



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL APPEAL NO 26 OF 2016**

**JOHN ISMAEL MUTUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number**

**99 of 2015 in the Senior Resident Magistrate's Court at Taveta**

**delivered by Hon W. K. Kitur (RM) on 16<sup>th</sup> July 2015)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, John Ismael Mutuku, was tried and convicted by Hon W.K. Kitur, Resident Magistrate for the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve ten (10) years' imprisonment for the said offence. He had also been charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows:-

**“On the 1<sup>st</sup> day of March 2015 at around 1630 hrs at [particulars withheld] Village within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of D N O a child aged 14 years.”**

**ALTERNATIVE CHARGE**

**“On the 1<sup>st</sup> day of March 2015 at around 1630 hrs at [particulars withheld] Village within Taita Taveta County, intentionally touched the buttocks of D N O a child aged 14 years with his hands.”**

3. Being dissatisfied with the said judgment, on 1<sup>st</sup> July 2016, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. On 6<sup>th</sup> October 2016, he filed an Amended Notice of Motion application seeking the same prayers. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

1. **THAT the honourable resident magistrate erred in law and fact by finding that the prosecution had established the appellant's guilt beyond any reasonable doubt to warrant his conviction(sic).**

2. **THAT the honourable resident magistrate erred in law and fact by believing the medical evidence relating the charges against him (sic).**

3. **THAT the honourable resident magistrate erred in law and fact by relying on the circumstances (sic)evidence which did not meet the threshold of proof beyond reasonable doubt to convict him.**

4. **THAT the honourable resident magistrate erred in law and fact in that he did not at all take into account the sub-mission (sic) of his defence he made (sic).**

4. On 1<sup>st</sup> December 2016, the Appellant was directed to file his Written Submissions. Instead of doing so, on 14<sup>th</sup> February 2017, he filed the said Written Submissions along with fresh Grounds of Appeal. The said Grounds of Appeal were as follows:-

1. **THAT the Hon. Trial Magistrate erred both in law and fact in depending or relying on the evidence of PW 1, PW 2 and PW 3 to connect him with (sic) the allegations of attempted defilement without proper findings that he was only implicated into (sic) the case and the evidence was not evaluated and bulk of those witnesses were from the same family(sic).**

2. **THAT the Hon. Trial Magistrate erred both in law and fact by failing to consider that the unproved allegations from PW 1 and her parents PW 2 and PW 3 were just mere allegations and gave contradictory accounts of what they saw.**

5. The State was to file its Written Submissions by 8<sup>th</sup> March 2017. However, when the matter came up in court on the said date, counsel for the State indicated that the State had opted not to file its Written Submissions because it was conceding to the Appeal herein.

6. It submitted that from its observation, there was nothing to show that the Prosecution proved that the Appellant herein had attempted to penetrate the vagina of the Complainant herein, D N O (hereinafter referred to as "PW 1"), a child aged 14 years or that he undressed her or that he undressed in readiness to defile her. It pointed out that she and her two (2) witnesses only testified that the Appellant had pulled her from a bicycle.

7. It was its submission that although the Appellant appeared to have intended to engage in a criminal act, the ingredients of the offence of attempted defilement of PW 1 were not proven.

## **LEGAL ANALYSIS**

8. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

9. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR**, the Court of Appeal made a similar observation when it stated as follows:-

**"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).**

10. This court therefore carefully perused the proceedings of the Trial Court and noted that according to

PW 1, on 1<sup>st</sup> March 2015 at about 4.30 pm, she was riding a bicycle when the Appellant herein, who was also riding a bicycle, overtook her, alighted from his bicycle and threatened her with defilement if she did not give him her bicycle.

11. P O B (hereinafter referred to as “PW 2”) was PW 1’s father. His testimony was that on the material date and time, he was coming from Church with his wife D M (hereinafter referred to as “PW 3”). He said that PW 1 was ahead of them riding a bicycle. He contended that while PW 1 was at a distance of three hundred (300) metres, she wailed loudly whereupon he rushed to where she was.

12. It was his evidence that when he reached where she was, he found the Appellant trying to pull her and the bicycle from a gully. He contended that her clothes were torn and that he saved the Appellant herein from mob justice.

13. On her part, PW 3 stated that on the material date and time, PW 1 was riding a bicycle ahead of them when she wailed from a distance of two hundred (200) metres. She said that PW 2 rushed to PW 1’s rescue and on getting there herself, she found “them” near a gully. Although she had testified that that PW 1’s skirt was torn, she admitted in her Cross-examination that a torn skirt was not proof of attempted rape.

14. No 87961 PC Francis Ndeti (hereinafter referred to as “PW 4”) confirmed that the Appellant was brought to Kitobo Patrol Base by members of the public on claims that he had tried to rape PW 1 whereupon he re-arrested him. It was his evidence that he went to the site in Lotima “AB” where he observed that there had been signs of a struggle. He said he also noted that the back of PW 1’s skirt had been torn at the zip point downwards.

15. In his unsworn evidence, the Appellant testified that he was at his farm at Mrabani Village, Taveta Sub-County on a Sunday at about 10.30 am when two (2) people came and arrested him. He denied ever having committed the offence herein.

16. The Learned Trial Magistrate may have relied on the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) when convicting the Appellant herein. The said proviso provides as follows:-

**“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.”**

17. Evidently, the Appellant’s defence, which was unsworn, had little or no probative value. However, it was his constitutional right to adduce unsworn evidence or even remain silent and leave it to the Trial Court to give its decision based on the evidence that had been adduced by the Prosecution witnesses. In other words, the Appellant was under no obligation to assist the Prosecution prove its case.

18. It was clear from PW 2’s and PW 3’s evidence that they were not present when the Appellant allegedly tried to defile PW 1. Indeed, PW 2 said that when he went to PW 1’s rescue, he found her and the bicycle in the gully. On her part, PW 3 merely said that she found “them” near a gully. She did not, however, specify who it was she found at the gully.

19. PW 1’s evidence that the Appellant wanted to steal her bicycle was puzzling to this court. This is because she said that he was riding behind her but overtook her in his bicycle. Though puzzling, no evidence was placed before this court to rebut or contradict her assertion. Nonetheless, this court was hesitant to accept her evidence as the plain truth for the reason that the Learned Trial Magistrate directed that she adduce sworn evidence without having enquired from her if she knew the meaning of or what was entailed taking an oath.

20. In the case of **Johnson Muiruri vs Republic [2013] eKLR**, the Court of Appeal rendered itself as follows:-

**“We once again wish to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:**

**“Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.”...”**

21. Bearing in mind the repercussions of relying on unsworn evidence adduced by a child in convicting an accused person, it treated PW 1’s evidence with minimal weight for the reason that this court was not certain whether or not she understood the meaning of taking an oath before she was sworn. The *voire dire* examination the Learned Trial Magistrate conducted in respect of PW 1 fell short of the threshold required to sustain a conviction against the Appellant herein.

22. Accordingly, having considered the Appellant’s Written Submissions, his Amended Grounds of Appeal, the reasons the State gave for conceding to the his Appeal herein, this court came to the firm conclusion that it was unsafe to rely solely on PW 1’e evidence and find him liable. Her evidence ought to have been corroborated by PW 2,PW3 or any other independent witness. Unfortunately, neither PW 2 nor PW 3 or any other independent witness witnessed the Appellant pulling PW 1 as she had contended.

23. This court thus found itself in agreement with the Appellant and counsel for the State that the Prosecution did not satisfy the ingredients of the offence of attempted defilement sufficient to have warranted the Appellant’s conviction. It was its opinion that the Learned Trial Magistrate misapprehended the law when he convicted and sentenced the Appellant for the said offence as the Prosecution had not been proven the same beyond reasonable doubt.

## **DISPOSITION**

24. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 1<sup>st</sup> July 2016 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

25. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

26. It is so ordered.

**DATED and DELIVERED at VOI this 16<sup>th</sup> day of March 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

John Ismael Mutuku - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk