



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 233 OF 2012**

KAMAU NJOROGE WANDURI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3707 of 2011 of the Chief Magistrate's Court at Mombasa – **Hon. Koech - RM**)

**JUDGMENT**

**KAMAU NJOROGE** hereinafter referred to as the Appellant was Convicted and Sentenced to ten (10) years imprisonment for the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the 2nd day of December 2011, at [Particulars withheld] area [Particulars withheld] Location – Kisauni - Mombasa County he unlawfully and intentionally attempted to cause his penis to penetrate the vagina of A. W. a girl aged twelve (12) years.

The appellant had rented the staff quarters of the Complainants parents building. He used to stay in the same compound with his wife. His relationship with the family of the Complainant was amiable as he was at times tasked with the work of feeding dogs of his landlord. The appellant when called upon to defend himself in the lower Court conceded that he had been tasked with feeding dogs on the night of the alleged attempted defilement. He had fed the dogs when he met the Complainant whom he told to return to the house as he had already fed the dogs. Upon going back to his house he was surprised when the Complainants mother called him and alleged that he had attempted to defile her daughter. The report was made to his wife and he was taken to police station and was later charged with this offence.

In her Judgment at page 18 line 10 the learned trial magistrate did frame the issues for her determination thus,

**“ Whether the Accused person made substantial but unsuccessful efforts to insert his penis into the Complainants vagina.**

**(b) Whether the Accused had the ability to complete the act of penetrating the Complainants Vagina?”.**

The magistrate did satisfy herself that the issue of age was not in dispute as the birth certificate had been produced showing that the Complainant was born on 27th November, 2000. She also satisfied

herself that the appellant had reasonable access to the Complainant and found that the Complainants mother and the appellant were in good terms and the appellant had been allowed to stay at the servant quarters with his wife.

On the issue of penetration. The Complainant herself had testified that the Appellant had not managed to penetrate her private parts. The evidence of the Doctor who examined her also confirms that there was no penetration as the hymen was intact and there was no bruising.

In answer to the issues she had framed she observed thus at page 19 line 1,

**“In her evidence PW1 informed the Court that the Accused touched her breasts, kissed her, removed her pants halfway, removed his trouser and underwear half way and tried to insert his penis into her vagina”.**

**It is my humble view that this was so. Both the Accused and the child were feeding the dogs, a fact that the Accused does not deny. The child was found by PW 2 after she was called, sweating. I believe this was because she was aroused or shaking”**

The trial magistrate proceeded to answer the issues posed in the positive and proceeded to Convict the Accused after finding that this was not a trumped up case.

Upon a careful evaluation of the evidence adduced before the lower court, I come to the same conclusion that the Appellant had attempted to penetrate the vagina of the Complainant as alleged with his penis. He would have completed the act were it not for the intervention of the Complainants mother.

The Conviction was safe. He was Sentenced to ten year imprisonment. That is the minimum Sentence provided for in the Sexual offences Act. It is a lawful Sentence.

The appeal has no merit and its dismissed.

Judgment dated delivered and signed this **20th** day of **September, 2013**.

.....

**M. MUYA**

**JUDGE**

**20TH SEPTEMBER, 2013**

**In the presence:-**

The appellant present

Court clerk Musundi