



**Mwaro v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 17396 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E043 OF 2022**

**GMA DULU, J
MAY 12, 2023**

BETWEEN

JACOB JEFA MWARO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E013 of
2021 at Voi Law Court on 7th June, 2022 by Hon. C. Kitinji - PM)*

JUDGMENT

1. The appellant was charged in the Magistrate's court at Voi with attempted defilement contrary to Section 9(1) (2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of offence were that on May 16, 2021 at about 12:00hours in Voi Sub County within Taita Taveta County intentionally attempted to cause his penis to penetrate the vagina of SMM (name withheld) a child aged 15 years.
3. He denied the charge. After a full trial, he was found guilty of "Count I and Ii and alternative charge to Count I and convicted of the offences of attempted defilement contrary to Section 9(1)(2) of the [Sexual Offences Act](#) and one count of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#)". He was then sentenced to serve ten (10) years imprisonment without the trial court indicating for which offence or count he was so sentenced.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
 1. That the learned trial Magistrate erred in law in failing to find that the appellant did not attempt to commit an act which would have caused penetration of PW1's genitalia as drawn in the charge.



2. The learned trial Magistrate erred in law by convicting and sentencing the appellant yet failed to find that his constitutional rights to fair trial under Article 50(g) and (h) were violated.
3. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case thus violating the provisions of Section 389 of the Penal Code and Article 50(2)(p) of the Constitution.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic* [1972] EA 32.
7. In deciding this appeal also, I have to bear in mind that this being a criminal case, the prosecution had the burden to prove each of the elements of the offence for which the appellant was convicted beyond reasonable doubt. The appellant had no burden to prove his innocence – see *Woolmington =Versus= DPP* [1935] AC 462, and suspicion alone however strong cannot be a basis for founding a conviction see J *Sawe =Versus= Republic* [2003] eKLR.
8. I will start with a technical point relating to the conviction of the appellant for various counts. The appellant was charged and tried for only one offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act. However, in the judgment of the trial Magistrate, the court convicted him for Count II an additional alternative offence to Count I of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
9. In my view, it was wrong for the trial to convict the appellant for count II and for indecent act for two reasons. First, as noted even at the beginning of the trial court judgment, the appellant was charged only with one count of attempted defilement and should not thus have been convicted of another undisclosed count II, and an alternative offence of committing an indecent act which he was not tried for.
10. Secondly, even if he was charged with an alternative count of committing an indecent act with a child, as purported by the trial court, he could only be convicted of the main charge of attempted defilement or committing an indecent act, as the two would be alternatives and not cumulative charges. I will thus quash the erroneous conviction for count II and committing an indecent act with a child, for which I note he was not sentenced.
11. Coming now to the offence of attempted defilement, the appellant has complained that his rights to fair hearing under Article 50(2)(g) and (h) of the Constitution were violated in that he was not informed of his right to legal representation. It is true he was not informed by the trial court about his right to legal representation. In my view however, no substantial injustice was occasioned to the appellant herein due to the fact that he was not offered free legal representation by the State. I dismiss that ground.
12. On the substantive grounds of appeal relating to proof of the charge, I note that the prosecution called five (5) witnesses in support of their case. The appellant on his part, tendered sworn defence testimony and did not call additional witnesses.
13. In my view, based on the evidence of the prosecution and the defence evidence on record, it is agreed that the appellant and alleged victim PW1 met that evening before sunset. PW1 was with PW2 JSM and PW3 BM.



14. The appellant gave PW1 the victim, a ride on his bicycle at the request of the victim, to his house. PW2 and PW3 on their part walked on foot and found the victim and the appellant in the appellant's house, wherein the victim PW1 was sitting on the bed.
15. Though PW1, PW2 and PW3 stated in evidence that the appellant attempted to defile PW1, the appellant stated that he was undressing simply to go and untether livestock at his place of work. There is no dispute that the house was at the appellant's place of work, as he was a farm worker.
16. This being an offence of attempt to commit defilement, I have to be guided by the definition of what constitutes an attempt to commit an offence under the Penal Code. In this regard, Section 388(1) of the Penal Code defines an attempt to commit an offence as follows:-
 - "388 When a person intending to commit an offence begins to put his intention (1) into execution by means adopted to its fulfilment, and manifests his intention by an 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 of 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."
17. I have considered the evidence tendered by witnesses herein before the trial court. In my view, the evidence on record is such that even if the appellant had in his mind an intention to defile the victim PW1, he did not carry out his intention by an overt act that would amount to an attempted defilement. First of all, it was the alleged victim PW1 who persuaded the appellant to give her a ride on his bicycle. Secondly, there is no evidence on record that the appellant coerced PW1 to get into his house or that he specifically told her to get into the house for sexual intercourse.
18. Thirdly, the fact that the appellant appeared to change his clothes could as well be for purposes of going for his work of untethering the livestock, which the appellant had earlier on said he was going to do at the point where PW1 persuaded him to give her a ride on his bicycle.
19. Fourthly, even if the changing of clothes by the appellant was in preparation to defile, such did not amount to an overt act to defile, as there is no evidence on record that he touched or attempted to undress PW1. His actions would thus amount merely to preparation to commit a criminal act, which was not enough to prove an attempt to commit an offence under our criminal law. In this regard, I am guided by the reasoning in the case of LKM =Versus= Republic (2020) eKLR wherein the court stated, *inter alia*:-
 - ".....in the case of Benson Musembi =Versus= Republic (2019) eKLR the court stated that in order to prove an attempt to commit an offence, the prosecution must prove the mens rea which is the intention and the actus reus which constitutes the overt act which is geared to the execution of the intention. The actus reus must be more than mere preparations to commit an offence."
20. In my view therefore, even assuming that the appellant intended to commit defilement, his actions remained at the mens rea or preparation stage, and without proof of the actus reus such as for example



touching or attempting to undress PW1, or telling her to lie on the bed, the prosecution did not prove that he attempted by an overt act to commit defilement.

21. I thus find that the offence of attempted defilement was not proved by the prosecution to the required standard. The conviction will therefore be quashed and sentence set aside.
22. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MAY, 2023 IN OPEN COURT IN VOI.
GEORGE DULU**

JUDGE

In the presence of:

Appellant

Mr. Sirima for state

Mr. Otolo court assistant

