REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 225 OF 2011

JOHN NZAMBA.................................APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sd. A.G. Kibiru Ag. Principal Magistrate delivered on 24/11/2011 in Kitui Chief Magistrate Sexual Offence Case No. 44A of 2010)

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(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **John Nzamba**, was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual offences Act No. 3 of 2006.

The particulars of the offence were that "on 28th day of October 2010 at about 5.30p.m in **Mutito District** of the Eastern Province, attempted to penetrate his penis to the vagina of **C S** a child aged 5 years contrary to **section 9 (1) (2)** of the **Sexual offences Act No. 3** of **2006"**.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual offences Act No. 3 of the year 2006.

The particulars of the offence were that "on the 28th day of October 2010 at 5.30pm in **Mutito District** of the Eastern Province, committed an act of indecency with **C S** a child aged 5 years by touching her private parts namely vagina, breasts and buttocks by using his hands".

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that the complainant, pw2 **C S** a five year nursery school girl was at her grandmother's home. That the Appellant called the complainant and informed her that she was being called by her mother. The Appellant carried her on his shoulders and took her to the bush. The Appellant then placed her on his laps, removed her pants and touched her private parts.

5. Pw3 **Patrick Mutuni Mwinzi** heard a child screaming in the bushes. On checking he saw the

Appellant carrying the complainant on the shoulders. Pw3 then saw the appellant removing the complainant's pants. Pw3 confronted the Appellant. The Appellant then started running away but he was given chase and caught. The Appellant was escorted to the Chief's camp then to the police station and was subsequently charged with the offences herein.

6. In his defence, the Appellant stated that he was arrested by three men who took away his kshs. 1,300/=. That when they released him he ran home to inform his mother what had happened. The following day he was re-arrested by two of the men and escorted to the Chief's Office. The Appellant blamed this case on a grudge with the complainant's mother. The Appellant further stated that the grudge arose after the complainant's mother was found with a donkey which had been stolen from the Appellant's family.

The Appellant further stated that he had a long dispute with one Kilonzo (pw3). The Appellant testified stated that the complainant's mother (pw1) and Kilonzo (pw3) lived together. He blamed them for framing him up with this case.

7. At the conclusion of the case, the trial magistrate convicted the Appellant in the alternative count of indecent act with a child. The Appellant was sentenced to ten (10) years imprisonment.

8. The Appellant was aggrieved by both the conviction and sentence and appealed in this court on grounds that can he summarized as follows:

> ***a. That the prosecution case was not proved due to contradictory and inconsistent evidence that lacked corroboration.***
>
> ***b. That the investigating officer did not visit the scene.***
>
> ***c. That no medical evidence was adduced.***
>
> ***d. That the prosecution failed to call crucial witnesses.***
>
> ***e. That the defence case was not considered.***

9. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially reiterate the grounds of appeal.

10. The appeal was opposed by the state. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

11. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences– *See* **Okeno –vs- Republic (1972) EA 32**.

12. The five year old complainant (pw2) testified after the case had carried out a ***voir dire*** and was satisfied that she understood the meaning of oath.

13. The complainant's evidence that the Appellant carried her to the bush and removed her pants was corroborated by that of pw3. It was the evidence of pw3 that he saw the Appellant carrying away the complainant and also saw him removing her pants. The offence took place in broad day light. It was evidence of recognition by both the complainant (pw2) and pw3. Both witnesses knew the Appellant as a neighbour. Pw3 denied having any grudge with the Appellant.

14. The complainant's mother (pw1) testified that the complainant told her that the accused took her to the bush and removed her pants.

The version of events given by the complainant to her mother on the material day is consistent with the complainant's evidence in court. The complainant's mother denied the suggestion by the Appellant that they had a dispute over a donkey.

15. Pw4 PC **Bernard Mahanda** gave the evidence that confirms a report was made and the investigations carried out.

16. The defence by the Appellant that the case was framed up on him is not believable due to the strong prosecution evidence against him. The Appellant was caught red handed with the child.

17. After evaluating the evidence afresh, I find no reasons to differ with the finding of the trial magistrate who had the benefit of seeing the witnesses testify and observing their demeanor.

18. On whether the prosecution failed to call crucial witnesses, the answer is found in the following dictum in the case of **Bukenya & Others –vs- Uganda (1972) EA 549, at page 550** where the Court of Appeal for East Africa stated:-

> **"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution."**

19. The failure to visit the scene or adduce medical evidence is not fatal to the prosecution case. The proviso to section 124 of **the Evidence Act** stipulates as follows:-

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

20. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

<u>JUDGE</u>

Dated and **delivered** at **Kitui** this **29th** day of **January 20**15.

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B. THURANIRA JADEN

<u>JUDGE</u>