



**Ngotho v Republic (Criminal Appeal E093 of 2021)
[2023] KEHC 2081 (KLR) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E093 OF 2021
JM CHIGITI, J
MARCH 13, 2023**

BETWEEN

PETER NDUNG’U NGOTHO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein Peter Ndung’u Ngotho was charged in the Chief Magistrate’s court at Githunguri with the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act* No 3 of 2006. The second count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars are that on the days between 4th and June 22, 2022. At around 0800 hours in Githunguri Sub-county within Kiambu County he intentionally attempted to cause his penis to penetrate the vagina of CW a child of 8 years. The appellant pleaded not guilty.
3. In support of its case the prosecution called 4 witnesses.
4. After voir dire was conducted the witness who testified as Pw1 said that she was sent by her grandmother in the morning. She testified that she decided to use a shortcut that passed near the appellant’s house. When she got at the house the accused called her. She went towards him he told her to get into the house. He followed her into the house and locked the door. He lowered his trouser and tried to remove her pants. She screamed and two boys came to her rescue, and shortly after the wife to the accused also came in. PW1 told the court the accused was their neighbor.
5. PW2 testified, that the complainant was her niece who was born on April 12, 2011, she adduced a copy of the immunization card. She informed the court she was notified by her sister in-law that CW had been molested. When she asked her, CW confirmed the incident. She took PW1 to Githiga Dispensary and upon examination a P3 form was issued. She produced the treatment book from



Githiga dispensary. She denied using the case to pin the Appellant after a dispute they had with her cousin JK.

6. PW3 testified that on June 22, 2020 she overheard the complainant telling her friends about an incident where the accused attempted to molest her. She called her to the side and she narrated the same to her. She informed the child's Aunt on the same.
7. PW4 Corporal Stephen Kuto testified he was the investigating officer, and that on June 24, 2020 he received a complaint of attempted rape from the Complainant and her Aunt. They informed him the accused was attending a case at the chief's office. He went there and arrested the accused. According to him the minor could not recall the date of the incident.

The defence oral evidence

8. DW1 the accused herein denied the charges and indicated it is a set up. He said on June 15, 2020 at 1pm he was in the Shamba, while JK hurled insults at him that he buys sweets to entice young girls, he crossed over to his Shamba and rained blows on him. He was arrested.
9. DW2 testified she is the wife to the appellant and that on June 15, 2020, at 3.00 pm while she was at home her husband returned home with soiled clothes and had an injured face and head. The appellant informed her he was attacked by JK. She escorted the accused to the hospital. And later to the police station to record a statement. And the accused together with JK were arrested.
10. The trial court convicted the accused for the offence of attempted defilement contrary to section 9(1) of the *Sexual Offences Act* and was sentenced to 10 years' imprisonment.
11. Aggrieved by the conviction and sentence of the trial court, the appellant filed the Memorandum of Appeal on October 4, 2021, citing the following grounds:
 - a. That the learned trial magistrate erred in both facts and law in failing to appreciate the glaring contradictions in the prosecution case.
 - b. That the learned trial magistrate erred in law and in fact in failing to appreciate the prosecution has failed to establish their case beyond reasonable doubt.
 - c. That the learned trial magistrate erred in law and in fact in failing to shift the burden of proof to the appellant.
 - d. That the learned trial magistrate erred in law and in fact in convicting the appellant with single witness identification.
 - e. That the learned trial magistrate erred in law and in fact in convicting the appellant on unsworn evidence.
 - f. That the learned trial magistrate erred in law and in fact in convicting the accused without the evidence of the doctor
 - g. That the trial magistrate erred in law and in fact in relying on uncorroborated evidence.
 - h. That the trial magistrate erred in law and in fact in dismissing the defence of the appellant herein.

It was proposed to ask the court to allow the appeal and quash the sentence and conviction of the trial court.



Appellant's submissions

12. The Appellant submits he was wrongly convicted and the prosecution did not prove the case to the required standard. That the charge is an afterthought which emanates from a family dispute. He urged the court to quash the conviction and set free the appellant.

Respondent's submissions

13. Opposing the appeal, the Prosecution told the court that it had proven the case beyond reasonable doubt against the appellant. The age of the complainant was proved by the immunization card. While the appellant was positively identified by the complainant. The Prosecution submitted that all the ingredients were properly proved and urged the court to uphold the conviction and sentence.

Analysis and determination

14. This is a first appellate court, the court is to analyze and re-evaluate afresh all the evidence adduced before the lower court and draw its own conclusions bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal held 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 (*Pandya v Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). 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 finding and conclusion; 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, see *Peters v Sunday Post* [1958] EA 424.”

15. The issue for determination is whether the prosecution proved the case beyond reasonable doubt and whether this court should quash or uphold the conviction.
16. In a case for attempted defilement the prosecution should prove beyond reasonable doubt all the ingredients of the offence of defilement save for penetration.
17. In the instant appeal the prosecution was able to prove the age of the complainant to be 8 years, through the immunization card.
18. Section 388 of the *Penal Code* provides 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. According to the complainant who was PW1, the appellant called the complainant to his house locked the door, removed his clothes, and ordered the complainant to remove her clothes. She screamed and 2 boys came to her rescue. It is evident from the evidence of PW1 that the accused intended to defile the complainant. The minor gave a clear version of what transpired, she understood she was under oath and was to tell the truth before the court.
20. DW2 contends that the appellant was attacked by a relative of the complainant, the appellant and the complainant did not give a clear account of the findings on the fateful day when the complainant raised the issue of the attempted defilement but after the incident.
21. Sentencing is a discretion of the trial court which is to be exercised judiciously, the Appellate court will interfere with the trial court’s discretion if it is proved the Magistrate misapprehended the law.
22. The law prescribes a punishment of a minimum of 10 years imprisonment and a maximum of life imprisonment. The trial Magistrate convicted the appellant to 10 years imprisonment. This is a minimum sentence as set by the law. The trial Magistrate noted the purpose of the sentence was to deter further crimes and to curb further such incidences as the one witnessed.
23. The main purpose for sentencing is to punish the offender for his wrong doing, the aim is to rehabilitate offenders to renounce the criminal tendencies.
24. I am not persuaded that the trial court erred in convicting the appellant for the offence of attempted defilement. The evidence of the PW1 was corroborated by that of PW2 and PW3.

Disposition:

25. In the upshot, the Appeal herein is dismissed for lack of merit, I uphold the trial court conviction and sentence of the appellant.

Order:

The Appeal is dismissed.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 13TH DAY OF MARCH, 2023.

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JK CHIGITI (SC)
JUDGE

