



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 314 OF 2010

MUKEKE KIVAVA APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the conviction and sentence of Hon. L. M. Wachira, Senior Resident Magistrate delivered on 1/09/2008 in Makueni Principal Magistrate’s Criminal Case No. 374 of 2007)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Mukeke Kivava**, was charged with the offence of attempted defilement of a child contrary to **section 9 (i)** as read with **sub-section (2)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that on the 6th day of August 2007 at **[particulars withheld] village, Waia Location in Makueni District** within the **Eastern Province** unlawfully and intentionally attempted to have carnal knowledge of **M K** a child aged 13 years.

2. In the alternative, the Appellant is charged with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that on the 6th August 2007 at **[particulars withheld], Waia Location in Makueni District** within **Eastern Province** intentionally and unlawfully did an indecent act on **M K**, a child aged 13 years by touching her private parts.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that on the material day at about 10.00 a.m., the complainant, PW1 **M K**, a thirteen (13) year old primary school girl was on the way to the farm when she came across the Appellant. That the Appellant who had previously worked for their family held her by the hand, threw her on the ground and pulled her panties. The panties got torn. The complainant screamed. Her brother PW2 **M M** who was grazing cattle nearby heard her screams and rushed to the scene. The brother hit the Appellant with a stick and the Appellant ran away.

5. The complainant's mother, PW3 **E W** also heard the complainant's screams and rushed to the scene. The mother was informed by her children what had transpired. The matter was reported to the village elder, PW4 **Josphat Kilonzo Ngula**. The Appellant was arrested by members of public and escorted to the police post. The Appellant was then charged with the offences herein.
6. In his defence, the Appellant elected to give sworn evidence. No witnesses were called. The Appellant stated that he is a casual worker.
7. The Appellant was convicted and sentenced to ten (10) years imprisonment in the main count.
8. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-
 - a. **that there were no proper investigations carried out.**
 - b. **that no medical evidence was adduced.**
 - c. **that no exhibits were produced.**
9. During the hearing of the appeal, the Appellant orally submitted that this case was framed up against him. That the complainant is an adult and that there was no evidence to warrant a conviction.
10. The appeal was opposed by the State. The learned counsel for the State submitted that the complainant was a minor. That the prosecution evidence is that of recognition in broad daylight. That the prosecution case was proved beyond any reasonable doubts and that the sentence is within the law.
11. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
12. The complainant's evidence was that the Appellant held her, threw her down and pulled her panties thereby tearing the same in the process. The complainant's evidence was corroborated by that of her brother (PW2) who rushed to the scene and rescued her. It was PW2's evidence that he found the complainant on the ground and rescued her by hitting the Appellant with a stick.
13. The complainant's evidence and that of her brother (PW2) is that of recognition. It is clear from the evidence of the complainant, her brother (PW2) and mother (PW3) that the incident took place in broad daylight when they had gone to the farm. The evidence of the mother (PW3) corroborated the complainant's evidence that the Appellant had worked for their family. The complainant (PW1), her brother (PW2) and their mother (PW3) identified the complainant's torn panties in court. The evidence of the village elder (PW4) also shows that he received the report of the matter at about 10.00a.m.
14. The evidence of PW5 **PC Christopher Chege** confirmed the evidence of the arrest and the investigations carried out. He produced the complainant's torn panties as an exhibit.
15. The Appellant in his defence case stated that he is a casual worker. The defence is evasive and fails to address the charge herein. However, the prosecution discharged their burden of proof. The trial magistrate believed the complainant. I have found no reasons to differ with the findings of the trial magistrate who saw the witnesses testify and observed their demeanour.
16. The Appellant was charged with the offence of defilement in the main count and in the alternative the offence of indecent act with a child. The act of throwing the complainant down and removing her panties established the offence of attempted defilement. The sentence of ten (10) years is within the law for the offence of attempted defilement.
17. The only evidence in respect of the complainant's age is that adduced by the complainant and by the mother. No documents of any kind were produced to ascertain the complainant's age. There was no medical evidence, birth certificate, baptismal card or any other document produced. What does this portend for the prosecution case?

18. Under **Section 2** of the **Children’s Act Cap 141 Laws of Kenya**, a child is defined as any human being under the age of eighteen (18) years.

19. The complainant’s evidence was that she was thirteen (13) years old and had sat for KCPE by the time she testified on 27th November, 2007. According to the mother’s evidence, the complainant was 14 years old by the time the mother testified in court on 31st March, 2008. This would still mean that the complainant was thirteen years old at the material time.

20. My view on the question of the above evidence is that the complainant was a child and not a borderline case. (See **FLAPPYTON MUTUKU vs R (2012) eKLR**). The complainant was far from reaching 18 years of age. The trial magistrate who saw the complainant was satisfied that the complainant was a child, hence the conviction.

21. I am persuaded by authorities where other Judges faced by similar circumstances took a similar route where no documents were produced to prove the complainant’s age. For example in **ZABLON ONGONYO MATOKE vs R., HCCRA Kisii No. 168 of 2012**, Hon. Justice Sitati relied on the case of **FRANCIS vs UGANDA CA CR. APP. No. 2 of 2000** where it was held:

“Apart from medical evidence age may also be proved by birth certificate, the victim’s parent or guardian and by observation and common sense ...”

22. Similar sentiments were followed in **FAUSTINE MGHANGA v R (2012) eKLR** where Nzioka J cited **MANGUNYU v R** where Hon. Justice W. Ouko cited **IE COLLINGWOOD’S CRIMINAL LAW OF EAST AND CENTRAL AFRICA (LUNDO: SWEET AND MAXWELL) 1967 ED** page 123 where it was observed as follows:

“Age may be proved by birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth.”

23. The Court of Appeal in the case of **Stephen Nguli Mulili v Republic [2014] eKLR** also stated as follows:

“Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.”

24. With the foregoing, I find the offence of attempted defilement was proved beyond reasonable doubt. The sentence of ten (10) years is within the law. The appeal has no merits and is dismissed.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 27th day of August, 2015

B. THURANIRA JADEN

JUDGE