



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 64 OF 2013**

**JOHN MUIA MANDI, .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 646 of 2011 by Hon. R. Yator on 24/9/2012)**

**JUDGMENT**

1. **John Muia Mandi**, the Appellant 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 are that on the 18<sup>th</sup> day of November, 2011 in **Makueni** District within **Eastern** Province, intentionally and unlawfully attempted to cause his genital organ to penetrate the genital organ of **M K** a child aged seven (7) years.

2. In the alternative he faced the charge of committing indecent assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act No.3** of 2006. The particulars are that on the 18<sup>th</sup> day of November, 2011 in **Makueni** District within Eastern Province unlawfully indecently assaulted **M K** by removing her pant and touching her private parts.

3. Facts of the case were that on the 18/11/2011 at about 4.00pm, **PW1 M K** was at home with her two (2) siblings when the appellant went and took her to the bush, tore her pants and open his trousers. In the meantime **PW3, J W** her grandmother went home to find her missing. She followed the direction pointed out by **PW1's** siblings. She found the appellant with **PW1**. The appellant was pulling up his trousers while the child was sitting down. She told the appellant to take the child back home. On seeing her **PW1** started crying and told her that it was the appellant who removed her pants. He was arrested and later charged.

4. In his defence the appellant denied having touched the complainant. He stated that he was framed up as a result of a land dispute that exists between him and the complainant's family.

5. The trial magistrate evaluated evidence adduced and made a finding that the appellant attempted to defile the complainant. She convicted him on the main count and sentenced him to serve ten(10) years imprisonment.

6. Being aggrieved by the decision of the court, the appellant appealed on grounds that:-

i. The entire trial was a nullity as a substantial part of the trial was conducted by an unqualified prosecutor;

ii. The issue whether or not the complainant's clothes were torn was not resolved;

iii. The case was not proved to the required standard;

iv. No cogent reasons were given why the appellant's defence was disregarded as required by **Section 169(1)** of the **Criminal Procedure Code**;

7. The appellant canvassed the appeal by way of written submissions.

8. In response thereto **Mrs Abuga** Counsel for the State opposed the appeal. It was her submissions that the complainant recognized the appellant as the person who attempted to defile her. He urged the court to confirm the conviction and sentence.

9. This being the first appellate court, it has the duty to subject evidence adduced at trial to fresh and exhaustive examination so as to reach its own independent conclusion as to the guilt of the appellant. (*See Okeno versus Republic (1972) E.A. 32*).

10. It is stated that the trial was a nullity because it was conducted by an unqualified prosecutor. In his submission the appellant states that the Sergeant of Police who prosecuted was below the rank of an Assistant Inspector. Following the amendment of the law such an officer can prosecute a case as long as he is gazetted by the requisite authority. According to **Section 88** of the **Criminal Procedure Code** the Magistrate has discretion to permit any "officer generally" to prosecute. Following the amendment it must be presumed that the magistrate permitted the prosecutor as required by **Section 85(1)** of the **Criminal Procedure Code**.

11. PW1 was a 7 years old child. She stated that the appellant pulled her, took her to the bush and tore her dress. He opened his pair of trousers and **Kyalo** arrived, then her mother **D** and her grandmother **J**. She concluded by stating that the Appellant also removed her pant but not completely. PW2, her mother testified that she found the appellant having been arrested. She stated that she found PW1's dress torn as well as the pant.

12. PW3 stated that she found the child sitting down. The appellant was pulling up his pair of trousers. PW1's pant had been removed. On cross-examination she stated that the appellant had a hoe.

13. PW5 who re-arrested the appellant found him having been tied by members of public. On cross-examination he stated that he relied on evidence of the Assistant Chief and specifically one **K M** a neighbor who alleged that he found the appellant in the act and raised an alarm attracting the attention of people.

14. To be guilty of the offence of attempted defilement it must be proved that the perpetrator of the offence attempted to commit an act which would cause penetration with a child. (*see Section 9 of the Sexual Offences Act, 2006*).

15. On cross-examination the appellant sought to establish that the child's dress was torn by her grandmother. There is a remarkable contradiction between the evidence adduced by PW1 and PW3 as to whether PW1's pant had been removed or not.

16. According to the testimony of the child (PW1), the first person who arrived at the scene was **Kyalo**. PW5 in re-arresting the appellant specifically relied on what was stated by **K M**, a neighbor. The said neighbour was not called as a witness. This was an independent witness who would have told the court in what state the child was. In the case of *Bukenya and Others - versus - Uganda [1972] E.A. 549* -it was held that failure to call crucial witnesses fatally weakens the case. Where an important

prosecution witness is not called to testify, an inference may be drawn that his evidence may be adverse to the prosecution's case.

17. In the instant case the court is left to guess what **Kyalo** would have said in respect to circumstances in which he found the appellant and PW1 in.

18. That notwithstanding, the child is said to have been found sitting down and not crying. It was after she saw her grandmother that she started crying.

19. Evidence adduced was that the appellant was pulling up his pair of trousers. No evidence was adduced of an attempt to remove his genitalia from his pants. No evidence was led of an intent to insert any male organ into PW1's female organ. Consequently, evidence adduced falls short of proving an attempt to defile the child as alleged. It was therefore unsafe for the trial magistrate to assume that the appellant's intention was to have carnal knowledge of the complainant.

20. In the premises the appeal succeeds. The conviction is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 20<sup>TH</sup> day of FEBRUARY, 2015**

**L.N. MUTENDE**

**JUDGE**