



**KP v Republic (Criminal Appeal E025 of 2023)
[2025] KEHC 9439 (KLR) (14 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E025 OF 2023
TM MATHEKA, J
APRIL 14, 2025**

BETWEEN

KP APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. By a judgment delivered on 9/3/2022, the appellant who was the accused in Makindu MCCRC (S.O) 18 of 2020 was found guilty of the offence of attempted defilement contrary to section 9(1) as read with 9(2) of the *Sexual Offences Act* No. 3 of 2006.
2. On 12/5/2022, he was sentenced to 10 years' imprisonment.
3. Aggrieved, he filed this appeal on the following grounds:
 1. That the trial magistrate erred by failing to observe that the trial was conducted under defective charge and in contravention of Article 50(2) j of *the constitution* as well as in violation of section 19 of the Oaths and Statutory Declaration Act; section 124 of the *Evidence Act* and section of the *Criminal Procedure Code*.
 2. That the appellant also argues that the fatally contradicting evidence by the prosecution did not prove penetration which is an essential ingredient.
 3. That in a case of this nature and that my defense had created weighty doubts and had actually discharged the prosecution evidence.
 4. The case for the prosecution was that the complainant aged 11 years was the appellant's niece as he is the brother to her father, who was married to the complainant's mother.



5. At the material time the complainant was living at her grandmother's. The appellant was living in the same compound. The complainant took a book for repair to the appellant when she entered the room where he was, he grabbed her, removed her pant, lay her on the sofa and put his urinating thing into hers – she screamed loudly.
6. Fortunately, her mother was passing by and heard the screams Michael niache!) leave me! Leave me! – she went in and found the appellant on top of her daughter who did not have a panty on – she ordered the appellant to leave her child alone. The mother took her child and on the way met the appellant's brother to whom she reported what had happened.
7. The following day she reported at Ulilnzi police post and took the child to Kibwezi hospital. The child was also issued with a P3. She said her child was born on 12/9/2008. She said she had known the appellant for seven years.
8. The mother to the complainant on cross examination told the court how the family of her husband frustrated the whole process. She told the court that she called to the brothers and sisters of the appellant on the issue - that she was warned by the family of her husband that if she went on with the matter she would have to take her children and leave the home. She told the court that her husband was not bothered about the issue – that her youngest child fell ill and she was admitted in hospital before the process could be completed, that the appellant's sister took away the complainant to keep her away from medical examination – and that even though the appellant was arrested soon after the incident, he was released when she was in hospital with her youngest child – and it is when she came back home that she followed up the issue and the appellant was re-arrested.
9. The police officer No. 119495 PC Salim Jodena Salim testified that he received the report on 28/2/2021 from the mother of the complainant who came with her daughter AW. She reported that the appellant had had attempted to defile her child – she had found him on top of the child. He arrested the appellant.
10. The medical evidence produced by PW4 – who testified that the PRC form was filled on 2/3/2020 and the P3 on 4/3/2020. The report was made to the police on 28/3/2020 – and the offence was committed on 2/2/2020. These reports revealed normal genitalia – but a broken hymen with an old scar.
11. The appellant submits that the charge sheet is defective because he was charged with attempted defilement, yet the whole evidence spoke about defilement – to that extent he argues that the charge is defective and he ought to be acquitted.
12. In addition, that the report was made 26 days after the event – it is alleged the offence was committed on 2/2/2020, and the report was made on 28/2/2020 and the medical examinations were done on 2/3/2020 and 4/3/2020. He submits that the court should see these as red flags.
13. That the prosecution failed to prove penetration despite accusing him of defilement.
14. That in any event, should the court find the appeal untenable the court should consider section 333(2) of the *Criminal Procedure Code* with respect to his sentence.
15. The state through the prosecution told the court on 2/7/2024 that they had filed their submissions on 27/5/2024. I have checked the file and the CTS and have not seen the same.
16. That besides, the issue for determination is whether this appeal has any merit.



17. This court is bound to re-assess the evidence and draw its own conclusion. I have done so and there is no doubt that the appellant and the complainant are known to each other – he is her uncle – he said as much in his defence. He confirmed that his brother is married to the complainant’s mother:

18. In his defence the appellant told the court in a sworn statement of defence that

He was a casual worker at the material time. That he understands the offence he was charged with. That he was told that he had defiled a girl and was arrested. That the girl was taken for examination while he was in custody. That he remained in custody for one week and was released. That the mother of the child had ran away and when she came back she made the allegations of defilement against him and I was charged. He said he was framed with the offence was re-arrested and charged.

He denied any attempt to defile the child. He said that the child lived with her grandmother, while he was living at the home of his married my sister.

He explained that the mother to the complainant was married by his brother and that she had left her smaller child with his brother. That his sister was married by the uncle to the mother of the complainant and that he was assisting her as his sister. That she would ask for things from him by force and he did not want to associate with her.

On Cross-examination by Court Prosecutor he told the court that the girl was coached by her mother

to frame him. That he could not have done that since her grandmother was present. That the child had gone to him and he had covered her books and did not touch her and even when she went to school she said nothing.

He called witnesses. Dw2 Sworn States Roemina Katua Maingi told the court that the accused person was her brother. She stated that on 28/2/2020 the chief called them to his office. When they went to his office the accused was arrested and taken to Kibwezi police station. They went to the station and then they insisted that the child be examined. They asked the mother to give them the lab results. She refused. Then on 29/2/2020 the mother told her that she would not take her daughter for medical tests. She told that the court that she left after that.

On Cross- Examination by Court Prosecutor she told the court that on 28/2/2020 they took the child to the hospital. That the offence was alleged to have taken place on 2/2/2020. That the complainant’s mother was a wife to her brother. That they lived at peace with her. That the chief called her and the accused, Kyallo Nduko and Maweu who is her husband. The complainant was present.

That Maweu had a dispute with his wife. The accused was placed in custody for the investigations to be conducted. On 29/2/2020 he was released and re-arrested after a week.

She said spoke to the child who told her that her mother told her to say she had been defiled otherwise she would be beaten up. She said she was still waiting to I am still waiting to record a statement and that she had not lied to court.

He was given another chance to call his remaking witness. This witness did not show up and he closed the defence on 9th February 2022.



The duty of this court as a first appellate court is to reanalyze the evidence on record and to draw its own conclusions Always keeping in mind that it never had or so the witnesses testify.

Then the issue for determination is whether this appeal has merit. and the questions to be answered are whether they charge was defective whether the evidence was contradictory and whether they accuse persons' defense created doubts in the case for the prosecution.

On whether or not the charge was defective the operative provision of the law is s. 214 of the [Criminal Procedure Code](#) which states: 214. Variance between charge and evidence, and amendment of charge

1. Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—
 - i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge; where a charge is altered under this subsection the accused may demand that the witnesses or
 - ii. any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re- examine the witness on matters arising out of further cross-examination.
2. Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.
3. Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

The appellant's argument is that the charge and the evidence on record were at variance and that makes the charging defective. His argument is that he said with an attempt to defile yet the complainant's testimony was how the appellant grabbed her and lay her on the sofa and took off her pant and defiled her.

Looking at the provisions of section 214 that would not make the charge defective Either in form or in substance. hence that first ground falls.



With regard to the contradiction in the evidence. Section 388. Of the Penal Code states: Attempt defined

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.
4. In *David Ochieng Aketch v Republic* [2015] eKLR the court discussed this issue thus
- The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of Sexual Offences Act No. 3 of 2006. What is attempted defilement? It can safely be stated to be the unsuccessful defilement. For a successful prosecution of an offence of attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises or lacerations from complainant's vagina and/or bruises or lacerations of culprit's genital organ and finding male discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration. There was absence of penetration or evidence linking the culprit with the offence of attempted defilement." In *Otieno v Republic* (Criminal Appeal E006 of 2022) [2022] KEHC 10559 (KLR) the court observed: "The two main ingredients of an attempted offence are the intention (*mens rea*) and the execution of the intention (*actus reus*). The prosecution must thus among other things, prove the steps taken by the accused to execute the defilement which did not succeed."
5. The prosecution's evidence on this is disjointed and does not go to establish these ingredients. For instance, the complainant stated that the appellant used to go to their home and that he removed her clothes. Then she went on to say that she took her book to him for repair, he grabbed her and undressed her and that he was alone. She added that he removed her clothes, her panty, put his thing that he urinates with into her thing that she urinates with, then lay her on the seat. She said she screamed loudly and her mother came and asked her what she was doing there. She says
- "I told her what the accused person had done and she took me to the police and the hospital".
6. On cross examination she said that the accused grabbed her hand lay her on the sofa and lay on top of her. that when she screamed her mother came and told her to go home and when they went home her mother asked her what had happened. That when she was being taken to hospital They accused her left to look for threads to repair her books



7. On the contrary her mother told the court that She was passing by her uncle's house when she had the complainant shouting leave me leave me. The door was not locked. she entered and found the complainant lying on the sofa with their accused on top of her she told the court that the complainant did not have a panty and the accused persons trouser was zipped up.
8. The report to the police by the mother was made on the 28th of February 2020 to the effect that the upper land had grabbed the complainant removed her panty, and removed his penis and that she found him on top of her in that state.
9. He said he arrested the appellant and sent the mother to get AP3 and when she took too long to bring it he released the appellant and re arrested him later when the P-3 was completed
10. The clinical officer said the P-3 was filled on the 4th of March 2020 For a defilement that was engaged to have taken place on the 2nd of February 2020 in her evidence she said that a condom was used during the defilement. the hymen was broken, Evidenced by an old scar In John Nyaga Njuki & 4 others v. Republic [2002] eKLR the court stated

In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

11. From the evidence on the part of the prosecution one can see that this was a developing story. It began with an allegation of attempted to defilement as per the charge sheet. But the testimony of the complainant was that there was penetration, yet the mother said she found the appellant with his zip intact but on top of the complainant. In addition, the complainant told the court that she is the one who told her mother what had happened after her mother called her out of the house.
12. According to the Police mother's report to the police was that she found the appellant on top of her child (who had no pant) with his penis out.
13. At the hospital the story changed to that the penetration had taken place but that a condom had been used. This was a per the clinical officer.
14. The broken hymen was described by the clinical officer as an old scar unrelated to this alleged defilement.
15. The evidence does not add up. The door to the house was not locked. The complainant states that when her mother called her out she left while the appellant was going to buy threads to fix her books. What happened to her clothes? She had stated that the appellant had removed her clothes and her panty. Did she leave them in the house? Did she pick them up? Her mother she did not have panty? Where was it?
16. The act of attempting defilement was also not established. The prosecution presented three different scenarios and each of them could not have happened at the same time.
17. The incident is said to have happened on 2nd February 2020, the charge sheet says the appellant was arrested on 7th March 2020. The incident as reported vide OB 6/8/3/2020 as per the charge sheet, and OB 6/28/2/2020 as per the P3.



19. The police officer stated that he arrested the appellant when the report was made, and rearrested when the P3 was filled.
20. These testimonies in their totality carry a question as to their credibility. They present material inconsistencies and contradictions and discrepancies which make the conviction unsafe.
21. The appellant's statement of defence and the testimony of his witness are credible. He admits that indeed the complainant took the books to him for covering. He denies any committing the alleged offences.
22. The onus remains upon the prosecution to prove its case beyond a reasonable doubt. That they did not in this matter and the appeal succeeds.
23. The appeal is allowed.
24. The conviction is quashed, the sentence set aside.
25. The appellant be set at liberty unless otherwise legally held. Parties notified

DATED, SIGNED AND DELIVERED, THIS 14TH APRIL 2025

MUMBUA T MATHEKA JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

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