



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL APPEAL NO. 64 OF 2016**

**BETWEEN**

**W T O.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. C.A.S. Mutai, PM dated 17<sup>th</sup> June 2016 at Principal Magistrate's Court at Mumias in Criminal Case No. 511 of 2015)***

**JUDGMENT**

1. The appellant, **W T O**, was convicted of the committing an indecent act with a child contrary to **section 8(11)(1)** of the ***Sexual Offences Act***. The particulars of the charge were that on 27<sup>th</sup> September 2015 at [particulars withheld] within Khwisero Sub-County of Kakamega County, he intentionally touched the breasts and buttocks of CMM, a child aged 17 years old with hands. He was sentenced to serve 10 years' imprisonment.
2. The complainant (PW 1) testified on oath that she was 17 years old and a Form 3 student. She knew the appellant as her paternal uncle. She told the court that on 27<sup>th</sup> September 2015, while at her grandmother's house, the appellant asked her why she had not greeted him. He insisted on shaking her and even tried to kiss her hand. He fell but insisted on following her entreating her to understand his feelings. He then touched her breasts and buttocks and when wanted to touch her private parts, PW 1 took a stick and hit him. PW 1 ran away and informed her uncle and grandfather.
3. One of the children who was present, PW 2, testified on oath that she was present when the appellant came and started touching PW 1 on the breast, buttocks and lower part of the abdomen. She told the court that PW 1 had a stick with which she wanted to hit the appellant but the appellant grabbed it while PW 1 ran to inform her uncle and grandfather what happened. PW 5 testified that he had seen PW 1 at about 2.00pm on that day to borrow a needle and thread. He found the appellant holding the PW 1's hand and told him to stop playing with her whereupon he saw the PW 1 run away.
4. Although PW 3 did not see what had taken place, he recalled that he passed by the homestead where the incident took place and he saw the appellant. In cross-examination, he stated that PW 1 told her what happened to her on the next day and she accompanied her to the Chief to report the matter. PW 1's grandmother, PW 4, testified that when she came home from Church on the material day, she was informed of the incident and she went to the Chief's office on the next day with PW 1.
5. In his sworn defence, the appellant denied that he committed the offence. He stated that he could not

recall where he was on 27<sup>th</sup> September 2015 at 2.00pm. He maintained that the charges were a frame up as a result of the land dispute.

6. The thrust of the appellant's case is that the prosecution failed to prove its case. That the case against him was fabricated and made up of inconsistent evidence. He contended that the failure to call the two witness to whom PW 1 first reported the incident was fatal to the prosecution case. In response, Mr Ng'etich, counsel for the respondent, submitted that PW 1 was aged 17 years and her testimony was clear and could be relied upon to support the conviction particularly because the appellant was well known to her.

7. The charge against the appellant was that of committing an indecent act with a child. **Section 2** of the **Sexual Offences Act** defines an "indecent act" as "*any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.*"

8. The testimony of PW 1 was clear that the appellant intentionally and unlawfully touched her breasts and buttocks. The touching was not unintentional and was done with a prurient mind. PW 1 recalled that the appellant told her that, "*When water is boiling it cannot be cooled.*" The incident was witnessed by PW 2 and PW 5. PW 5 even warned the appellant not to play with PW 1. The fact that he was seen at the *locus in quo* was confirmed by PW 3. The testimony of PW 1 was firm and unshaken and trial magistrate who had the opportunity to hear the witness was impressed by her testimony.

9. Apart from failing to account for his whereabouts on the material date, the appellant's allegation that he was framed does not hold any weight. There was no evidence to suggest that PW 1 was part of the scheme to frame him. The issue of the land dispute was not put to PW 3 and PW 4 who were the appellant's relatives and who would have shed light on the matter. I do not think that failure to call PW 1's uncle and grandfather, to whom she reported the incident in the first instance is fatal to the prosecution case in light of the direct and corroborated testimony. Furthermore, PW 1 also informed PW 3 and PW 4 of the incident and that is why they reported the matter to the Chief on the next day.

10. The fact that PW 1 was 17 years old was proved by the production of her birth certificate. I therefore find and hold that the ingredients of committing an indecent act with a child were proved. The sentence prescribed under **section 11(1)** of the **Sexual Offences Act** is imprisonment for a term of not less than ten years. As the minimum sentence is mandatory, the sentence imposed was within the law.

11. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at KAKAMEGA this 31<sup>st</sup> day of August 2017.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.