



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. NO. 101 OF 2011**

**MATHINA MWANZIA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 82 of 2011 by Hon. S.K. Mutai, RM on 20/5/2011)*

**JUDGMENT**

1. **Mathina Mwanzia**, the appellant is charged with the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act. No.3 of 2006. Particulars of the Offence are that on the 22<sup>nd</sup> day of March, 2011 at 12.45 at Kalivu Location, Kalivu sub-location [*particulars withheld*] village in Mutomo District in Kitui County, he attempted to defile **N K M** a juvenile aged 8 years. There is then what is referred to as a second count where the charge reads indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. Particulars thereof being that on 22<sup>nd</sup> day of March 2011 at around 12.45pm at Kalivu location Kalivu sub-location, [*particulars withheld*] village in Mutomo District of Kitui County, he committed an act of indecency with **N K**, a juvenile aged 8 years by touching her private parts namely vagina and breasts.
2. The prosecution called four (4) witnesses at the trial. **PW1, N K**, the complainant, a child aged 8 years told the court that the appellant asked her to take a stick and hit the roof. He then placed her on the bed, removed her pants and harassed her. She started crying and the appellant ran away. She reported to her mother on what transpired. **PW2, M K**, her mother stated that she saw her daughter running out of the house while crying. She told her that the accused wanted to defile her. The accused was inside the house. When he asked him he said nothing. **PW1** was wearing her pant. She took her to the health centre. **PW3, K M**, the father to the child was told by **PW2** that the appellant intended to defile their daughter. **PW4, No. 56069 PC Athma Mwanzia** re-arrested the appellant and placed him in custody.
3. When put on his defence the appellant stated that he was arrested and thereafter charged. It was his evidence that he was at the house of the complainant's parents having been engaged to repair it. The complainant then told her mother that he had disturbed her. They then framed him up so as not to pay him for the work done.
4. The appellant was tried, convicted and sentenced to ten (10) years imprisonment on both counts. Being dissatisfied with the conviction and sentence he appealed on the grounds that the trial magistrate erred in law and fact by not relying on evidence adduced without considering that the case was a fabrication as the evidence was contradictory; and rejecting his defence without

reasons which was contrary to section 169 (1) of the Criminal Procedure Code.

5. In his submissions the appellant stated that the evidence of the complainant as to where he was after the commission of the alleged offence was contradictory. He called upon the court to note that the evidence on record was based on that of a single witness and there was no medical evidence to support PW2's allegations that she took the child for treatment. Failure to summon the doctor who treated the child was detrimental to the prosecution's case in his opinion. Finally, he stated that by the magistrate rejecting his defence without giving good reason was detrimental to him.
6. The learned State Counsel, **Mr. Mukofu** conceded to the appeal. He stated that the testimony of the complainant at the time of the alleged offence was at variance with the kind of offence described in the charge sheet in respect of the time the offence was alleged to have been committed. He faulted the trial court to have not considered the nature of harassment the single witness talked of, and failure to make any determination as to the credibility and reliability of the witness; then failure to warn itself on the danger of relying on a single witness's evidence. He also faulted the court for convicting on both the primary and alternative charge.
7. This being the first appellate court, it is duty bound to subject evidence adduced at the lower court to fresh and exhaustive examination. And as I do that I must also bear in mind the fact that I did not have the opportunity of hearing and seeing the witnesses which I must give allowance to. (*see Okeno versus Republic [2006] 2KLR 28.*)
8. In the main charge the appellant was charged with attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act, No. 3 of 2006 which provides:-

***“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years”.***

9. The complainant stated that the appellant placed her on the bed, then removed her pants. He then harassed her. She screamed and he ran away when he heard her mother going to where they were. Her evidence is contradicted by that of the mother, PW2 who said PW1 came out of the house crying. She then told her the appellant wanted to defile her. She found the child wearing her pants.
10. The evidence of PW1 was that of a single witness. It is trite law that a fact may be proved by a single witness. But the court must assess the truthfulness of the witness. The magistrate must also caution himself of the danger of relying on such evidence. (*see Uganda versus Muhwezi Lanuel HCT-CR-CSC-073/2011.* Section 124 of the Evidence Act is also clear on the issue of the victim being the sole witness. It provides thus:-

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***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.”***

11. In this case the learned trial magistrate failed to express his opinion in respect of how he assessed the complainant whether or not he believed she was telling the truth. His reliance on her evidence could only be safe if he found her to have been truthful.

12. According to the law a person can only be guilty of an offence of attempted defilement if he commits an act which would cause penetration with a child. Penetrating would entail making an effort to get into. Act defines penetration thus ;-

***“Means the partial or complete insertion of the genital organs of a person into the genital organ of another person”.***

The child said the appellant harassed her but the nature of harassment was not divulged. The act of her pants being recovered is questionable since her mother who was at the house found her with pants on. It was also not alleged that the appellant made any attempt of an act that would expose his genital organ to use it as a weapon. In the circumstances, the attempt was not committed.

13. With regard to the second count. The learned trial magistrate ought to have caused the charge to be amended to be an alternative count. It was also a mis-direction on his part to convict in both counts.

14. From the foregoing the conviction is unsafe. The appeal is allowed, conviction quashed, and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9<sup>TH</sup> day of DECEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**