



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 126 OF 2014**

MWINJAKA SALIM ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1469 of 2012 of the Chief Magistrate's Court at Mombasa – **Hon. Odenyo- SPM**)

**JUDGMENT**

The Appellant was Convicted and Sentenced to five(5) years imprisonment for the offence of indecent act with a child contrary to section 11(1) of the Sexual Act No. 3 of 2006.

The particulars being that:-

***“On the 18th day of March, 2012 at [Particulars withheld] area of Mombasa County he willfully and unlawfully caused his penis to rub the vagina of M N N a girl aged thirteen (13) years”.***

Being dissatisfied with that decision the appellant decided to lodge this appeal.

The grounds are that the learned trial magistrate relied on the evidence of a minor without conducting a ***Voire dire*** test.

That the evidence was not corroborated and was largely circumstantial in nature and the Sentence of five (5) years imprisonment was excessive.

In the Court of Appeal case of ***Johnson Muiruri –Vs- Republic 1983 KLR*** it was held,

***“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 satisfied his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking 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.....***

- 3. Where a child of tender year gives unsworn evidence, then corroboration of that evidence is an essential requisite, but if the child gives sworn evidence no corroboration is required but the assessors must be directed that it would be unsafe to Convict unless there was corroboration”.***

In the present case there is no dispute that at the time of the incident the Complainant was aged thirteen (13) years old.

Was she a child of tender years? Under the Children Act Cap 141, a child of tender years is defined under section 2 to mean ***“a child under the age of ten years”***.

The Complainant does not fall under the bracket of a child of tender years and the learned trial magistrate was not under any obligation to conduct a Voire dire examination before receiving her evidence.

The appellant contends that there are material contradictions in the prosecution case between the Complainants evidence and that of her mother PW 2 in that the Complainant had earlier on during examination in chief testified to have gone to the house of the Accused at 9:00 a.m. but during cross - examination she told the Court that the incident started at midday and she went home at 1:30 p.m.

Further that the Mama Junior went to their house at 3:00 p.m. and inquired as to what had taken place and that her mother arrived at 4:00 p.m. PW 2 Complainants mother did testify to have received a text message at 7:00 p.m.

I do not find the discrepancy in timing as going to the root of this case. The Complainant could have gone to the house of the Accused at 9:00 a.m. where she was in the company of his children but she does state the incident took place at Midday when he sent his children to go and buy chapati. There is no material contradiction. There is contradiction on the time PW 2 arrived from work. PW 1 states it was 4:00 p.m. whereas PW 2 states that it was at 7:00 p.m. This contradiction is also not a material one. Its not in dispute that the Complainant was in the house of the accused on the material day watching TV.

Doctor Lawrence Ngone examined the Complainant on 19th March, 2012 and found that the hymen had been perforated. He also found that she was not a virgin at the time. The Doctor was of the view that the Complainant had been defiled. Its the contention by the Appellant that there was contradiction as to whether the complainant was a virgin or not.

Its common knowledge that virginity can be broken through other acts not necessarily engaging in sex. These include physical exertions like sports.

On the issue of representation. It is the Accused right to be represented by an Advocate of his choice. A perusal of the record of proceedings shows that the Accused was represented Miss Mwijuma who was holding brief for Mr. Khatib. On 20th March, 2013 the matter was rescheduled for hearing to 4th June, 2013 in the presence of Mr. Khatib. On 4th June, 2013 the matter proceeded to hearing in absence of Counsel. No reasons were given for failure to attend Court on the hearing days that followed. It cannot therefore be said that the Accused was denied representation.

The Appellant was Convicted on the alternative Count of indecent act contrary to section 11(1) of the sexual offences Act which provides for an imprisonment term of not less than ten years. The Sentence of five(5) years imprisonment is an illegal one. It is therefore increased to the basic minimum Sentence of ten (10) years.

The upshot is that the Court having found the appeal lacking in merit disallows it and increases the Sentence to ten (10) years from the time of Conviction.

**Judgment delivered dated and signed this 26th day of February, 2015.**

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**M. MUYA**

**JUDGE**

**26TH FEBRUARY, 2015.**

**In Open Court in the presence of:-**

Mr. Khatib for the Accused

Miss Ogwenko for the State

Court Assistant Musundi

**M. MUYA – JUDGE**

**Mr. Khatib:**

We apply for certified copies of the Judgment.

**Court:**

Certified copies of the Judgment to be furnished to the Defence and the Director of Public Prosecution.

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**M. MUYA**

**JUDGE**

**26TH FEBRUARY, 2015.**