



**Mbuthia v Republic (Criminal Appeal 26 of 2020)
[2021] KEHC 116 (KLR) (6 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 26 OF 2020
DAS MAJANJA, J
OCTOBER 6, 2021**

BETWEEN

JOSEPH KIAMA MBUTHIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence of
Hon.V. Kachuodho , SRM dated 28th May 2020 in Sexual Offence
Criminal Case No. 52 of 2017 at the Magistrate’s Court at Thika)*

JUDGMENT

1. The Appellant, JOSEPH KIAMA MBUTHIA, was charged, convicted and sentenced to serve 10 years’ imprisonment for the offence of attempted defilement contrary to section 9(1) and (2) of the *Sexual Offences Act, 2006* (“the Act”). The particulars of the charges were that on 7th June 2017 within Kiambu County, he intentionally attempted to cause his penis to penetrate the vagina of JNM, a child aged 8 years. He now appeals against the conviction and sentence.
2. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic , Kiilu and Another v Republic*). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.
3. The complainant, PW 1, testified on oath after a *voire dire*. She stated that she was aged 8 years old and was in Class 3. She narrated what took place as follows:

Accused lied to me to go play in his plot. His plot is opposite out plot. I entered his plot.
Accused then carried me and took (me) inside a house there was no one else in the house.



Accused removed my clothes. I was wearing a skin tight and dress. Accused removed my skin tight and pant. Accused then removed his trouser and pushed me on the bed. When he removed his clothes I saw his Kachuchu, one used for urinating. The room was one when heard the knock and left me on the bed and wore his clothes then went to the door to open. It then wore my clothes and came out of the house. ...

4. The lady who knocked the door inquired from her what was happening. She told her what happened and her mother (PW 2) was called. In cross-examination, PW 1 told the court that the Appellant covered her mouth and told her to stop crying.
5. PW 2 recalled that on the material day in the evening, she sent her other daughter to call PW 1. She saw some ladies who asked her where PW 1 was. They went to look for her and when they heard a child crying in the house, they knocked. PW 2 stated that the person inside took long open and when he did, PW 1 came out running while crying. PW 1 took PW 2 to show her where she had been assaulted and while doing so, they met the Appellant whom PW 1 identified.
6. PW 1 was taken to hospital for examination. PW 3, a medical doctor, produced the P3 medical report on behalf of the doctor who examined PW 1 on 13.06.2019. The doctor did not see any signs of penetration or any remarkable signs. PW 4, the investigating officer, told the court that on 8th June 2017 she was informed of the incident by PW 1's father. The Appellant was brought to the police station by members of the public. She recorded witness statements and charged the Appellant.
7. In his sworn testimony, the Appellant (DW 1), denied that he committed the offence. He told the court that on 7th June 2017, he went to work as usual and when he came back home at about 4.00pm, he heard people screaming at him. He found out that PW 2 was accusing him of defiling PW 1. Fearing for his life, he went to the police station.
8. In this appeal, the issue is whether the prosecution proved that the appellant committed the offence of attempted defilement. Section 9 of the *Sexual Offences Act, 2006* refers to an attempted defilement as follows;

9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
9. In *Francis Mutuku Nzangi v Republic*, the Court of Appeal elucidated the meaning of an attempt, as defined by section 388 of the *Penal Code* (Chapter 63 of the Laws of Kenya) as follows;

Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.
10. In other words an attempted defilement is a failed defilement and that is why the intention to penetrate is a key ingredient (see *Pius arap Maina v Republic*). I find the evidence was sufficient to prove that the Appellant intended to achieve and effect penetration. The evidence is clear that he lured her to his house, he removed her clothes, removed his trousers exposing his penis, pushed her on the bed and slept on her. His lascivious intention was interrupted by the knock at the door.



11. I do not find that the identity of the Appellant is in doubt. The incident took place in broad daylight. The Appellant was caught in the vicinity of the incident and identified by the PW 1 whereupon he was arrested by the mob and taken to the police station. His defence that he was away was displaced by the totality of the evidence. I agree with the conclusion of the trial magistrate that, “the witness testimony was reliable and truthful, with no reason to lie against the accused person. Their evidence was consistent and corroborated to the extent that the accused attempted to defile PW 1 the minor.”
12. I affirm the conviction. The sentence of imposed was the statutory minimum sentence and appropriate given the age of PW 1 who was a child.
13. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF OCTOBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the respondent.

