

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 54 OF 2020

BENARD MWANGI MUCHERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM

Sexual Offence Case No 56 of 2019 – B M Mararo, PM)

J U D G M E N T

1. The Appellant herein, **BENARD MWANGI MUCHERU**, was charged in Count I with **defilement of a child** contrary to **section 8(1) & (3)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged that on 31/05/2019 at about 6.30 am at [particulars withheld] area in Laikipia Central Sub-County of Laikipia County, he intentionally caused his penis to penetrate the vagina of one JN, a child aged 13 years.

2. As an alternative to Count I the Appellant was charged with **sexual assault** contrary to **section 5(1) (a) (i) & (2)** of the same Act. It was alleged that on the same date and at the same time and place, he unlawfully inserted his penis into the vagina of the same complainant without her consent.

3. In Count II the Appellant was charged with **committing an indecent act with a child** contrary to **section 11(1)** of the same Act. It was alleged that on the same date and at the same place and time, he intentionally touched the vagina of the same complainant.

4. After trial the Appellant was convicted on the main charge in Count I and also in Count II. On 19/10/2020 the he was sentenced in Count I to 20 years imprisonment and in Count II to 10 years imprisonment sentences to run concurrently. He has appealed against both conviction and sentence.

5. It will be immediately seen that the main charge in Count I and the charge in Count II are duplex. This is because ordinarily the acts charged in Count II (that is, touching the vagina of the complainant with the penis) would constitute part of the *actus reus* of the charge in Count I (intentionally causing his penis to penetrate the vagina of the complainant). There could not be penetration of the vagina without of necessity touching it with the penis! The charge in Count II should thus have been an alternative to the main charge in Count I.

6. The charge sheet was thus fatally defective for duplicity.

7. As for the alternative charge, it is to be noted that lack of consent is not an ingredient of the offence of sexual assault under section 5 of the Sexual Offences Act. In any case, the complainant in this case, a child aged 13 years, would not have been capable of giving consent for her own assault! The alternative charge was thus also fatally defective in law.

8. As for the evidence tendered, I have read through the record of the trial court in order to evaluate the same. I find that only penetration was proved beyond reasonable doubt. The identity of the perpetrator of the defilement was tenuous. He was a stranger to the complainant, and yet no identification parade was conducted. There was even no evidence of how the Appellant was arrested, or what led to his arrest as no police officer testified at the trial. In fact, only 3 prosecution witnesses testified: the complainant, her mother and the clinical officer who examined the complainant. Learned prosecution counsel properly conceded this appeal.

9. In the event I will allow the appeal in its entirety, quash the convictions and set aside the sentences imposed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 23RD DAY OF FEBRUARY 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 24TH DAY OF FEBRUARY 2022