



**Shimirimana v Republic (Criminal Miscellaneous Application  
E063 of 2023) [2024] KEHC 9988 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E063 OF 2023  
RN NYAKUNDI, J  
AUGUST 8, 2024**

**BETWEEN**

**PASCAL SHIMIRIMANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J.M  
Wekesa in Kakuma Law court Cr. SO E015 of 2029)*

**JUDGMENT**

1. The appellant was charged with the offence of attempted defilement contrary to section 9(1) as read together with section 9(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that on 21<sup>st</sup> June, 2019 at (particulars withheld) the appellant intentionally touched the vagina of A.A.D, a child aged 11 years with his fingers.
2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of charge were more less the same.
3. He denied both charges. After a full trial, he was convicted on the main count of attempted defilement and sentenced to serve 10 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, relying on the following couched grounds –
  - a. That the learned magistrate erred in both law and facts when she failed to consider that there were 3 crucial witnesses who wrote their statements in this matter but they were nit availed on court.



- b. That the learned trial magistrate erred in both law and facts when she failed to consider that this is a serious case that needs age approval, in which case there was no document availed in court to prove the age of the victim.
  - c. That the learned trial magistrate erred in both law and facts when she failed to consider that in this instance there was single evidence which was not supported by the law.
  - d. That the learned trial magistrate erred in both law and fact when she convicted the appellant without considering the appellant's defence.
5. At the time of drafting this judgment, none of the parties had filed submissions. I shall proceed to analyze the evidence adduced at the trial court and make a determination.
  6. At the trial court, the prosecution marshalled four witnesses who testified in support of the Respondent's case. PW1 was the complainant. She testified that she is 12 years old and a class 2 pupil at x primary school. On the night of 21/6/2019, she was at the Kakuma 3 reception hall with her mother and sisters and after taking her meal, went to sleep. She slept on the ground with another girl. She had slept with her clothes on but on waking up found herself naked. She could not recall what he may have done to her. He was sleeping on her chest. The perpetrator had a shirt and a "tara" or lesa tied around his waist commonly worn by Muslims. Her mother used a torch light to shine on the perpetrator, the accused herein whom she caught and screamed. The accused did not leave the scene as there is a fence around the said reception that prevented him from escaping.
  7. She testified that she was referred to hospital for treatment and was issued with some white paper to take to hospital for filling. She could not recall her birth date. An age assessment was conducted on her at the hospital. She identified the p3 form, PRC form and age assessment reports for her sake before court. She identified the appellant before court as her assailant.
  8. On cross examination by the appellant, she testified that she could not recall the date, month or year when the incident happened. Her clothes were removed from her body without her knowledge but they were not torn. She stated that she did not hear anything or feel any weight since she was asleep.
  9. PW2 was the victim's mother. She testified that on 21/6/2019 at night at around 1:00-2:00am, she was sleeping at the partitioned place within the reception area when she heard screams that prompted her to rush to where ADD was sleeping with the other girls. The said room was small without a door and accommodated only two mattresses. She rushed there with her torch and on arrival spotted the appellant herein trying to escape but she made noise and prevented him from running away. Other neighbors joined here in apprehending the appellant. The said commotion attracted security personnel that came and put lights on. This enabled them to see the appellant clearly that had no clothes on top.
  10. The witness informed the court that when ADD screamed, she did so with an impression that an animal was on her bedding. She had no idea how the appellant entered the room where the victim was sleeping. She further stated that the appellant had his lesa that fell down when her neighbors woke up and responded to her screams and that is when they noticed that he did not even have his inner wear on.
  11. She further testified that the assailant was beaten and taken away by the security who escorted him to the police station. In the morning, she was called to go and identify him and she took the victim with her. A child protection officer also accompanied her and she did everything since PW2 did not understand Swahili Language. She identified the appellant before court as the one she caught trying to escape from the room where ADD was sleeping. She did not know him before. She also informed the court that her child was born on 26/6/2008 however her birth certificate got lost during movement. The only available document was a vaccine card.



12. On cross examination by the appellant, PW2 stated that she had not seen him before. The accused was handed over to the security after the incident where he was kept the entire night till the following morning when he was escorted to the police station. She saw him inside the net and caught him to prevent him from escaping. The incident happened at night. She located him inside her daughter's room trying to exit. She lit her torch on him then screamed. Light was put on later and she saw him clearly. He did not leave the scene. After the incident, she was moved to Kakuma 2 but was unable to stay alone so she moved further to Kakuma 4 area hence it was difficult to trace her. The reception police too were searching for her to go and record her statement.
13. PW3, Dr. K tendered evidence on behalf of his colleague namely Dr. EW that he had known and worked with at IRC Hospital and was familiar with her handwriting and signature. He took the court through the medical report in respect of PW1 as follows; the same was filled by Dr. E W on 26/6/2019. On state of clothing, the survivor had changed clothes and did not present them at the time of examination. Nature of offence was attempted defilement. She was in fair general condition, calm with no evidence of alcohol, substance or drug use. Head and neck were normal, upper and lower limbs normal. There were no physical injuries thus no drugs were given. Age of the victim was 11 years. There were lacerations at the opening of the vagina. There were spermatozoa on the vulva.
14. The witness equally took the court through the Post Rape care form regarding the victim. It was testified that the victim has never been pregnant and had not started her menses. He testified that there was a whitish creamy discharge on the vulva. There were lacerations on the vagina entry that were not actively bleeding.
15. On cross examination by the accused, PW3 said the doctor that examined the victim saw lacerations at the entry of the victim's vagina, a sign that someone tried to penetrate her and that is why she was given HIV prevention drugs. The said doctor did not specifically say they were sperms for a male perpetrator. Her urine was taken for urinalysis.
16. PW4 testified as PC John Thuku Karuga who testified that a case of attempted rape was reported to him. The rest of the evidence corroborates with that of PW1, PW2 and PW3. He recorded witness statements then issued the complainant with a P3 form that was filled at IRC Hospital and returned to him at the Police station. He prepared a file and charged the appellant with the present offence. The appellant was arrested by the security manning the reception center that took him to the station. He re-arrested him and put him in the cells. He took the victim to hospital for age assessment examination and was issued with a report indicating she was between 9-12 years old that he produced as exhibit.
17. The appellant was put on his defence and he testified that he was living at the reception area prior to his arrest, having arrived from Nairobi. He got his livelihood through performing casual jobs at construction sites. He stated that he had a case with someone in Nairobi and one Jackson, security personnel at the reception area took him to the police station saying it was about another boy he had a case with in Nairobi. On reaching the police station, he was asked to remove one shoe and was put in the cells at Kakuma 2. Later he was taken to Kakuma police station. After some days he was taken to Lodwar and charges read to him to the effect that he had attempted that he had attempted to rape the victims herein. He stated that the victim and her family are strangers that he met in court on 5/10/2019.
18. On cross examination by the prosecution, the accused said that he was residing at the reception area prior to his arrest. He stated that he did not know if the victim also lived there. He testified that Ezekiel is the boy who had him arrested. He had a case with him in Nairobi. He went to where he was sleeping at around 8:00Pm with the security guard and arrested him. On inquiry as to why he was being arrested, they told him it was about his case with Ezekiel in Nairobi. He was in court when the victim testified. He could not recall the victim saying he tried to remove her clothes.



## **Analysis and determination**

19. I have considered the appeal and evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
20. The elements of attempted defilement are the attempt to have sexual intercourse with the complainant, the age of the complainant, and the identity of the culprit.
21. It is evident that intention is a key component of the offence of attempted defilement. It is a requirement however that the accused person at the material time had begun to put his intention to execution and that he manifested this by way of an overt act. The extent as to how far he went in his mission to commit an offence would not matter and neither would it matter that he was prevented from committing the main act itself. In this case, what the law is concerned with is the attempt itself, characterized by the setting into motion an intention.
22. The key questions are whether the complainant was a child and whether there was an attempt of penetration of the Appellant genitals into the complainant's genitals.
23. Was the age of the complainant proved? At the trial court, the prosecution presented the complainant's age assessment report which indicated that the victim is between 9-12 years. The victim's mother equally testified that she was born on 26/6/2008. It has been evidenced that the victim was a minor and I so find.
24. Was the attempt to defile the complainant proved? The evidence regarding the incident is that of the complainant Pw1, corroborated by PW2. The learned magistrate in his judgment stated that he considered the evidence and concluded that the same could sustain a charge on the main count.
25. Based on the evidence adduced by PW1 and the trial court's record, which had the advantage of observing the demeanor of the witness, I take the view that there was indeed an attempt to defile the complainant. As per the definition of attempt under Section 388 of the Penal Code, the test is whether an accused person had begun to set his intention into motion by way of an over act. Indeed, this was the case herein. It was however not clear how the appellant got himself into that room. It is immaterial that the Appellant did not complete his intention. This Court finds that the ingredients of the offence of attempted defilement were indeed proven beyond reasonable doubt.
26. Subsequently I find that the appellant was positively identified since he was identified by more than one person.

## **Whether or not the sentence meted out was excessive in the circumstances of the case.**

27. The leading authority on the question of interfering with sentence is that of *Wanjema v Republic* Criminal Appeal No. 204 of 1970 (1971) EA 493, 494,, where Trevelyan J held as follows:-

‘An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.’



28. The penalty section for the offence of attempted defilement under the [Sexual Offences Act](#) is found in Section 9 (2) and it provides as follows: -

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.

29. The trial court sentenced the accused person to serve 10 years imprisonment. I take the view that mandatory minimum sentences place a bar on the trial court's ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate's power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps.

30. The sentencing objectives in Kenya have been captured in the [Sentencing guidelines 2023](#) to be the following: -

- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- v. Community protection: to protect the community by incapacitating the offender.
- vi. Denunciation: to communicate the community's condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society.

31. I have put all these factors into consideration and the mitigation proffered by the appellant at the trial court. It is my considered view that he should serve a lesser sentence.

32. In the upshot, the court is mindful of the provisions of section 333(2) of the [criminal procedure code](#). This Court finds that indeed, a custodial sentence of 6 years would best serve the punitive, deterrent and retributive functions of sentencing in the circumstances of the case. The court is mindful of the provisions of Section 333(2) of the [C.P.C](#) on credit period given in favor of the Appellant for the period spent in pre-trial remand awaiting final determination of his case.

33. The appeal therefore partially succeeds.

34. Orders accordingly.

**DATED AND SIGNED AT EDORET THIS 8<sup>TH</sup> DAY OF AUGUST 2024**

In the Presence of

Appellant

Mr. Kakoi for the State



.....  
**R. NYAKUNDI**  
**JUDGE**

