



REPUBLIC OF KENYA



**KENYA LAW**  
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**Situma v Republic (Criminal Appeal E044 of 2021)  
[2025] KEHC 4537 (KLR) (Crim) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4537 (KLR)

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

**CRIMINAL**

**CRIMINAL APPEAL E044 OF 2021**

**CJ KENDAGOR, J**

**MARCH 17, 2025**

**BETWEEN**

**KENNEDY SIMIYU SITUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence in Milimani CM Sexual Offences Case No. 10 of 2019 delivered on 28/05/2020 by Hon. Z. Abdul)*

**JUDGMENT**

1. The appellant was 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 the 29<sup>th</sup> May, 2019 at Parklands, within Nairobi County, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the anus of S.M.N. a child aged 17 years.
2. The appellant faced an alternative charge of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that on the 29<sup>th</sup> May, 2019 at Parklands, within Nairobi County, the appellant intentionally touched the buttocks of S.M.N., a child aged 17 years.
3. The Appellant pleaded not guilty to the charges, and the case proceeded to trial. In a judgment delivered on 28<sup>th</sup> May, 2020 the Appellant was convicted on the main charge of attempted defilement and sentenced to ten (10) years' imprisonment. The alternative Count 2 was held in abeyance.
4. Being dissatisfied with both the conviction and the sentence, he appealed to this court vide a petition of appeal dated 13<sup>th</sup> May, 2021 in which he raised the following grounds of appeal;



- I. The learned trial magistrate erred in law and, in fact, by convicting the appellant on evidence that did not meet the required standard of proof, i.e. beyond a reasonable doubt.
  - II. The learned trial magistrate failed to observe that the evidence of PW1 and PW2 was a creation of an attempted defilement case against the appellant.
  - III. The learned trial magistrate heavily relied on the testimony of PW1 without critical analysis of the same.
  - IV. The learned trial magistrate erred in fact and in law by tilting Section 124 of the *Evidence Act* in favour of the complainant while blatantly dismissing the appellant, thus rendering an opinionated judgement.
  - V. The learned trial Magistrate erred in law and fact by blatantly believing the complainant and PW2 not considering their character as street boys.
  - VI. The learned trial magistrate erred in law and in fact, by not considering that there was no corroboration of PW1's testimony with that of PW2.
  - VII. The learned trial magistrate failed to be guided by the obvious circumstances of the case, hence wrongly convicting the appellant.
5. In his submissions, the appellant argued that the trial court wrongfully convicted him based on a flawed charge sheet and without sufficient evidence to support the charges against him. He contended further that the sentence was harsh and excessive.
  6. As a first appellate court, I must reconsider and evaluate the evidence in the court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In *Kiilu & Another V Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate court as follows:-
 

“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 court's 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 court's findings and 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.”
  7. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court, and the written submissions filed by the Appellant. I have also read the judgment of the trial court. Having done so, I find that the issue for my determination is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt, whether the conviction was safe, and whether the sentence was appropriate or excessive.
  8. The prosecution called three witnesses. The complainant, a 17-year-old homeless youth, testified that while walking from Muthurwa Market to City Park, he stopped by the river to take a bath when he saw the Appellant who was also at the river. He testified that the Appellant exposed his penis while gesturing and left, only to return and continue the same, and, this time, signalled the complainant to go to where he was. The complainant stated that the Appellant walked past him while he followed



from a distance. He stated that he met PW2, who was on patrol, and he recounted the incident after PW2 asked what he was doing at the location.

9. The complainant stated that PW2 advised him to follow the Appellant so they could discern his intentions, and he complied. The complainant stated that he followed the Appellant who went into a bush. According to the complainant, when he reached the Appellant, the Appellant asked him what he wanted, but he didn't respond. After this, the Appellant removed the complainant's trousers and started touching the complainant's thigh and waist. He stated that during this occurrence, the Appellant promised to give him some money on his return from work. He mentioned that, at that moment, the Appellant warned him that a police officer was approaching and advised the complainant to run away. He stated that he followed the Appellant even though he was asked not to. He further described the subsequent arrest by the police and his placement in a Children's Remand home that followed thereafter.
10. PW2 was a police officer. He testified that he spoke with the complainant, who described an incident involving a man who was exposing his genitals and calling him to a nearby bush by the river where he had gone to bathe. He stated that he advised the complainant to listen to what the person was saying while he sought reinforcement from fellow officers. He mentioned that he called the City Council askaris, who joined him - four of them in total - and they followed where PW1 had moved, along with the Appellant, into the bush.
11. According to PW2, when they approached, PW1's trousers were lowered to his knees, and the appellant fled upon seeing the officers. PW2 recounted that, with the help of the county officers, they chased the appellant, who was subsequently apprehended and placed under arrest. According to PW2, his advice to the complainant was based on multiple complaints regarding a man making sexual advances in the area by exposing his genitals.
12. The appellant, in his defence, denied the charge and stated that on the day in question, he decided to enter the bush to answer the call of nature when the complainant, a street child, asked him to buy lunch and insisted, even after he told him he had none. He stated that when he resisted, the police officer who arrested him attacked him, causing him to fall, and he was forced to run away. He maintained that he was charged with false accusations because he declined to pay a bribe that the officers had demanded.
13. The Appellant was convicted on the offence of attempted defilement, contrary to Section 9(1) of the *Sexual Offences Act*. The Section provides as follows:-

“9. 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.
3. The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section.”

14. The elements of attempted defilement are the same as those of defilement, except that penetration does not occur in attempted defilement. The case of *John Gatheru Wanyoike v. Republic* [2019] eKLR addressed the elements of an attempted defilement charge and made the following determination: “It is clear that the elements of the offence of attempted defilement are similar to those of defilement save



- that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler.”
15. The complainant’s age was established through an assessment report produced as Exhibit 1. This assessment was conducted as a radiological exam under police escort. Its validity was not questioned during the examination of the witness who produced it. The report indicates that the complainant is 17 years old and is considered valid proof of age.
  16. The complainant explained how he first noticed the stranger in the public area around the river where he had hoped to bathe. He provided a detailed account of an encounter with the male individual who was displaying his genitals and urging him to come closer. The person led him to a secluded spot in the bushes, removed his trousers, and touched him on the waist and thigh before the police accosted him, and he fled.
  17. Concerning identification, the suspect was promptly apprehended at the incident scene. There was no indication that the complainant interacted with anyone else besides the appellant. The testimonies of witnesses PW2 and PW3 corroborate the appellant’s presence at the location, detailing how they saw the appellant in the vicinity and the state of the complainant’s trousers, which had been removed down to the knees. Their consistent accounts add a layer of credibility, reinforcing the assertion that the appellant was indeed at the scene when the arrest was made.
  18. The term attempt is defined by Section 388 of the *Penal Code* as follows: -
    - “1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil 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 fulfilment 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.”
  19. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
  20. In cases of attempted defilement, the Prosecution must demonstrate that the accused took steps to initiate an act of penetration but was unable to complete it, either by their own choice or due to the intervention of another person. There must be clear evidence of the attempt, but no actual penetration should have occurred.
  21. The evidence is that the appellant was exposing his penis and he was accosted when he had pulled down the complainant’s trousers halfway. He was also touching him in intimate areas – his waist and thighs – and had taken him to a secluded spot in the bush. The events are clearly connected as overt acts, leaving



- no doubt about the appellant's intentions. The appellant's actions clearly show an attempt to defile the complainant, a vulnerable boy.
22. The prosecution case was cogent and corroborated. The defence did not cast any doubt on the prosecution case, I see no reason for malice as fronted by the appellant.
  23. The court also dismisses the defence's argument that the complainant's status as a street boy should lead to questioning the credibility of his testimony. The circumstances of the complainant's living situation do not undermine the validity of his account of events. The trial court found his testimony credible, and this court concurs on appeal. It is essential to assess the evidence based on its merits, regardless of an individual's background.
  24. I also criticize the conduct of PW2, who, after the complainant reported the appellant's behaviour - specifically, that a male adult was calling him over while exposing his penis - advised the complainant to follow the appellant. The complainant was a vulnerable boy, and the police officer should have helped him to safety. Instead, he encouraged the boy to follow the appellant, which could have exposed the complainant to even more serious harm if the police officers had not returned in time.
  25. In the submissions presented by the appellant, it was asserted that the evidence leaned more towards supporting the alternative charge rather than the main charge. However, as previously detailed, the appellant's conduct clearly reflects his intentions and motives. The analysis of the evidence indicates a consistent pattern of conduct that aligns with the main charge. There was no defect in the charge sheet.
  26. I agree with the trial court's findings regarding the appellant's guilt for the offence of attempted defilement. The conviction was safe.
  27. Regarding the 10-year sentence imposed by the trial court, this being an appellate court, it follows that it can only interfere with it if it finds that it was excessive or arrived at based on wrong principles of the law or by considering irrelevant factors.
  28. According to Section 9(2) of the [Sexual Offences Act](#), the offence of Attempted defilement carries a sentence of imprisonment for a term of not less than ten years. The appellant was given the minimum sentence. It was neither harsh nor excessive. I uphold the sentence.
  29. The appellant did not secure bond; therefore, pursuant to Section 333 (2) of the [Criminal Procedure Code](#), the sentence will run from 29th May, 2019 when the appellant was placed in custody.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF MARCH, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl Appellant – present

Mr. Omondi, ODPP for Respondent

