



**Director of Public Prosecutions v Jumapili (Sexual Offence  
E021 of 2022) [2025] KEMC 14 (KLR) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEMC 14 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E021 OF 2022  
ZK KAGENYO, RM  
JANUARY 15, 2025**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**AND**

**NYIRO KITSAO JUMAPILI ..... ACCUSED**

**JUDGMENT**

1. The accused person was on the 14<sup>th</sup> day of March 2022 arraigned facing an indictment of attempted defilement contrary to section 9(1)(2) of the Sexual Offence [Act No. 3 of 2006](#) where it was said that on the 7<sup>th</sup> day of March 2022 at 0900 hours in [Particulars Withheld], Kwale county within Coast region the accused person intentionally attempted to cause his penis to penetrate the anus of CD a child aged 14 years. He faced another indictment but in the alternative whereby he was accused of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 where it was said that on the 7<sup>th</sup> day of March 2022 at 0900 hours in [Particulars Withheld] Kwale county within Coast region the accused intentionally touched the buttocks of CD a child aged 14 years with his penis.
2. The accused denied the charges and a trial ensued. He conducted his case partly while in custody and partly out of custody on a cash bail of Ksh. 50, 000/= together with one personal surety.
3. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, the language of choice by the accused.

**The Prosecution's case**

4. To prove the guilt of the accused, the prosecution marshalled a total of 5 witnesses.
5. It was the Prosecution's case that on the eventful day, the complainant was herding his father's goats when the accused ambushed him, held him by his hands, beat him up and undressed him, and frightened as the two were at a sequestered place together, he screamed for help whereupon his parents



came of whom the accused fled on seeing them. Thereafter, the matter was reported to the police wherefrom investigations and arraignment of the accused followed.

### **Defence case**

6. The accused person was placed on his defence under section 210 of the *Criminal Procedure Code*, and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) having been explained to the accused person, he, in person, elected to defend himself by way of tendering unsworn evidence and call one witness, whom he did not present.
7. In his defence, the accused told this court that the case was an abuse of court process castigated by a jealous and vengeful uncle who wanted to firstly, have the accused punished for being smarter and more successful in life and secondly, to deprive him ownership of his land. He denied any association with the alleged offence and invited the court to find as much and dismiss the case hatched against him.
8. Both parties having closed their respective cases, the Court was invited to make its findings, which I hereby do.

### **Analysis and Determination**

9. Section 9 (1) of the *Sexual Offences Act*, 2006 defines the offence of attempted defilement as;

A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
10. In the case of *Abraham Otieno vs Republic* [2011] eKLR Kisii H.C Criminal Appeal No 53 of 2009, Asike Makhandia J (as he then was) tells us what would constitute the offence of attempted rape, which I borrow mutatis mutandis, as follows;

For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of factus interveniens, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him stop, again that would be good evidence of attempted rape.
11. In the present case, firstly, before I delve into a finding on whether the alleged acts of the accused person constituted acts which would be said to be an attempt to defile, I deemed it fit to first satisfy myself that the evidence as a whole was credible evidence that would be relied upon by this court to make a finding of guilt, a finding I found in the negative having been informed by the following observations;
  - i. When the complainant was testifying, at his examination in chief, he feigned to know the accused person in a very scarce manner only to confirm, at his cross-examination, that the accused is his cousin whom he knows and sees as frequently as he lives in their home. It is



still a mystique to me why the child would act in such restraint when testifying which raised questions on his credibility if not motive;

- ii. When the complainant was testifying, he told the court that the accused person ambushed him at the river, struck him by a fimbo and then undressed him and it is at that point he screamed for help causing the accused to run away. When his father was testifying, he described the event as that he saw the accused person assaulting the complainant, beating him on his body using a fimbo and when they approached, they found the complainant full of mud and was bleeding and complaining that his hand had been broken. The information given to Cpl Kimeli, the investigating officer as narrated by Cpl Kimeli was that as the complainant was grazing, the accused ambushed him and dragged him headed to the forest and as he was dragging him as such and struggling to undress him, the complainant screamed for help which caused their father to respond. The said Investigating Officer said that he saw injuries on the hands, neck and back. The medical practitioner, PW 5, testified that the boy was in fair general condition and could only spot a bruise that was very faint. He did not observe the bleeding or the mud foiled boy.

I compared the accounts as narrated by the different witnesses and I could not understand how one alleged account could have such varying details that are so distinct not to be confused neither the contradictions to be branded as fanciful. In any case, I don't understand how the medical practitioner of 20 years standing could not observe the alleged obvious injuries and state of the complainant, and my finding is that he could not observe the obvious as none of the stated mud, blood and injuries existed.

- iii. It is in the public domain how our beloved country as a community of Kenyans and the authorities frown upon sexual and gender based violence. In fact, it is a loathed abominable act that every right thinking person fights by all means. I have had a look at the Medical Treatment Notebook dated 7<sup>th</sup> March 2022 and produced as P.Exh 3 same as the Medical Examination Report, Police Form P3, of even date and produced as P. Exh 2. P.Exh 2 produced by PW 5 who gave oral evidence in court and said that there was no history of defilement or sexual assault of the boy contained as much information. On the other hand, P. Exh 3, which appears to be under a different hand said that the boy gave a history of being sodomised by one known to the patient. These two documents emanated from the same hospital. PW 5 said that the two documents were not adding up and maintained his position that there was neither history of sexual assault nor evidence to support such an allegation even assuming it was there, which wasn't. Having testified as much, there was no withdrawal of either of the two contradictory pieces of documents neither was the maker of P.Exh 3 called by the prosecution to explain his/ her findings. I wonder what motive such a maker would have had when giving untruthful information which I would have opined differently giving him or her a benefit of doubt had the examination and filling of P3 form been done on a later date by PW 5 but the same were done on the same day. This raises questions on integrity of our processes and it is my hope that it is a sad phenomenon happening to this file only and none other in the past or future, whatever motive was.

12. Having found as much, I take note that the accused blamed all his tribulations on jealousy, selfishness and concerted evil schemes by his uncle. I will cautiously take his evidence which was given unsworn. However, I note that it was undenied by the complainant's father and mother that there was a



continuing land dispute between them and the accused person. Further, I take notice of the PW 2's perception of the accused where he describes him as,

The case about land was between you and I. we concluded that case. You are my brother's son. I have ever heard you having conflicted with another person. You have quarreled with everyone in the village. Nobody embraces you apart from one home.

In my view, PW 2 could not be giving an opinion of the whole village and his description of the accused betrayed too much vile that he holds against the accused person, and I am tempted to find the case theory by the accused as credible.

### **Disposition**

13. From the foregoing, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the *Criminal Procedure Code* for both the main count of attempted defilement proscribed under section 9(1) as read with section 9(2) of the *Sexual Offences Act*, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11(1) of the *Sexual Offences Act*, 2006.
14. The accused person who has been on the trial while on a cash bail of Ksh. 50, 000/= that was deposited in court on the 8<sup>th</sup> day of September 2022, and one personal surety, is discharged forthwith. Consequently, the aforesaid cash bail deposited in court shall forthwith be refunded to the depositor. The personal surety, Mwaruwa Chidzao Tsuma is equally discharged as a surety.

**JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JANUARY, 2024.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

This Judgment has been Delivered in Open Court at Kwale on this 29<sup>th</sup> day of January, 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the *Criminal Procedure Code*, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11<sup>th</sup> September 2023.

In the presence of :

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

