



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL NO. 226 OF 2013**  
**MWANGANGI MWANZU.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. S.K. Mutai - Resident Magistrate delivered on 21/11/2011 in Mutomo Resident Magistrate Criminal case No. 263 of 2011)*

\*\*\*\*\*

*(Before Hon. B. Thurairaja Jaden J)*

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

1. The Appellant, **Mwangangi Mwanzu**, was charged with two counts as follows:

Count I - Being in **possession of cannabis sativa (Bhang)** contrary to section 3(1) (2) (a) of the Narcotic Drugs and Psychotropic Substance control Act No. 4 of 1994.

The particulars of the charge were that on **6<sup>th</sup> of October 2011**, at about **3.00 p.m** at **Ikutha Market**, Ikutha Location in Ikutha District within **Kitui County**, was found being in possession of cannabis sativa (bhang) with 30grams to wit a street value of kshs. 60/= which was not in any form of medicinal preparation.

Count II – **Attempted defilement** contrary to section 9 (1) (2) of the Sexual offences Act No. 30 of 2006.

The particulars of the charge were that on **3<sup>rd</sup> day of October 2011** at around **6.30a.m**, at [particulars withheld] village Kasaala Location, Ikutha District within **Kitui county**, attempted to defile **P J I** a child aged **9 years**.

2. The Appellant pleaded not guilty on both counts. The case proceeded to a full hearing.

3. The prosecution case was that at the material date, pw1 P J, a nine (9) year old Std 3 girl was on her way to school at about 6.30 a.m. The appellant stopped her and asked her to have sex with him. The complainant ran away and the Appellant chased her. The Complainant screamed and was rescued by Pw2,

K K. The Complainant's parents were informed of the matter. A report was made to the Chief. The Complainant's father and Community Policing Members started looking for the Appellant. The Appellant was arrested. The Appellant was searched and found with one roll of bhang. The Appellant was escorted to Mutomo Police station. After investigations the Appellant was charged.

4. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant stated that at the material time he was on the way to Ikutha area when he met school going children. That he saw one child ahead of him and he told one Kavuku to stop the child. The Appellant then went to work. The following day allegations were made that he had attempted to stab a child. He was then arrested by some touts and taken to Mutomo Police Station. The Appellant termed the case as a frame up.

5. The Appellant was convicted and sentenced to serve ten years imprisonment in each count. The sentence runs concurrently.

6. 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 the charge sheet was defective.**
- b. **That the conviction was against the weight of the evidence.**
- c. **That the Appellants fundamental rights were infringed.**
- d. **That the trial magistrate failed to give the defence case adequate consideration.**
- e. **That the sentence meted out is harsh and excessive.**

7. During the hearing of the appeal, the Appellant relied on written submissions which I have duly considered.

8. The appeal was opposed by the State. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

9. 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.*

10. The Complainant (pw1) gave sworn evidence. The Trial magistrate carried out *Voir Dire* and was satisfied that the Complainant could give sworn evidence.

11. The Complainant narrated to the court how the Appellant asked her to have sex with him and chased her when she ran away. The Complainant knew the Appellant and referred to him by his name, Mwangangi.

12. The Complainant's evidence was corroborated by that of pw2, K K who rescued her. According to Pw2 he heard a child screaming and when he looked up he saw the Appellant chasing the child. Pw2 identified the said child as the Complainant and named the person who was chasing the child as the Appellant. It was Pw2's evidence that he rescued the child and informed the child's mother about the matter.

13. The evidence of Pw2 corroborates the Complainants evidence. There is no chance of mistaken identity. Both (Pw1) and (Pw2) knew the Appellant. The offence took place in broad daylight.

14. The Complainant's father, Pw3 J I M and Pw4 N N a community Policing member testified on the arrest. It was their evidence that upon being arrested, the Appellant was searched and found with one roll of bhang.

15. Pw5 PC Haron Yator produced the roll of bhang together with the exhibit memo form and the report of the Government Chemist as exhibits. The same confirmed that the plant material in the roll was examined and found to be *cannabis*.

16. The Appellant in his defence case gave evidence that places him at the scene. It was his evidence that he saw the child (Complainant) ahead of him and he asked K (Pw2) to stop the child. It does not come out clearly why the child was to be stopped. Although the Appellant talked of a frame up, no reasons emerge from the record why the witnesses herein would frame him up. The defence failed to cast any reasonable doubts on the prosecution case.

17. I have observed that there was no ascertainment of the complainant's age by way of medical evidence, birth certificate, baptismal card or any other documents.

18. The complainant gave her age as ten years. Her evidence further shows that she was a standard three (3) pupil at [particulars withheld] Primary School at the material time. PW2 who was an eye-witness and PW3 the complainant's father described the complainant as a child. PW2 specifically testified that the complainant was on her way to school. The trial magistrate who saw the complainant testify was satisfied that she was a child of tender age and even conducted a **VOIR DIRE** prior to the taking of the child's evidence. I am satisfied that PW2 and PW3 who knew the complainant and the trial magistrate who saw the complainant testify were able to tell that the complainant was a child. The complainant was not a borderline case. She was far from attaining the age of eighteen (18) years. (See for example **FLAPPYTON MUTUKU VS R. (2012) eKLR**).

19. 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 ...”*

20. 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.”*

21. 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.”*

22. With the foregoing, I am satisfied that the offences in both Count I and II were proved. I have found no defects in the charge sheet. However, the sentence of ten (10) years for the offence of being in possession of Cannabis Sativa (Bhang) is harsh and excessive taking into account the stated quantity and the street value of the same. I reduce the same to six (6) months imprisonment. The sentence of ten (10) years imprisonment for attempted defilement is within the law and this court will not interfere with the same. Sentence to run concurrently. Right of Appeal 14 days.

.....

**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 26<sup>th</sup> day of August, 2015.

.....

**B. THURANIRA JADEN**

**JUDGE**