REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 3 OF 2013

STEPHEN MWANZIA KIUMO ……..…..… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. J. Karanja Principal Magistrate delivered on 16/8/2011 in Makueni Principal Magistrate Criminal Case No. 103 of 2011)

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(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **Stephen Mwanzia Kiumo**, was charged with the offence of attempted defilement contrary to **section 9 (2)** of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that on the 2nd day of March 2011 at [**particulars withheld]** in **Makueni District** within **Eastern Province** attempted to cause penetration of his male genital organs to **E N K** a girl under the age of eleven (11) years.

2. In the alternative, the Appellant was charged with the offence of indecent assault of a girl contrary to **section 11** (1) of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that on the 2nd day of March 2011 at [**particulars withheld]** in **Makueni District** within **Eastern Province** unlawfully indecently assaulted **E N K** by touching her private parts.

3. When the appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted in the main count of attempted defilement and sentenced to ten (10) years imprisonment.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:

v. **That the charge sheet was defective.**
v. **The evidence of the prosecution witnesses (PW1 & PW3) was unreliable and uncorroborated.**
v. **The case was a frame up due to a grudge with PW2.**

5. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded the grounds of appeal.
6. The appeal was opposed by the State. The learned counsel for the State submitted that the evidence of the complainant and the evidence of PW3 were corroborated by the medical evidence adduced by the Clinical Officer.
7. The facts that emerge from the evidence on record is that the complainant, PW1 **E N K**, a four year old nursery school girl was at home when the Appellant caused his male genital organ to penetrate her female genital organ. The complainant cried and her her six (6) year old brother **K M** who was playing outside went to her rescue.
8. When the grandmother to the children PW2 **E N** arrived home from work, she found the complainant crying. The complainant informed the grandmother what had transpired. The matter was reported to the police. The complainant was issued with a P3 form and escorted to hospital for examination and treatment. The Appellant was subsequently arrested and charged with the offences herein.
9. In the defence, the Appellant gave unsworn evidence. No witnesses were called. He testified that on the material day, he went to his place of work at the barber shop as usual. He later accompanied a friend to a farm where the friend was going to buy oranges. That he later went home then thereafter went to a fund raising function. The following day he went about his usual activities then returned home in the evening. Armed police officers then came to his home and arrested him on allegations of defilement. The Appellant was later charged with the offences herein, which he denied.
10. 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**.
11. The evidence of PW1 and PW2 is the one the links the Appellant to the offence herein. The evidence of PW1 (the complainant) is that the Appellant is the one who defiled her.

The evidence of PW1 is scanty and lacks details that show how she knew the Appellant to give credence to evidence of recognition.

12. Although the complainant stated in her evidence that the offence took place in the evening, no inquiry was made on whether there was sufficient light to enable her see the culprit clearly. PW1 was about four years old at the time of the offence. The trial court did not conduct a *voire dire* to ascertain whether she was possessed of sufficient intelligence to warrant the reception of her evidence or whether she understood the duty to tell the truth. The same applies to the evidence of PW3 who was about six years old at the time he testified.
13. It was the duty of the trial magistrate to conduct a *voire dire* and make a record of the same and not merely record that the court has observed that the witness is a minor of tender years and will not be sworn as happened in this case. *See* **Kibangeny Arap Korir –vs- Republic (1959) EACA 92**.
14. The appellant complained that the evidence of PW1, and PW3 was unreliable and contradictory. I have combed through the evidence of PW1 and PW3 and I am persuaded to agree with the Appellant. The evidence of PW3 does not reflect whether the offence took place during the day or night while the complainant gave the time of the offence as during the evening The grandmother's (PW2) evidence does not help matters as she testified that she arrived home at about 7.00 p.m.. PW1's evidence does not clearly show whether the offence took place at the home or at the home of the Appellant. On the other hand, the evidence of PW3 is that he found PW1 crying in the house of the Appellant. However PW3 contradicted himself in cross-examination when he stated that he saw the Appellant 'put something' in **E** (PW1). In his evidence in chief PW3 had stated that he had found the complainant on the seat crying and that the Appellant was on the bed. The evidence of the two minor does not contain sufficient details to show how they knew the Appellant for the court to be certain that their evidence was free from error.
15. Although the evidence of the grandmother (PW2) and that of the Clinical Officer, PW5 **Onesmus Katua** and the Investigating Officer **Cpl. Agnes Ikiba** has left no doubts that the complainant was defiled, the evidence on the identification of the culprit was shaky. I have however found no defects in the charge sheet or any evidence on record that reflects any existence of a grudge

between PW2 (grandmother) and the Appellant as alleged by the Appellant.

16. A conviction is however based on the strength of the prosecution case and not the weakness of the defence case. The appeal has merits and I allow the same. The conviction is quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and **delivered** at **Machakos** this **18th** day of **February** 20**14**.

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B. THURANIRA JADEN

JUDGE