



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO 10 OF 2013**  
**(FORMERLY NYERI HC CR APPEAL NO 170 OF 2011)**  
**(APPEAL AGAINST CONVICTION AND SENTENCE IN MURANG'A SPM CRIMINAL CASE**  
**NO 2202 OF 2010 – E N J OSORO SRM)**

**CHARLES KIBE MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant **Charles Kibe Mwangi** (alias **Ndung'u**) was on 21/07/2011 convicted after trial of **sexual assault** contrary to **section 5(1) (a) (i) & (2)** of the **Sexual Offences Act, No 3 of 2006** (the **Act**). The particulars of the charge were that on 10/09/2010 in Murang'a North District of Murang'a County he unlawfully used his fingers to penetrate the vagina of one **MWW**. He was sentenced to serve ten (10) years imprisonment on 26/07/2011. He appealed against both conviction and sentence according to a document filed in court on 03/08/2011, but I cannot find on the record any petition of appeal. At the hearing of the appeal on 30/06/2015 however, the Appellant informed the court that his appeal was against sentence only.

2. Learned Prosecution Counsel for the Respondent supported the conviction. She submitted that the conviction was safe as penetration by finger by the Appellant into the vagina of the complainant was proved beyond reasonable doubt. She further submitted that PW4, a child aged 5 years, was present when the offence was committed. The complainant herself was 9 years old. However, learned Prosecution Counsel also pointed out that the available medical evidence by PW1 showed that there was no penetration as the hymen was intact, though there was injury to the external genitalia. But according to learned counsel, penetration as defined in **section 2(1)** of the Act does not have to be complete; it can be partial.

3. Learned Counsel also submitted that the Appellant had put forth a defence of alibi, and that he did not call any witness to prove it. It must be pointed out immediately that an accused is under no burden to prove his alibi. He need only put it forward. It then becomes the burden of the prosecution to disprove it. That is well-settled law.

4. Regarding sentence, learned Prosecution Counsel pointed out that there was an issue of the Appellant's age as evidenced at pages 2 and 3 of the typed proceedings of the trial court. Learned Counsel further submitted that after convicting the Appellant the court called for a probation report, and that report appeared to say that the Appellant was under 18 years old. The court appeared to accept this, but nonetheless sentenced him as an adult, apparently because he was only four (4) months shy of 18 years.

For this reason learned Prosecution Counsel did not support the sentence.

5. I have looked at the charge as laid against the Appellant under section 5(1) (a) (i) & (2) of the Act which provides –

**“5. (1) Any person who unlawfully –**

**a. Penetrates the genital organs of another with –**

**(i) any part of the body of another or of that person; or .....**

**is guilty of an offence termed sexual assault.**

**2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”**

Penetration by finger as the Appellant was charged would thus constitute the offence of sexual assault.

6. However, the definition of “penetration” under section 2(1) of the Act poses a serious challenge. That definition is –

**“penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person ”.**

According to this definition therefore, to constitute the offence of sexual assault the penetration must be by genital organs of a person into the genital organs of another person. Fingers are not genital organs.

7. This conflict between the definition of penetration under section 2(1) and the offence of sexual assault as created under section 5(1) of the Act needs to be resolved first. I did not have the benefit of full submissions on the issue, and I will therefore not resolve the conflict now. Suffice it to say, for this present case, that because of the definition of penetration under section 2(1) of the Act, the particulars of the charge did not disclose the offence charged. The charge was thus incurably defective, and I so hold. The conviction cannot be upheld.

8. If I upheld the conviction, the sentence was clearly illegal. The Appellant was a minor not only at the time of commission of the offence, but also at the time of conviction and sentencing. The trial court never referred to the provisions of **section 8(7)** of the Act, which in turn would have taken him to **section 191** of the Children’s Act. That section takes precedence over any other law with regard to sentencing of minor offenders. It provides a wide range of options to the trial court on how to deal with a convicted minor. Those options do **not** include imprisonment.

9. In the event I will quash the conviction and set aside the sentence of imprisonment imposed upon the Appellant. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG’A THIS 29<sup>TH</sup> DAY OF JULY 2015**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG’A THIS 31<sup>ST</sup> DAY OF JULY 2015**