REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 304 OF 2013

FRANCIS MATHEKA MUTISO ……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original Conviction and Sentence of the Principal Magistrate's Court at Makindu by Hon. E.M. Muiru (RM)) in Criminal Case No. 187 of 2013 dated 1st August, 2013)

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JUDGMENT OF THE COURT

1.The appellant was charged with the offence of Attempted Defilement contrary to **Section 9** of the **Sexual Offences Act No. 3 of 2006.** The particulars were that on the 11th day of February, 2013 in Kibwezi District within Makueni County, **Francis Matheka Mutisia** intentionally attempted to cause his penis to penetrate the vagina of **S M** a child aged 9 years. He was convicted and sentenced to serve ten (10) years imprisonment.

2.The appellant, not being satisfied appealed both conviction and sentencing urging the following grounds;

> *a.That the evidence relied upon by the trial magistrate as a basis for the conviction was not sufficiently trustworthy to have been acted upon.*
>
> *b.That the entire case for the prosecution was not proved to the required standard needed in law.*
>
> *c.That the appellant's defence statement was not properly considered neither did the trial magistrate adhere to the provision of **Section 169(1)** of the **Criminal Procedure Code.***

3. The prosecution opposed the appeal submitting that the prosecution's case was proved beyond any reasonable doubt.

4. Parties filed submissions which I have considered. This being the first appeal, I have reviewed and re-evaluated the evidence so that this court can reach its own finding on the matter.

5. The prosecution called a total of four (4) witnesses. **PW1** the complainant testified of how on the material day, as she went home from school at about 6pm in the evening, she met the appellant riding a

bicycle and the appellant offered to carry her home. They rode together until the appellant asked her to alight as he had reached his home. It was her testimony further that the appellant followed her and gave her a ride again and she alighted near her home. As she was leaving, the appellant called her and asked her if she had engaged in sex before. She replied in the negative and the appellant advised her not to engage in the act. He asked her to hop onto the bicycle again and after riding a while he took her to some bushes and started grabbing her at the back as they faced each other. She started crying and the appellant asked her not to. They then saw someone passing by and the appellant requested her not to say a word.

6. **PW2 and PW3** testified on how they got the news of what happened to PW1 and the steps they took in reporting the matter and arresting the appellant. The appellant was someone from the neighbourhood so he was known to the witnesses.

7. PW4 confirmed that a report was made to them by the AP officers and who brought the appellant to the police station. Investigations commenced and the appellant was charged before court.

8. I have carefully considered the evidence in trial court. In the matter before the court there was only one very important witness, that is, the complainant **PW1**. The complainant being a minor, the court conducted a *voire dire* to establish if she understood the need to tell the truth, and if she understood the nature of an oath. Evidence shows that at all material times the complainant was alone with the appellant. Because the charge was an attempted defilement, there was no evidence to prove elements of penetration or spermatozoa and related evidence. The evidence was that of the complainant against that of the appellant. All other prosecution witnesses were not at the scene of the crime, and all their testimony can only be treated to establish circumstantial case. **PW2** was the complainant's father and stated that his daughter was not defiled by the appellant, but that there was an attempt to defile her. The process leading to arresting the appellant was commenced by PW2 and PW3. **PW3** was the owner of the hotel in which the appellant was taking tea. PW2 and PW3 then called PW1 to identify the appellant at PW3's hotel. The accused escaped from the hotel but was chased by PW2 who caught up with him and took him to the police station.

9. Upon cross-examination, PW3 testified that if the appellant was innocent why then did he try to escape? **PW4** was the investigating officer who testified that the appellant was brought to him by an AP officer on allegation of attempted defilement. He then carried out investigations and charged the appellant with the offence. He further stated that the appellant had a bad reputation in the village for he had previously attempt to rape old women and children.

10. When the appellant was put in his defence he testified that on **16th February, 2013** he left home in the morning and proceeded to his place of work and while there he saw AP officers from Thongoni come to him and proclaim that they had arrested him. They did not tell him why they were arresting him. But while at the station a child was brought and he was told that he had defiled her, a charge he denied.

11. From the foregoing, it is clear that the process leading to the identification and arrest of the appellant was championed by parties who did not witness the alleged crime. It is also clear that the appellant's arresters had already formed an opinion that the appellant was a man of bad reputation. It was possible for the mind of the minor complainant to be directed towards the appellant as he already allegedly had a bad reputation. This is a case where the minor's evidence was not corroborated at all. It is also a case where the minor's views or testimony was shaped or influenced by PW2, PW3 and PW4. It is the kind of evidence which a court cannot use to convict a person and then sentence him for ten (10) years. It is the kind of evidence where the court must be extremely cautious. The sentences under **Sexual Offences Act** are intentionally made very harsh so that a proper accused person may suffer the consequences of their proved crimes. What then would happen to a person who is wrongly accused, simply because he is a village bad boy? It is better to find no person liable than to send one innocent person to jail for ten (10) years.

12. It is the finding of this court that the prosecution did not prove its case beyond any reasonable doubt, and that there was a doubt as to whether the appellant was responsible for the crime. Any such doubt, in criminal jurisprudence, must be given to the accused person.

13. This court finds that the appeal has merit. The conviction and sentence by the trial court is hereby revoked and set aside. The Appellant is hereby set free unless otherwise lawfully held.

THAT is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF NOVEMBER, 2016.

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E. OGOLA

JUDGE

In the presence of;

Mr. Machogu for State

Appellant present in person

Court Assistant – Mr. Munyao