



REPUBLIC OF KENYA



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**Charo v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 24625 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E020 OF 2022
A. ONG'INJO, J
OCTOBER 19, 2023**

BETWEEN

ISSA FRANCIS CHARO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Hon. D. Odhiambo (RM) delivered on 13th January 2022 in Shanzu S. O. Case No. 112 of 2019, Republic v Issa Francis Charo)

JUDGMENT

Background

1. The Appellant, Issa Francis Charo was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No. 3 of 2006.
2. Particulars were that Issa Francis Charo on the 12th day of September 2019 in Kisauni Sub-County within Mombasa County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of HJK a child aged 17 years old.

Prosecution case

3. PW1, HJK gave sworn evidence that she knew the accused. That the accused had gone to her sister and when he saw her, he told her that there was a job for a house girl and that he had been sent by someone who wanted a house girl. That after taking her number, he used to call her every day. That the complainant received fare from someone called Zubeida Ahmed and that she took a matatu and came to Mombasa. That she reached Mombasa at 7.30 pm and alighted at VOK. That she met the woman and was directed to Mshomoroni where she was met by the accused at 8.00 pm. PW1 said that the accused said he would take her to the house she was supposed to work but told her the woman had



gone to Ukunda. That they did not get into the house and that the village elder had the keys but when they went to her house, she did not open.

4. PW1 said that the accused told her that he would take her to his house to sleep and he would go sleep somewhere. That they reached his house at 9.00 pm and that he removed his shirt and said he would rest a bit. That he told her to wake him up at 11.00 pm and that when she did, he said he would not leave. That she had to remain in the house and that at 2.00 am, she thought he was asleep and heard paper noises. That she switched on the phone light and got shocked as he did not have any clothes. That he asked her why she had switched on the phone light and that when she asked him what he was doing, he said he was praying. That he said he wanted to marry her and started calling her sweet names. That he then held her hand and tried to push her to the bed and that she told him that she could not sleep with him. That she took a knife and threatened that she would kill herself and that he did not do anything. That the accused got scared and slept aside.
5. PW1 further testified that the following morning, the complainant woke him up and told him to go to the village elder and that he said she had left for a burial. That he then left the house but did not return. That she locked the door, looked for the village elder and reported what happened. That the village elder told her that nobody had left her keys and that nobody was looking for a house help. That they then reported to the police station and recorded a statement.
6. PW2, TK testified that on 12.09.2019, he received information from the complainant that the accused had lied to her that he would get her a job in Mombasa. That he then sent her fare and that when she came to Mshomoroni, she was taken to a place where she was to work. That he told her where the woman who wanted a house help was but that the woman was not around and that the village elder had the house keys. That it was at 9.00 pm and that the accused said he would take her to the village elder. That they then went to his house and slept there. That the following morning, the complainant went to PW2 and narrated what had happened to her in the accused's house. That PW2 sent her to Kiembeni Police Station where she recorded her statement and that the accused who was her neighbour was arrested. PW2 identified the accused in court.
7. PW3, Benard Kamanda Onjeko testified that he knew the complainant and the accused because of this case. That on 12.09.2019 at 8.00 am, he was at work when he received a call from the village elder who told him there was an emergency in her office. He said that he is a member of community policing. That he went to her office and found a girl who identified herself as HJK and that the girl had gone to her office and reported a case of attempted defilement. That the girl told her she had gone to work as a house girl and that the accused told her the woman whom wanted a house girl was not around.
8. PW3 testified that the accused told her that she would sleep in his house and that he would get a place to sleep. That at 11.00 pm, the complainant asked him why he was not leaving and that the accused told her that he would sleep there. That at 2.00 am, the complainant heard noise and woke up and she found the accused naked and he pushed her. That she took a knife and said she would kill herself if he proceeded with what he wanted to do. That the accused told her that he did not want a police case. That in the morning, the girl asked where the village elder was and that she then went and PW3 was called there. That PW3 advised her to report to the police. That they then went to the accused's house with the village elder and took him to the police. That it was the complainant who identified him and that PW3 went and recorded his statement.
9. PW4, Dr. Fatma Ahmed form Coast General Hospital testified that she had a P3 Form filled by Dr. Irene for the complainant on 10.02.2020 who was a colleague. That they had worked together for 4 years and she was familiar with her handwriting. That there was tenderness on the throat and the approximate age of the injury was 92 days. That a blunt object was used, no treatment was given, the



- degree of injury was harm and the nature of offence was defilement. That the complainant was 18 years old, the hymen was broken with an old scar and menstrual flow. PW4 produced the P3 Form as Pexh-1.
10. PW4 also said that she had a PRC Form for the complainant filled by Loice on 17.09.2019 and that the date of the incident was 12.09.2019. That she alleged that she was promised a job in Kiembeni and that a person was sent to pick her. That a young male adult picked her and took her to his house where he attempted to defile her but she resisted. That there was no physical injury noted and that there was tenderness on the anterior region of the arm as a result of the struggle to resist. That she admitted she had intercourse with a different person and that tests done were normal. She produced the PRC Form as Pexh-2.
 11. PW5, PC Elizabeth Mwinyi (101705) from Kiembeni Police Station gender desk testified that she was the investigating officer and that on 01.02.2019, she was in the office when a child went and introduced herself as HJK and that she was in the company of the village elder Tatu Hamisi. That the child reported that she had come to Mombasa on 11.09.2019 after being promised a job by the accused who was supposed to take her to a woman who needed a house girl. That she then travelled from Kilifi to Manor B area where she met the accused who took her to his house and attempted to defile her. That PW5 recorded her statement together with that of the village elder and later advised the village elder to assist her get medical attention. That she took her to Coast General Hospital where the PRC Form was filled and that the P3 Form was also filled. That she then arrested the accused and charged him with the current offence. PW5 said that she had a clinic card showing that she was born on 29.01.2002 and produced it as Pexh-3.

Defence Case

12. The accused, gave sworn statement that he is a tuktuk driver and that the complainant is known to him from their rural home in Mlaleo. That on 12.09.2019, she told him to get her a job as a house help. That he then met a passenger by the name Zubeda who wanted a house help whom he gave the complainant's number and that they started talking. That the passenger sent her fare twice but the complainant did not show up. That when fare was sent for the third time, the complainant went but Zubeda was not around. That the accused took the complainant to the village elder then left for work at 9.00 pm as he usually worked overnight.
13. The accused said that Zubeda and the village elder were neighbours and that he was not called for three days. That after the 3rd day, Benard went to his house and woke him up and said he wanted to talk to him. That he asked for Kshs. 3000 but the accused did not have it. That the said Benard is a member of community policing and that the accused agreed to follow. That he was taken to Concordia Police Station and told to call his people to take the Kshs. 3000. That Benard told the accused that if he did not have money then he would teach him a lesson. That he was taken to Kiembeni Police Station and later to Bamburi Police Station at 8.00 pm. That he was told by madam Kaaru that he would know why he was under arrest. That she then told him that he had been arrested for defilement. That he did not have any issues with the complainant.
14. Based on the evidence by the prosecution and the appellant's sworn statement, the trial magistrate found the appellant guilty and he was convicted and sentenced to 10 years imprisonment.
15. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -
 1. That the learned trial magistrate erred in law and facts for failing to consider that the prosecution failed to discharge my defence as per the relevant law.



2. That the learned trial magistrate erred in law and facts by failing to consider that the charge of attempted defilement was not proved beyond any reasonable doubt as per the law against the appellant rendering the conviction and sentence not liable.
 3. That the learned trial magistrate erred in law and facts for not noticing that the shoddy and insufficient investigations rendering my conviction and sentence not sustainable.
16. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

17. The appellant submitted by citing the case of *John Gatheru Wanyoike v Republic* (2019) eKLR that the elements of the offence of attempted defilement that had to be established were whether the age of the complainant was proved, whether there was an act to cause penetration which was not successful and whether the appellant was positively identified by the minor. The appellant stated that the age of the minor is not disputed as the clinic card produced by PW5 indicated she was 17 years and 8 months. However, the other ingredients that complete the charge were not proved.
18. On whether there was an act to cause penetration which was not successful, the appellant relied on the case of *Benson Musumbi v Republic* (2019) eKLR where the court held that the prosecution must prove the mens rea which is the intention and the actus reus which constitute the overt act which is geared to the execution of the intention. That the actus reus must be more than mere preparation to commit the act as there is a difference between mere preparation to commit an offence and attempting to commit an offence. The appellant also cited the case of *Daniel Simiyu Wanyonyi v Republic* (2019) eKLR where the court held that care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be, if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge.
19. The appellant argued that the prohibited thought constituting the mens rea and the prohibited act constituting actus reus were never established. That the prosecution did not prove that there were any acts of preparation by the appellant to attempt defile the complainant. That all that was relied on instead was the statement by PW1 saying that she woke up and found the appellant naked. That nudity of one party does not and should not equate to them being found/convicted for attempted defilement.
20. The appellant cited Section 388 (1) of the *Penal Code* which defines attempt as: -
 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.



21. The appellant was also guided by *David Aketch Ochieng v Republic* (2015) eKLR where Makau, J. observed as follows: -

The appellant was charged and convicted with an attempted defilement contrary to Section 9 (1) of the *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 culprits 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.

22. The appellant submitted that other than PW1's own testament that the appellant tried to defile her and there being no other witnesses and strict proof of such an alleged attempt, the prosecution in the trial court failed to prove beyond reasonable doubt that there was attempted defilement. That the complainant went for medical examination approximately 5 days after the alleged attempted defilement and there was no evidence of lacerations, bruises or semen on the genitalia of PW1 to indicate that indeed a struggle had taken place. That PW4 testified and said that the complainant had some tenderness and bruises on her throat which she estimated to have occurred 92 days earlier which was more than 3 months earlier, thus could not have been caused by the appellant as he was not in contact with the complainant back then.

Respondent's Submissions

23. The respondent submitted that to establish a charge of attempted defilement, the prosecution must prove beyond doubt all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. That the prosecution must therefore prove that the victim was a child within the meaning of the *Children's Act*, that the accused was positively identified as the assailant and the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.
24. The respondent argued that an attempt to commit an offence is defined in 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 for the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists on 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.
25. The respondent contended that proof of age of a victim in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim. That in this case, although the appellant did not dispute the age of the complainant as stated in the charge



sheet, it is important to note that PW4, the doctor, testified that she was about 18 years old at the time she testified before the trial court. This was on 23rd March 2021 which was about one and a half years after the offence was allegedly committed. The respondent stated that Section 2 of the *Children's Act* defines a child as a person under the age of eighteen (18) years. That therefore the prosecution sufficiently discharged the burden to prove the age of the victim.

26. On whether the prosecution adduced sufficient evidence to prove that the appellant attempted to defile the child victim as alleged, the respondent submitted that PW1 testified that when she woke up at 2.00 am, she found the appellant naked. That the promise by the appellant to the victim that he would get her a job was only made to induce the complainant and make her go to the appellant's house thus making it easy to prey on her. That the prosecution therefore proved its case against the appellant beyond any reasonable doubt. Additionally, the respondent stated the punishment prescribed by law for the offence of attempted defilement is a minimum mandatory sentence of 10 years and which is what the learned trial magistrate imposed.

Analysis and Determination

27. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -

- i. Whether the charge of attempted defilement was proved beyond reasonable doubt
- ii. Whether the prosecution discharge the appellant's defence
- iii. Whether the conviction and sentence were safe in the circumstances

Whether the charge of attempted defilement was proved beyond reasonable doubt

29. In the case of *Rodgers Odhiambo Mangeni v Republic* [2022] eKLR, it was held: -

Starting with the first issue, to establish a charge of attempted defilement, the prosecution must prove beyond doubt all the ingredients of the offence of defilement except penetration which is what completes the offence of defilement. The prosecution must therefore prove that the victim was a child within the meaning of the Children's Act; that the accused was positively identified as the assailant and the overt acts or steps taken by the accused towards committing the offence of defilement which was not completed.

30. On the age of the complainant, PW5 produced the clinic card as Pexh-1 showing that the complainant was born on 29.1.2002 and therefore a child within the meaning of the *Children's Act*. Also, there is no dispute on identification of the assailant as the complainant spent a considerable amount of time



with the appellant from 8.00 pm when she met him and spent the night in his house to the following morning when she woke him up to go to the village elder.

31. On the third element, the appellant took overt acts or steps towards committing the offence of defilement which was not completed. According to PW1, at 2.00 am when she heard paper noises, she switched on her phone light and the appellant did not have any clothes on. That he told her that he wanted to marry her and started calling her sweet names. That he then held her hand and tried to push her to the bed but when she held a knife and threatened to kill herself, the appellant got scared and slept aside.
32. The appellant's conduct when the complainant travelled to Mombasa were obvious steps taken towards committing the offence of defilement. He lied that there was someone who wanted a house help but when the complainant came to Mombasa, he claimed that the person had gone to Ukunda. He then took the complainant to his house and assured that he would go to work at night and leave the house for her. When the time came for him to go to work at 11.00 pm, he declined to leave. When the appellant thought that the complainant had slept, she was woken up by the noise of papers and when she switched on the light on her phone, she found the appellant was stark naked. She inquired what the appellant was doing and he said he was praying. The appellant then started making advances on the complainant and tried to push her to the bed.
33. The only inference that can be made from the conduct of the appellant was that he intended to canal knowledge of the complainant but he was stopped in his tracks when the complainant switched off the light in her phone.

Whether the prosecution dislodged the appellant's defence

34. The appellant's defence was that he was charged because he was unable to raise Kshs. 3,000 which was demanded by Benard, PW3. When PW3 testified, the appellant did not question him about the claim for Kshs. 3,000. This was therefore an afterthought and a mere allegation that was not related to the accusations by the complainant. The complainant had reported to PW2, the village elder about what had transpired between her and the appellant and it was PW2 who called PW3 to go and effect arrest of the accused person. The appellant's defence did not therefore challenge the prosecution's case that he attempted to defile the complainant.

Whether the conviction and sentence were safe in the circumstances

35. The appellant was sentenced to 10 years imprisonment upon conviction for the offence charged.
36. Section 9(2) of the *Sexual Offences Act* provides: -

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.

37. Having found that the offence of attempted defilement was proved beyond reasonable doubt and that the appellant's defence was properly considered and disregarded, the finding by the trial magistrate that the appellant was guilty was safe. The sentence was also lawful. However, considering that the appellant did not complete the act of defilement and that he contained himself for the rest of the night with the complainant in the same room would have called for a lenient sentence and not the maximum provided for. This court finds that the punishment already served from 28th September 2021 when the appellant's cash bail was withdrawn up to 13th January 2022 when he was convicted and sentenced to date i.e. 2 years and 16 days is sufficient punishment commensurate with the offence committed. He should therefore be released forthwith unless lawfully held. 14 days right of appeal explained.



**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 19TH DAY OF OCTOBER 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Ms. Lozi Advocate H/B for Ms. Nzamba Advocate for the appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

