



**Kiiru v Republic (Criminal Appeal 178 of 2023)
[2024] KEHC 15864 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 178 OF 2023
DR KAVEDZA, J
DECEMBER 17, 2024**

BETWEEN

NICHOLUS KIIRU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered at Kibera Chief Magistrate's Court Sexual Offences Case no. E356 of 2023 Republic vs Nicholas Kiiru)

JUDGMENT

1. The appellant 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. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same *Act*. After a full trial, he was convicted and sentenced to serve ten (10) years imprisonment on the main charge. Aggrieved, he filed a petition of appeal challenging his conviction and sentence.
2. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
3. In his petition and amended grounds of appeal, he raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his defence. In addition, the sentence was illegal and harsh.



4. The starting point would be to look at what the law states in regard to the offence in question. Section 9(1) (2) of the [Sexual Offences Act](#) provides that;

“(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”

5. The prosecution in an offence of attempted defilement must therefore prove the other ingredients of the offence of defilement except penetration. The prosecution called seven (7) witnesses in support of their case. PW1, F.B(name withheld) the complainant herein recalled playing with her friends B.E(name withheld) PW2, and T.A(name withheld). The appellant approached them and promised to buy her snacks. He went with him whereupon he undressed her lay her on the ground and ‘urinated’ in her (pointing at her vagina). During the ordeal, the appellant threatened to stab her with a knife. During the incident, her friend was waiting for her at the gate. In addition, the place where the incident happened was deserted. She identified the appellant in court as her assailant.

6. In her testimony, PW1 gave clear and graphic testimony of the ordeal. PW1 remained steadfast that it was the appellant who did bad manners with her. The victim maintained that she saw the appellant and the identification was by recognition. I therefore hold that the Appellant is the one who committed the act alleged.

7. As discussed in the [Kenya Judiciary Criminal Procedure Bench Book](#) 2018 paragraphs 94-96 corroboration is necessary for the evidence of a child not taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”

8. PW1's testimony required corroboration in accordance with the proviso to section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) In this regard, further evidence was given by PW2 a minor; who testified that on the material date, he was playing together with the victim near their plot. He said that the appellant came and told PW1 that he was going to buy her snacks.

9. He followed them and saw them enter a plot that had no people. The appellant removed her clothes. He said that he was able to see them through a peephole on the gate. The appellant removed PW1's



- trousers and slept on her. PW2 picked up a stone and threw it on the iron sheet, which scared the appellant after which he dressed up quickly and fled. PW2 assisted the complainant dress up and took her to their house where he informed his mother.
10. PW2 said that later on, he saw the appellant buying fish near their place, he quickly notified his mother who then pursued the appellant before he was apprehended. He pointed at the appellant confirming he was the person who he saw take his friend PW1. Upon cross-examination, he said that the appellant wore a red marvin and jeans with a green sweater.
 11. PW3 the complainant's mother testified that her daughter was born on 1st January 2019. On the material date, she was busy at work when she received a call that her daughter had been raped. She rushed home and took her to Kangemi Hospital and reported the matter to Kangemi police station, later on to Nairobi Women's Hospital.
 12. Upon cross-examination, she said that she took her daughter to the hospital on the same date the incident happened and that she was wearing the same clothes.
 13. PW4 testified that on the material day, the children left to play outside. Her daughter later returned alone, reporting that a man promised PW1 snacks. PW1 and PW2 returned, with PW2 stating a man took the complainant and did "bad manners" to her. Upon examining PW1, PW4 found her private parts dirty. A week later, PW2 identified the same man, leading to his arrest.
 14. PW5, John Njuguna a clinical officer from Nairobi Women's Hospital gave evidence on behalf of Faith Mbithi who examined the complainant. Upon examination, she had no injury on her body. He noted that her hymen was intact and she had no sexually transmitted disease. He produced the GVRC report. PRC and P3 Forms. He testified that since it was attempted defilement therefore no expectation for the hymen to be broken.
 15. Nasra Abdul Ali PW6 examined the complainant on 21/02/2022 at Gichagi Dispensary. The complainant was irritable, with foul-smelling vaginal discharge, lacerations, and bruised inner thighs. Bloodstains indicated forced contact, and friction caused the bruising. No penetration occurred, but there was attempted penetration; the hymen was intact. Medical notes were produced.
 16. On the age of PW1, PW7, the Investigating officer said that the case was minute to her for investigation. She corroborated the evidence of PW1 and PW2 in the order of events as he had recorded in the statements. She confirmed that the child was four years old being born on 11/1/2019. She produced the Birth identification. There is therefore no doubt that PW1 was a child.
 17. When put on his defense, DW1, Michael Kiiru said that initially, members of the public accused him of stealing. He was told in court that he had defiled a girl. He said that on the material day, he was at work. He averred that he read the medical reports and noted that the girl was okay and said she had rushes on her thighs. Upon being cross-examined, he insisted that he was at work.
 18. I have already found above that PW1's testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that elements of the offence of attempted defilement were proved beyond reasonable doubt.
 19. The appellant was sentenced to serve ten (10) years imprisonment. During sentencing, the trial court considered the appellant's mitigation, the pre-sentence report, and the fact that he was a first offender.
 20. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.



21. In the premises, I find that the appeal is lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant.

