



**Director of Public Prosecution v Mwamzuzu aka Zecha (Sexual Offence  
E003 of 2023) [2024] KEMC 72 (KLR) (9 January 2024) (Judgment)**

Neutral citation: [2024] KEMC 72 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E003 OF 2023  
ZK KAGENYO, RM  
JANUARY 9, 2024**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**OMAR ALI MWAMZUZU AKA ZECHA ..... ACCUSED**

**JUDGMENT**

1. The accused person was on the 5<sup>th</sup> day of January 2023 arraigned for the offence of attempted defilement contrary to section 9 (1) as read with (2) of the [Sexual Offences Act](#) No. 3 of 2006. (sic).

The particulars were that on the 4<sup>th</sup> day of January 2023 at [Particulars Withheld] in Kwale county within the coast region, intentionally attempted to cause his penis to penetrate the anus of A.M.M a child aged 15 years.

2. The accused denied the charges and a trial ensued.

**Prosecution's Case**

3. The DPP, to discharge their duty under section 107 of the [Evidence Act](#) lined up a total of 6 witnesses.
4. PW 4 was AMM, the complainant herein who told the court that in the early morning hours of the 4<sup>th</sup> day of January 2023, while at their family business where they operate a water vending machine, the accused person who was their home's groundman stormed into that water vending shop and in a weird and unprecedented behavior, he closed the door and the window from the inside and placed the keys into his pocket. After so doing, the accused commandeered the complainant thus, "vua suruali leo nakufira!" In a state of fear and adrenaline reflex reaction, the complainant attempted to scream and fight back but the accused person threatened, "ukipiga kelele mimi nakuua leo!" It dawned on the complainant that it was a life and death situation and not only his genital sanctity was threatened but also his young, innocent and blameless life. He put a good fight by screaming and resisting the hellbent



efforts by the accused person. The accused beat up the complainant senselessly threatening him further that, “nyamaza! Nyamaza! Ama nakuua!” In the melee the complainant sustained knife cuts, teeth bites and other blunt object trauma injuries. The complainant lives to thank his courage and defiance of the threats of the accused as the screams and bangs on the door attracted the neighbours and relatives who came to his rescue. Too drained, worn out and starved of oxygen, the complainant just collapsed and fell unconscious immediately he was rescued from the shackles of death and threatened pedication.

5. PW 1, FWO was one of the first responders to the screams of the complainant, PW 4. He narrated how he heard the screams coming out from the shop in which the complainant was in and when himself and other responders tried to knock and make pleas for the opening of the door, all their efforts were in futility that necessitated them to break the door and rescued the complainant whom they found held captive by the accused person in that shop. He told the court that he rescued the accused from a mob injustice by the angry crowd of people that had formed.
6. PW 3, YKO also testified as among the first responders just as PW 2. Her evidence was in consonance with that of PW 2 on material facts which was a similar case with PW 5, RHM.
7. The medical practitioner who testified as PW 3 confirmed the injuries that had been sustained by the complainant and observed that in general, the complainant had observable injuries all over his body which were freshly inflicted as at the time he was examined by the medical practitioner.
8. PW 6, NPS Officer Service No. 87838 Cpl Machafu Said testified in his capacity as the investigating officer and narrated how the complaint was lodged in their station and how he investigated the same and preferred the charges before court. He however stated that the accused was presented to the station by police officers from the Administration Police who told the station that they had rescued him from a mob injustice. Cpl Said in the company of other police officers escorted the accused to the hospital for treatment.
9. After the evidence of PW 6, the prosecution closed its case.
10. The accused person was placed on his defence and section 211 of the Criminal Procedure Code and Article 50 (2) (i) of *the Constitution* of Kenya having been explained to the accused person, he elected to exercise his right to silence and invited the court to make its judgment without him making any closing arguments.
11. As is its duty, the court retired to make its determination.

### **Analysis and Determination**

12. The accused person has been charged with the offence of attempted defilement which is proscribed by section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* thus;

A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement and such 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.
13. In SKM v Republic [2018] eKLR the Court in interrogating the essential ingredients to be proven by the prosecution in a charge of attempted defilement held that, the prosecution in an offence of attempted defilement must prove the other ingredients of defilement except penetration; it must prove the age of the complainant, positive identification of the accused, and then prove steps taken by the accused to execute the defilement which did not succeed.



14. The prosecution was duty bound to prove that;
- a. The accused took steps that were it not for the “but for” test, would have caused penetration to the complainant;
  - b. The complainant was a child; and
  - c. The positive identification of the accused.
15. On the second element, the prosecution produced as P.Exh 4 a Certificate of Birth for AMM the son of MAM and MHM and indicated the date of birth as 9<sup>th</sup> day of January 2008 and therefore as of 4<sup>th</sup> day of January 2023, the complainant was just 5 days shy to his 15<sup>th</sup> birthday and hence a child under section 2 of the *Children Act*, 2022 as well as under Article 260 of *the Constitution* of Kenya.
16. On the element of identification, I note the evidence proffered on the manner in which the accused ended up locking himself up into the shop with the complainant and how he was found by the responders to the screams of the complainant. I further note that the complainant and the accused had known each other for long and hence there would be no possibility of error.
17. On the first element of attempt it is my view that the same comprises both a subjective test and an objective test.
18. Section 388 of the *Penal Code* defines attempt as:
- Section 388 (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.
- Section 388 (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.
- Section 388 (3)
- It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.
19. In *Joseph Owino Khadudu v Republic* [2020] eKLR, faced with a similar situation of attempted defilement, the court found that;
- For an offence to be an attempt, it must pass the “but for” test
20. Borrowing from what the High Court opined as constituting an offence of attempted rape and reading it mutatis mutandis, 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 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.

21. Now turning on to the present case, firstly I assessed the nature of the witnesses who testified before this court. I considered the witnesses as forthright and who testified in a manner desirable by any adjudicating tribunal. On the part of the complainant, I chose to believe that he was telling the truth for the narration of the sequence of the accounts that unfolded and the subsequent corroboration of some of the facts and further for the honesty he displayed by alluding to the good character of the accused when he said that he has never heard of such a heinous act by the accused person in the past.
22. I observed that the accused person;
  - a. entered the shop and demonstrated weird and unusual character to the complainant;
  - b. thereafter he locked the shop from inside and retained the keys;
  - c. Sequentially, he ordered the complainant to remove his panties;
  - d. He expressed his intention as to sodomize the complainant;
  - e. Upon the resistance of the complainant, the accused used force to get his body into that of the complainant;
  - f. Upon further resistance by the complainant, the accused used actual threats and violence;
  - g. When the complainant called for help, the accused who was at a vantage and dominating position refused to open neither the door nor the window;
  - h. The accused continued to withhold the keys and denied the complainant any opportunity to open the door or the window; and
  - i. The accused only surrendered when he was outwitted and overpowered by the responders who broke into the shop.
23. I make a finding that but for the resistance of the complainant, the accused would have sodomized the complainant while conscious and but for the prompt response by the villagers the accused would have sodomized the lifeless body of a suffocated and if lucky unconscious complainant.

### **Disposition**

24. Having found so, I do make a finding that the prosecution has furnished evidence before this court proving beyond reasonable doubt that the accused person attempted to defile the complainant and I thus find him guilty of the offence of attempted defilement which is proscribed under section 9 (1) as read with 9 (2) of the *Sexual Offences Act*.
25. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.



**JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

This Judgment has been Delivered in Open Court at Kwale on this 9<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

