REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 130 OF 2010

MATHEKA MAKAU...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 500 of 2008 by Hon T.M. Mwangi, SRM on 29/4/2010]

JUDGMENT

1. The Appellant, **Matheka Makau** was charged with the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the **31st** day of **July, 2008,** at about **8.00pm** at **[Particulars Withheld]** in **Mutomo District** of the **Eastern Province,** defiled **M K M** a child aged **12 years**

   In the alternative the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3** of **2006.** The particulars of the offence being that on the **31st** day of **July, 2008,** at about **8.00pm** at **[Particulars Withheld]** in **Mutomo District** of the **Eastern Province** committed an act of indecency with **M K M** a child aged **12 years** by touching her private parts.

2. He was tried and convicted for the offence of attempted defilement pursuant to provisions of **Section 186** of the **Criminal Procedure Code** (*Cap 75 Laws of Kenya*) and sentenced to **15 years** imprisonment. Being aggrieved by the conviction and sentence he now appeals on the following grounds:-

i. The Learned Magistrate misdirected himself by reaching a finding on evidence not adduced.
ii. The Learned Magistrate misdirected himself and erred in law when he rejected the appellant's defence.
iii. The Learned trial Magistrate erred by failing to appreciate that the charge was fabricated following a grudge that existed between the appellant and the family of the complainant.
iv. The Learned Magistrate erred by failing to appreciate that the prosecution's evidence was contradictory which called for corroboration.
v. In sentencing the Learned Magistrate was influenced by extraneous matters.
vi. The sentence imposed was severe.

3. Both counsels for the state and the appellant filed written submissions. The appeal was therefore

canvassed by way of written submissions.

4. This being the first appeal, I am duty bound to analyse and re-evaluate the evidence adduced before the trial court. I have to come up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses who testified (see **Okeno versus Republic [1972] E.A. 32.)**
5. The facts of the case are that PW3, **M K R** a child aged **12 years** old went to the appellant's shop. The appellant asked her to go round the counter. A lantern lamp was in the shop which aided her to see. The appellant covered her mouth and led her to the backroom of the shop, he removed her pants, unzipped his pair of trousers and lay on her on the mattress that was inside the room. She screamed as he made love to her. In the meantime PW1, **F K M** her aunt got information, went to the shop and found the appellant lying on top of the complainant. He had lifted up the child's clothes as his clothes had been pushed down. She held him. He attempted to escape but members of the public arrested him.
6. PW5, No**. 55584 P.C. Paul Ngei Mutia** on receiving the report referred the complainant to hospital. She was examined by PW2 **Dr. Amote John.** She did not have obvious injuries on the genitalia. There was however, redness of the vaginal wall and whitish discharge on the genitalia. A vaginal swab revealed the presence of Trichonomous vaginalis a sexually transmitted disease. Her hymen was broken. The doctor was not able to positively conclude if the complainant had been defiled.
7. In his defence the appellant said that on the material date he went to the shop after work, he stayed with his wife till *7.30pm.* She left for their home that is some 0.5 kms away. As he balanced the accounts using a lantern lamp he was surprised to see a girl who posed as a customer. On inquiry as to what she wanted she said food. A little while later he saw a woman enter in haste. The lady was known to him. He also knew her husband and mother. She held his jacket by the shoulders, screamed and said that she had been looking for him. He denied having taken PW3 to the backroom, having removed her inner pants and unzipped his trousers. It was further his evidence that the case was fabricated because of a land dispute he had with PW1's family.
8. He also said that he was a chairman at **[Particulars Withheld] School** where PW3 attended. Her father opposed the resolution of cost sharing which prompted him to remove her from that school. They also disagreed over a borehole that was dug by parents and sponsored by the Catholic Church. PW3's father refused to contribute money to pay for labour, he was deterred from fetching water. He also said that PW1 wanted him to marry her but having got opposition from his wife he did not, hence creating animosity between them. He was examined and the tests were negative.
9. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced during trial, in order to arrive at its own independent conclusions, bearing in mind that it did not hear or see the witnesses testify. (see ***Okeno versus Republic [1972] E.A. 32).***
10. This is a case where evidence adduced by the prosecution neither proved the main charge nor the alternative count as framed. The learned magistrate then invoked provisions of **Section 186** of the **Criminal Procedure Code** and convicted the appellant of the offence of attempted defilement. The court reached the decision because medical evidence adduced by PW2 was not favourable to the prosecution's allegations. It could not conclude if the complainant (PW3) had been defiled. Her hymen was not present and she had a sexually transmitted disease. On cross-examination the Doctor said it would mean the complainant may have indulged in sexual intercourse before as such an infection is usually common to girls who are sexually active.
11. The learned magistrate did not consider the alternative count. It had been stated that the appellant committed an act of indecency with the complainant by touching her private parts. An indecent act has been defined as an unlawful act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration. There was no evidence to support the alternative count. The magistrate had a duty of making a finding on that particular count.
12. In reaching the decision to convict the appellant of the offence of attempted defilement, the court invoked the provisions of **Section 124** of the **Evidence Act Cap 80 Law** of **Kenya.** The trial magistrate stated thus:-

"I have no reasons to doubt the evidence of PW3 who was the victim of a Sexual

> ***Offence. PW3 stated that she was defiled by DW1. In fact I find that PW3 had stated that she was defiled because she had seen and felt DW1's genitalia. What PW3 thought was defilement must have been actually an attempt to defile her."***

13. **Section 9(1)** of the **Sexual Offences Act** which provides for the offences of attempted defilement states thus:-

> ***"a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."***

The court invoked the provisions of the proviso to **Section 124** of the **Evidence Act** because the only evidence as to what transpired was that of PW3. She stated thus;-

> ***"... he then removed my underpants and he unzipped his trousers and then lay himself on top of me. There was a mattress on the floor. Accused then forced me to lie down on the mattress and then he lay on top of me. He then made love to me..."***

14. Making love would be interpreted to have sex with her. Therefore according to the complainant the appellant did not just make an attempt but defiled her. Her evidence is however not confirmed by medical evidence. This would have called upon the prosecution to establish if the appellant had the sexually transmitted disease that the child had, it would have been proof beyond reasonable doubt that the appellant made love to her.
15. The appellant claimed he was framed up and gave reasons why he believed so. What is however not controverted is the fact that PW3 was at his shop on the material night. The appellant however argues that she had not crossed the counter and the door was not shut. However, according to PW1 she found the appellant on top of PW3. He was holding her clothes which were lifted up. The appellant's clothes had been pulled down. When he asked him why he was damaging the child he was astonished such that they could not rise and he held him.
16. PW4, allegedly went to call PW3 having been sent by **M.** He heard PW1 shouting asking why the appellant was "***destroying the child***" and people gathered. He saw PW3 holding the appellant but he did not tell the court in what state the appellant was, whether he was properly dressed or if his pair of trousers was unzipped.
17. The evidence adduced by the complainant falls short of proving whether indeed the appellant made an attempt of defiling her or if he did defile her per her allegation.
18. In the case of **Kiilu** and **Another versus Republic [2005] 1 KLR 174, the Court of Appeal** held thus.

> ***"the witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not straight forward person, or raise a suspicion about his trustworthiness, or do/or say something which indicated that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept her evidence."***

19. Taking into consideration reasons I have given, it cannot be said that the appellant was framed up but PW1 was not a person of integrity therefore it was a misdirection on the part of the magistrate to opine that what PW3 thought was defilement must have been an attempt.
20. The appeal is meritorious since the prosecution's case was not proved beyond doubt. The appeal is allowed. The conviction is quashed and sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, DELIVERED and **SIGNED** this **3RD** day of **APRIL,** 2014**.**

L.N. MUTENDE

JUDGE