It is accused who asked that I love him and I agreed. We have had sex relationships then. In 2015, December accused asked me to go for family planning at Garasa Health Centre which I did. We used to meet at night and have sex. My father found me in accused's house.”

On cross-examination, the complainant admitted that “we were about to have sex when my father came. We had not started to have sex. We were in the house with the accused. [In] December I used to take contraceptives before. On 08/02/2019 we cuddled but we didn't have sex.”

7. PW3, the complainant's father told how he interrogated the accused and complainant:

“PW2 had gone to accused's house. Accused is my in-law and I knocked his door, he opened the door holding his shorts on his hands. He was naked. My daughter was on his bed naked also. I had a torch. I got through the door. I was annoyed and asked him why he was doing that to my daughter. I raised alarm and called neighbours.”

The father said his daughter was born on 03/06/2004.

8. PW4 brother to PW3 confirmed that when he responded to the alarm raised by his brother he went and found “the accused and the complainant had no clothes and we were shocked. The complainant was in accused house, Accused's wife is a sister to mother of the complainant.”
9. PW5, the Investigating Officer testified that they went to the complainant from [Particulars withheld] Primary School where the complainant schooled, that the Accused had on interrogation admitted that “he had a relationship with the complainant. He claimed to have had sex with her for only few times between 2017 and December 2018. According to him, he had been betrothed to the complainant so he didn't see anything wrong.”
10. When put on his defence, the accused testified that complainant was niece to his wife. He admitted that the complainant had gone to his house at about 3:45am and that her father had come; that the complainant was sitting on the bed; that her father had raised alarm and neighbours came; and that he slept in a “Kikoi”. On cross-examination, he said that complainant was not naked and that the complainant was sitting on his bed.
11. Weighing the prosecution evidence and the defence as a whole, the Court finds the prosecution evidence including that of the complainant herself consistent with aspects of the defence that the complainant was at the accused's house at 3:45am on 8/2/19 and was found sitting on the bed by her



- father and in, in her own words, were about to have sex with the accused with whom she had had sex since 2017. Defilement which requires penetration cannot be proved on the evidence.
12. The age of the complainant PW2 was given as 15 years by the complainant herself who said she was born in 2004. Her father PW3 gave her date of birth as 3/6/2004. The Court accepts the age of the complainant as 15 years at the time of the offence in February 2019.
 13. The accused did not raise a defence under section 8(5) of the *Sexual Offences Act* that “the child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence....”
 14. There was evidence in the testimony of the complainant PW2 and her father PW3 and her uncle PW4 that there was a clear attempt within the meaning of section 388 of the Criminal Procedure Code. The acts of being naked in bed and cuddling as confirmed by PW2 are covert acts of proximate nature as to qualify the attempt to complete sexual intercourse by penetration.
 15. The offence of attempted defilement contrary to Section 9(1) of the *Sexual Offences Act* carries, under Section 9(2) thereof, a penalty of “imprisonment for not less than ten years.” In accordance with the Directions of the Supreme Court in *Muruatetu & Another v. R (2021) eKLR* that the decision in *Muruatetu & Another v. R (2017) eKLR* does not apply to offences under the *Sexual Offences Act*, the Court is bound to pass the sentence of imprisonment for 10 years as the minimum for the offence of attempted defilement contrary to Section 9(1) of the *Sexual Offences Act*.

The Trial Court’s Finding

16. In a well-reasoned judgment the trial court found that the offence of defilement was not proved on the evidence but was that there was evidence to support the offence of attempted defilement and using section 179 of the CPC justified conviction for attempted defilement under section 9 of the *Sexual Offences Act*.
17. With respect the trial court need not invoke the provisions of section 179 of the Criminal Procedure Code that allows the conviction on a lesser, actually minor, offence although the accused was not charged with it.
18. The true position is not that “a combination of some only of several particulars of the offence of defilement constitute a complete minor offence” as would be the case in a charge of indecent act, or that there are “facts which reduce the act to a minor offence.” It is that the act was one of attempt which was interrupted by the intervening act of the father of the complainant.
19. The correct provision of law is the law on attempt as set out in Section 180 of the *CPC* which provides as follows:-
 - “ 180. Persons charged with any offence may be convicted of attempt
When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.”
20. The trial Court, however, rightly convicted the appellant for attempted defilement contrary to section 9 (1) of the *Sexual Offences Act*, not because it was a lesser or minor offence to defilement but correctly because it was an attempt.



21. The appellant sought to justify the act of attempted defilement stating that he was being true to some cultural practice of early marriage in his submissions before the court, as follows:

“ [T]he appellant is being punished for following norms of his community, the nomads, for who the man is the master of the home and where the girl child is married at a young age to a man who is old enough to be her father, or even older.

The law in Kenya does not allow a person under eighteen (18) years of age to engage in consensual sex but who has the right to interfere in the conduct of such communities whose tradition and practices have been going on for years and years, furthermore if it were not for the advancement of civilization these practices would go on forever untouched.”

22. The Court appreciates the feeling of dismay that a culturalist may feel about the criminalization of a cultural act. But the act in question here is the sexual defilement of a child by early marriage. It is exactly for such kind of conduct that the offence against defilement is prescribed by early marriage. A child is a child in any culture and she/he ought to be protected from violence, sexual, physical or psychological that may arise from any cultural practices and attitudes. This decision may help educate the accused and others of his cultural persuasion, if any truly exist today.

23. The disgusting aspect of the case is that the accused the child’s uncle who should have at all times the child’s best interest, which cannot lie in her early marriage to himself denying her the dignity to grow and develop as an independent human being. It matters not that the child in her innocence is wallowing in love with the accused!

ORDERS

24. Accordingly, for the reasons set out above, the court finds no merit in the appeal by the appellant from conviction and sentence for the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act*, and the appeal is dismissed.

25. However, the sentence shall commence on 23/2/2019 when the accused was arrested awaiting his trial.
Orders accordingly.

DATED AND DELIVERED ON 28TH DAY OF APRIL, 2022

EDWARD M. MURIITHI

JUDGE

Appearances

Appellant in person

Ms. Nandwa, Prosecution Counsel for the DPP.

