



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO.100 OF 2016**

**PETER MWITI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*( From the original conviction and sentence in criminal case No. 715 of 2013 of the Chief Magistrate's Court at Meru by Hon. J. Karanja – Principal Magistrate)*

**JUDGMENT**

**PETER MWITI**, the appellant, was convicted for 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.

The particulars of the offence were that on 23<sup>rd</sup> June 2013 in Imenti North District of Meru County intentionally attempted to cause his penis to penetrate the vagina of **JK** a child aged 4 1/2 years.

The appellant was found guilty of the offence and sentenced to twenty years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by convicting without any medical evidence.
2. That the learned trial magistrate erred in law and in fact by convicting without sufficient evidence.
3. That the learned trial magistrate erred in law and in fact by meting an illegal sentence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel. He argued that the appellant ought to have been convicted for the alternative charge.

The facts of the prosecution case were briefly as follows:

After the complainant's mother had gone to a neighbour's house, the appellant went and attempted to defile the complainant but for her cries that attracted a rescuer.

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

In cases of attempted defilement, it is not always necessary to call for medical evidence to prove the offence. The same if forthcoming, may be of great assistance to the court depending on what the evidence says transpired. In the instant case it would appear the investigating officer wanted this case to flop for whatever reason. This is why he never called for medical evidence. Since penetration is not required to be proved, then this ground of appeal lacks merit.

**JK (PW2)** in her evidence testified that the appellant found her alone at home. He took her behind the house and undressed her so that they could do "**tabia mbaya**" (bad manners). He undressed her and lay on top of her. She felt a lot of pain and screamed. This is when the person who guards the church went and pulled him from her.

The evidence of **John Kimathi (PW3)** is that as he was going to the church where he is a guard, he heard screams of a child and dogs were barking. He went to check for he thought the dogs were attacking the child. He found the appellant who had removed his trousers up to the knees lying on the child. He removed him.

**J M (PW1)** is the complainant's mother. she testified that while returning from a neighbour's house she met with **John Kimathi (PW3)** who was holding the appellant while **JK** was at the rear crying. This is when she was informed what had transpired.

An attempt to commit a crime is defined in the Oxford Concise Law Dictionary (2<sup>nd</sup> Edition) as;

***Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.***

The evidence on record points to an act that was more than preparatory. But for the intervention by **John Kimathi (PW3)**, the appellant would have defiled the complainant. The conviction was therefore proper. The appeal on conviction must fail.

Section 9(2) of Sexual Offences Act prescribes the sentence as follows:

***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.***

The complainant in this case was aged only 4 1/2 years and the sentence cannot be said to be harsh in the circumstances. The appeal on sentence is also dismissed. The appellant shall serve the sentence.

**DATED at MERU this 27th day of April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**