



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**H.C.CR.A 117 OF 2013**

SAMMY NZAU KALOKI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Being an appeal from the original conviction and Sentence of the Chief Magistrate's Court at Machakos by Hon. M.K. Mwangi (PM)) in Criminal Case No. 564 of 2011 dated 23<sup>rd</sup> January 2013)*

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*(Before E. Ogola J)*

**JUDGMENT OF THE COURT**

1. The Appellant, **Sammy Nzau Kaloki**, was charged with the offence of **attempted defilement** contrary to **Section 9 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 20<sup>th</sup> day of March, 2011 at [particulars withheld] **Sub Location** in **Kathiani District** within **Eastern Province**, **Sammy Nzau Kaloki** alias **Mutua** intentionally attempted to cause his penis to penetrate the vagina of **R M M** a child aged 12 years. The second count was the offence of **indecent act** with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. He was convicted on the first count and sentenced to serve 10 years imprisonment.

2. The Appellant not being satisfied with both conviction and sentence filed this appeal urging the following grounds:-

**i. That there was no collaboration of evidence among the witness as PW1 stated that she was defiled and after finishing is when she screamed whereby some children came, but PW2 and PW3 both claimed that they found the Appellant lying on top of PW1.**

**ii. PW1 was firm that she was defiled and her sentiments as collaborated by PW4 were not proved by a medical report and that the Appellant was charged with attempted defilement but not defilement as they alleged.**

**iii. The prosecution also did not explain why defilement never took place yet the alleged victim is a minor who could not over power energetic and strong person of his type.**

**iv. Very important ingredients which support sex like spermatozoa, semen, torn clothes or physical injuries were not established despite PW1 being taken to police and hospital before the collapse of 72 hours.**

v. That the charge sheet was defective after all the witnesses, i.e PW1, PW2, PW3 and PW4 admitted that there was defilement but later charged the Appellant with an offence which did not rhyme with the allegations.

vi. PW1 alleged that the assailant slept on his back on her what the Appellant termed as mathematical impossibilities for a man to lie on his back while a lady on the ground and have sex.

3. In response the prosecution contends that the charges against the Appellant were proved beyond reasonable doubt.

4. I have carefully considered the appeal and the grounds. It is the duty of this court to review and re-evaluate the evidence after which the court may reach a finding. The only issue I raise for determination is whether the charges were proved to the standard required by law.

5. Grounds 1 to 4 are similar in nature since they refer to the evidence adduced in the trial court. The prosecution called in a total of four witnesses. PW1 the complainant testified of how on that material day, she went to fetch firewood in a field belonging to one, **Mutune**. The Appellant who was no stranger to her emerged from a thicket throwing her to the grounds, lay on top of her and removed her underwear. The Appellant then removed his trouser and inserted his penis into her genitalia, and she screamed for help. PW 2 and PW3 who were attracted to the screams do corroborate the happenings upon the complainant. The time the offence was committed was during the day, therefore, there was sufficient light for the witnesses to see the Appellant. The Appellant was someone from the neighbourhood so he was known to the witnesses.

6. PW4 confirmed that a report was made to them and that the Complainant was referred to **Kathiani Sub District Hospital**. The report having been made 11 days after the incidence, the medical report would not avail much. However, it is a fact that the Appellant had the intention of defiling the Complainant and the screams which were heard by PW2 and PW3 saved the Complainant.

7. The victim was 12 years at the time of the offence. The other witnesses for the victim were also minors. The record shows that a *voire dire* examination was conducted for the victim and the minor's witnesses. Record also shows that the victim knew the virtue of telling the truth. She stated that she had never lied. She also recognized the Appellant. The victim understood that the Appellant had defiled her. Her testimony was so moving. In cross-examination she had this to say to the Appellant:-

**“I felt so bad after you defiled me.... You were the first one to have intercourse with me”.**

8. This court believes the evidence of the prosecution witnesses which proved the prosecution's case beyond any reasonable doubt.

9. The Appellant is a moral and sexual pest which should not be allowed in an open society until such a time as he will have reformed after serving the sentence.

10. The appeal herein has no merit and fails. The Appellant shall serve full term in prison.

That is the judgment of the court.

**Dated and delivered at Machakos this 13<sup>th</sup> day of October, 2016.**

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**E. OGOLA**

**JUDGE**

**In the presence of**

Mr. Sijenje for State

Accused –present

Court Assistant – Mr. Munyao