



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 122 OF 2013

(From original conviction and sentence in Criminal Case No. 468 of 2012 of

the Principal Magistrate's Court at Mavoko, L. A. Mumassabba (R. M.)

GIDRAPH KAMBURIA MWORIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Gidraph Kamburia Mworio was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence are that on the 5th day of August 2012 in Kajiado County, intentionally attempted to cause his penis to penetrate the vagina of AK, a child aged 14 years.

2. In the alternative charge the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya. The particulars of offence state that on the 5th day of August 2012 in Kajiado County intentionally touched the vagina of AK a child aged 14 years with your fingers.

3. When the Appellant was arraigned in court, he denied the charge. The case proceeded to a full trial.

4. The prosecution case was that on the material day at about 8.15 p.m., the complainant PW1 AK, a 14 years old Std. 6 pupil went to the toilet which is outside their house. A man who she identified as the Appellant who was a neighbour followed her into the toilet, pulled down his pants and started touching her and inserted into her vagina something that felt like a finger. Meanwhile, the complainant's mother PW2 CKK followed the complainant into the toilet to see what was taking her so long. The complainant's mother knocked at the door of the toilet. Both the complainant and the Appellant came out of the toilet.

The complainant narrated to her mother what had transpired. The matter was reported at Kitengela Police Station. The complainant was issued with a P3 form and escorted to hospital for examination and treatment. The Appellant was subsequently charged with the offence herein.

5. The Appellant in his defence case gave sworn evidence. Two witnesses were called. The Appellant denied the offence and termed this case as a frame-up by the complainant's mother who he said was her lover but they had disagreed.

6. The Appellant was convicted in the alternative charge of attempted defilement and sentenced to serve ten years imprisonment.

7. The Appellant was dissatisfied by both the conviction and sentence and appealed in this court on the grounds that can be summarized as follows:

a) That the prosecution case was not proved as required by the law.

b) That the defence case was not considered.

8. During the hearing of the appeal, both the Appellant and the learned counsel for the State opted to rely on written submissions. I have considered the said written submissions.

9. The complainant's evidence and that of her mother is that the Appellant was in the toilet with the complainant at the material time. Both witnesses gave the time of the offence as between 8.15 p.m. and 8.30 p.m. This was at night. It does not come out from the evidence of the said two key witnesses how they were able to see at the time of the night. Although both PW1 and PW2 stated that the Appellant was their neighbour, there is no evidence to establish whether there was light that enabled them to see the Appellant or whether they recognized him by any other method e.g. voice recognition.

10. With the foregoing, there was no proof that the Appellant was the culprit. The appeal has merits and is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE