



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. E004 OF 2021

JOSEPH MWANZIA MUTUNGA .....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. A. Mayamba in Makindu Senior Principal Magistrate's Court SPMCR Case No.83 of 2019 pronounced on 17<sup>th</sup> October, 2019).

**JUDGMENT**

1. The appellant Joseph Mutunga Mwanzia was charged in the magistrates' court with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 13<sup>th</sup> August 2019 in Kibwezi Sub-County within Makueni County intentionally attempted to cause his penis to penetrate the vagina of AMJ (*name withheld*) a child aged 3 years and 9 months.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and at the same place intentionally and unlawfully caused his male organ namely penis to touch the vagina of AMJ a girl aged 3 years and 9 months.

3. He denied both charges. After a full trial, he was convicted of the main count of attempted defilement and sentenced to 20 years imprisonment.

4. Dissatisfied with the conviction and the sentence, the appellant has now come to this court on appeal, on the following grounds –

- 1. That he was sentenced to 20 years imprisonment custodial sentence when there was no plea of guilty entered.**
- 2. The crime was fabricated against him by the parents of Pw1.**
- 3. The doctor gave his information on his report which were irrelevant and contradicting which he could not prove beyond reasonable doubts.**
- 4. That he prays for leniency in the careful consideration analyzing and determination of this appeal.**
- 5. That he is a first offender and prays for dismissal of the case as he is a family man.**
- 6. That if found guilty, he be given a non-custodial sentence.**

5. The appeal proceeded through filing of written submissions. In this regard, I have perused and considered the written submissions of both the appellant and those of the Director of Public Prosecutions.

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

7. In proving their case, the prosecution called five (5) witnesses. Pw1 CM was the mother of the alleged victim (Pw4) aged 3 years and 9 months, whose evidence was that on 15/08/2019 in the morning she prepared to go to work and let the victim go out to play only to come out and not find her. As she looked for the victim, the victim emerged from a bush and said someone had “*urinated*” on her and on checking her found traces of spermatozoa on the undergarments of the victim.

8. It was Pw1's evidence that shortly thereafter, the appellant emerged from the bush carrying a water jerrican and the victim stated that he was the culprit, and thus Pw1 together with her husband arrested the appellant.

9. Pw2 was NM who testified that he was a teacher and that on morning at 9am, he heard noise from Pw1 calling for help and on arrival, found Pw1 and her husband struggling with the appellant to arrest him. It was his evidence that he assisted in arresting the appellant whose trouser zip was noted to be open.

10. Pw3 was the Investigating Officer PC Francis Musyoka who received the alleged defilement report at Kibwezi Police Station at 10am on 15/8/2019, took possession of the clothes of the victim and the boxer underwear of the appellant for laboratory tests, and later charged the appellant in court.

11. Pw4 was the victim who testified but not on oath, and stated that "*uncle urinated*" on her. She also pointed at the appellant in court as the culprit.

12. Pw5 was Dr. Anthony Masila of Kibwezi hospital. He testified on evidence of a Clinical Officer Mr. Mutiso. It was his evidence that the victim was seen at the hospital on the same 15/8/2019 and that her clothes were soiled. Body systems were normal but thighs were splashed with sperms, and the vaginal orifice was splashed with spermatozoa. He testified that the P3 form was signed by the Clinical Officer. He produced the P3 form, treatment notes (PRC form) and a birth certificate of the victim as exhibits.

13. When put on his defence, the appellant tendered unsworn defence testimony. He stated that he was working in the farm when people came and arrested him. It was his defence that he neither knew the child nor the parents. He denied committing the offence.

14. This being a case of attempted defilement, the first element of the offence that the prosecution was required to prove was the age of the victim. With the evidence on record, of the mother Pw1 CM and the birth certificate of the victim (Pw4) produced as an exhibit in court by Pw5 Dr. Anthony Masila, I find that the age of the victim herein was proved by the prosecution beyond reasonable doubt to be 3 years and 9 months.

15. The second element of the offence to be proved by the prosecution beyond reasonable doubt was the actual act of attempt to defile. What constitutes an attempt to commit an offence is defined under section 388(1) of the Penal Code which provides as follows –

**388(1) When a person intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment and manifest 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."**

16. In the present case, the evidence of an attempt to commit defilement was that of the victim Pw4, and that of Pw1 CM and Pw2 NM. Pw4 said that the appellant urinated on her, while Pw1 and Pw2 stated that they met the appellant shortly after he emerged from the bush with his trouser zip open and together arrested him.

17. In my view, the prosecution did not prove beyond reasonable doubt that there was an attempt to defile the victim. First, the father of the victim who was a key witness did not testify in court, and no reason was given by the prosecution. Secondly, though the prosecution evidence was that spermatozoa were found on the undergarments of the victim and thighs and vaginal orifice, there is no medical evidence tendered that the presence of spermatozoa was confirmed through laboratory tests. What was produced in evidence were just entries in the Post Rape Care Form entered by a Clinical Officer Mr. Francis Musyoka which was not backed by laboratory findings. Thirdly, all the medical documents produced in court were signed by Mutiso a Clinical Officer, and no basis was made by the prosecution at the trial for Dr. Anthony Masila to testify on behalf of the Clinical Officer under section 77 of the Evidence Act. Lastly, even the P3 form was signed not by the Clinical Officer in his own capacity but for Dr. Masila, which is a very unusual procedure.

18. In my view therefore, the prosecution did not prove beyond any reasonable doubt that there was an attempt to defile the victim herein.

19. The other element of the offence required to be proved by the prosecution beyond any reasonable doubt was the identity of the culprit. Since I have found that the prosecution did not prove that there was an attempt to defile the victim, I find that the prosecution also did not prove that the appellant was the culprit.

20. Consequently and for the above reasons, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DELIVERED, SIGNED & DATED THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**