



REPUBLIC OF KENYA



KENYA LAW
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**Nyaga v Republic (Criminal Appeal E028 of 2024)
[2024] KEHC 13627 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E028 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

PIUS MUCHANGI NYAGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. Njoki Kabara, SRM in the Magistrate's Court at Siakago Sexual Offence No. E026 of 2022 delivered on 18th December 2023)

JUDGMENT

1. The appellant herein 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. Particulars are that on 19th July 2022 at (Particulars withheld) area of Mbeere North sub-county within Embu County, the appellant intentionally attempted to cause his penis to penetrate the vagina of WM, a child aged 12 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) whose particulars are that on 19th July 2022 at Mbeere North subcounty within Embu County, the appellant intentionally touched the vagina of WM, a child aged 12 years with his penis.
2. At the trial, the appellant pleaded 'not guilty' to the charge and after the full hearing, he was convicted and sentenced to 10 years imprisonment.
3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 03rd January 2024 seeking the following orders:
 - a. This appeal be allowed;
 - b. The conviction be quashed and sentence be set aside; and
 - c. The appellant be set at liberty.



4. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:
 - a. By convicting the appellant without considering that the adduced prosecution evidence was inadequate to sustain conviction;
 - b. By convicting the appellant without considering that the prosecution evidence was full of inconsistencies and was uncorroborated, hence section 163 of the [Evidence Act](#) was not complied with;
 - c. By disregarding the appellant's defense without giving cogent reasons; and
 - d. By relying on the evidence of prosecution witnesses without considering that the same was unsatisfactory.
5. At the trial, PW1 was the victim's aunt who testified that she had returned from work when the victim went to her homestead, carrying a sweet and 10 shillings and she was laughing. She asked the victim where she had gotten the sweet and the money and she told her that the appellant had given them to her. The victim also told her that the appellant had also given her a banana which she had already eaten.
6. Upon further inquiry, the victim told her that the accused had given her the sweet, ten shillings and the banana after he took her to his house, removed her clothes and lay on top of her. She stated that she called the victim's mother who went to her home and took the victim to the hospital and the matter was reported at the police station. On cross-examination, she stated that she did not know where the appellant got the things he gave to the victim and that she did not witness the appellant defiling the victim.
7. PW2 was the victim's cousin who stated that PW1 called her and asked her to look for the victim's mother and take her to PW1's home. That she accompanied the victim's mother to PW1's home and when they arrived, PW1 told them that the victim had a sweet and 10 shillings which she said the appellant had given her. That the victim told her that the appellant had taken her to his home, removed her trouser and lay on top of her. That they took the victim to Siakago Level 4 Hospital for examination and treatment. That there was no mistake about the appellant's identity because the victim said that it was Muchangi, son of Cynthia, whom they all knew. On cross-examination, she stated that she did not witness the incident but the victim told that it was him who defiled her.
8. PW3 was the victim's mother who stated that the victim was born in 2009 and was still a minor at the time of the incident. She stated that PW2 called to inform her that they needed to go to PW1's home and they went. That they found the victim who told them that the appellant has taken her to his house, removed her clothes, made her lie down and he lay on top of her. That afterwards, the appellant gave her 10 shillings, a sweet and a banana. She testified that the victim is a child with special needs and does not communicate clearly.
9. PW4 was the victim who testified through PW3 as an intermediary. She demonstrated to the court how the appellant made her to lie down on the ground and then he slept on top of her. That the appellant twisted her hand and when he slept on top of her, she was only wearing her blouse. That afterwards, he gave her soda, cake and biscuit. On cross-examination, she stated that it was the first time she had gone to the appellant's house.
10. PW5 was Corporal Silas Korir of Siakago Police Station who stated that PW3 and PW4 reported the incident at the police station and he interrogated them. He stated that the victim identified the appellant as her assailant and she was referred to hospital for examination. That the appellant was arrested and arraigned in connection with the offence. That the victim is a minor who is mentally challenged and she holds a disability card.



11. PW6 was John Mwangi, a clinical officer at Mbeere District Hospital, who testified that he examined the victim on the day of the incident and found that her private parts were normal.
12. At the close of the prosecution's case, the trial court placed the appellant on his defense. He gave sworn evidence as DW1 denying the allegations made by the prosecution. He stated that there are no eye witnesses to the incident.
13. The court directed the parties to file written submissions but only the respondent complied.
14. In its submissions, the respondent relied on the provisions of section 9(1) and (2) of the [Sexual Offences Act](#) and section 388 of the Penal Code. Further reliance was placed on the case of Moses Kabue Karuoya vs Republic [2016] eKLR where the court discussed the elements of attempted offence. It was its argument that the appellant was properly identified by the victim and it relied on the case of Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR. That the trial court considered the defense offered by the appellant before convicting him. It urged the court to uphold the findings of the trial court on both conviction and sentence keeping in mind the case of Republic v. Nicholas Wambogo (2022) eKLR.
15. The issues for determination are as follows:
 - a. Whether the offence was proved beyond reasonable doubt; and
 - b. Whether the sentence meted out to the appellant should be set aside.
16. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”
17. It is important to establish that the appellant had the intention to defile the victim and he set his intentions in motion through actions that if successful, would end up in defilement. Section 388 of the Penal Code 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.”
18. The prosecution has the legal burden of proving beyond reasonable doubt that the appellant attempted to defile the victim. For a conviction to be upheld, it must be proved that the victim was a minor and the acts of the appellant were capable of causing penetration if successful. Under section 9(1) and (2) of the *Sexual Offences Act*, the offence herein is provided for as follows:
- “(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
- (2) 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.”
19. The court discussed the purview of this offence in the case of *David Ochieng Aketch v Republic* [2015] eKLR in which it observed as follows:
- “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.”
20. If defilement were to occur, it would have been paramount that the prosecution proves that the victim was a minor, penetration occurred and the perpetrator was positively identified. However, in attempted defilement, it must be proved that the victim was a minor and the appellant did actions that would otherwise end up in defilement of the said minor. The identity of the appellant is not in dispute as he appears to be well known to PW4. PW1, PW2 and PW3 testified that the victim told them that she went to the house of Muchangi son of Cynthia, whom they all knew.
21. The age of the victim was also correctly proved through her birth certificate and she was indeed found to be a minor at the time of the incident. On the element of the unlawful act, PW5 testified that he examined the victim within 4 hours of the incident and he observed that her private parts were all normal. According to the P3 form, there were no lacerations, bruises or tears. The prosecution ought to prove that the appellant was possessed of both mens rea and actus reus to commit the offence. In the case of *Otieno v Republic* (Criminal Appeal E006 of 2022) [2022] KEHC 10559 (KLR) the court stated:
- “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.”
22. From the evidence at hand, there is doubt as to the steps taken by the appellant in executing his attempt to defile the victim. The medical examination does not disclose an attempt towards defilement given that there were no lacerations, bruises or tears on the victim’s genitals. In my view, the act of attempted defilement and the intent have not been established from the available evidence. This is reasonable



doubt which I adjudge in favour of the appellant herein. However, the evidence adduced, in its totality, proved the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* which provides:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

23. Section 2 of the Act provides:

“indecent act” means any unlawful intentional act which causes-

- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
- (b) exposure or display of any pornographic material to any person against his or her will;”

24. Even though there is no proof of attempted defilement, there is sufficient proof of the alternative charge for which the appellant can be convicted. The victim testified that the appellant removed her trouser, lay on top of her and afterwards, he gave her some snacks. She said that she was only wearing her blouse when he lay on top of her and he twisted her hand.

25. Therefore, I find that the appeal lack merit. The following orders shall issue:

- a. The trial court’s finding convicting the appellant of attempted defilement is hereby set aside;
- b. The appellant is hereby found guilty of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*; and
- c. The sentence imposed upon the trial court for the main charge is hereby set aside and substituted with a sentence of 10-years imprisonment as prescribed under section 11(1) of the *Sexual offences Act*.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

.....for the Respondent

