MBITHI KILONZO……...APPELLANT

VERSUS

REPUBLIC ..……...RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 664 of 2008 by Hon H.M. Nyaberi,SRM on 14/1/2010)

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JUDGMENT

The appellant, **Mbithi Kilonzo** was charged before the Senior Resident Magistrate's Court at Mwingi with an offence of attempted defilement contrary to section 9(1) of the Sexual Offences Act. The particulars of the offence were that on 1st July, 2008 at Kyuso District within Eastern Province, he attempted to commit an act which would have caused penetration of his male genital to female genital organ of **S.K.M** a girl aged 12 years. The appellant denied the offence and was soon thereafter tried.

The complainant, **S,M,** PW1 on 1st February, 2008 at about 9.00am was at home together with **K** aged 2 years and a small baby. While making porridge for the baby, the appellant came and asked **K** to be shown their bed. He was accordingly shown the bed. After a few minutes, the appellant came to where the complainant was and pulled her to the bedroom and asked her to sleep with him. She refused and feigned an excuse that she wanted to go for a short call. He allowed her to leave. She left him seated on bed and duly went out and locked the door from outside. Thereafter, she ran to M Primary School and reported to her teachers what the appellant had told her. She was accompanied back to the house by 3 teachers who found the appellant sitted in room. The area assistant chief namely **A.M,** PW3 was contacted. When he arrived, the door was opened and the appellant was arrested and subsequently escorted to K Police Station.

PW2, **B.M,** a teacher at M Primary School was among those who received a report from the complainant that there was a person in their house who had threatened to kill her and at the same time wanted to have sex with her. Together with the complainant and her fellow teachers, they proceeded to her home whereby they found the appellant locked in the house.

PW3, **A.M** is the one who opened the door and arrested the appellant and escorted him to K Police Station. At the Police Station, the appellant was received by PW5. He re-arrested the appellant and later charged him with the offence.

In his defence, the appellant gave unsworn statement of defence and called his mother as a witness. It was his evidence that on 30th June, 2008, he had gone to the home of PW4 to collect his debt. His wife paid him Kshs. 400/= leaving a balance of Kshs. 300/= which she promised to send by 1st July, 2008. The following day while at K Market, he was arrested by the assistant chief without being informed of the charges. His mother, **Kilonzo Mbiti,** DW2 told the court that her son had gone to the home of PW4 and found PW1 taking care of the children.

The learned magistrate having evaluated the evidence on record reached the verdict that the appellant was guilty as charged. Accordingly, he convicted the appellant and sentenced him to ten years imprisonment.

That conviction and sentence triggered this appeal. The appellant claimed that the prosecution case had not been proved beyond reasonable doubts, there was no cogent evidence linking him to the crime, some crucial witnesses were never called to testify and finally, that his defence was not given due consideration.

When the appeal came before me for plenary hearing on 28th June, 2012, **Mr. Mukofu,** learned State Counsel conceded to the same on the grounds that no *voire dire* examination was conducted before the complainant's evidence was received and that the act constituting the attempt did not come out clearly.

On his part, the appellant only asked the court to re-evaluate the evidence afresh and return the verdict in his favour.

The learned State Counsel was right in conceding the appeal on the above grounds. The testimony of the complainant who alleged to be 12 years was not subjected *voire dire* examination by the learned magistrate before her evidence was received. This is mandatory requirement before evidence of a minor can be received and acted upon by courts of law. Such examination is necessary to enable the trial court to determine whether the minor understands the meaning of an oath, whether she is possessed of sufficient intelligence and understands the need to tell the truth. If such an examination is not conducted by trial court, the evidence of such minor cannot be received and acted upon. This is what happened here. That was a fatal omission on the part of the learned magistrate.

Secondly and as correctly pointed out by the **Mr. Mukofu,** the complainant's testimony does not wholly bring out the act that constituted the attempt to defile. She merely stated that the appellant asked her to sleep with him. She believed that the appellant wanted to have sex with her. Merely telling someone that I want to have sex with you, *perse* does not constitute an attempt. The assailant must proceed to put in motion his intention but before he can accomplish the mission, he is stopped in his tracks by actus interveniens. No such thing happened here.

Finally, it is also apparent that the trial in the subordinate court was presided over by two magistrates. **D. M. Ochenja** Ag. P.M. and **H.M. Nyaberi,** SRM**.** In fact **Ochenja,** presided over the entire prosecution case. **Nyaberi** presided over the defence, crafted and delivered the judgment. However, when **Nyaberi** took over the case from **Ochenja,** he failed to comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code. This failure rendered the entire trial a nullity.

For all these reasons therefore, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA
JUDGE