



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL NO. 156 OF 2013**

*(From original conviction and sentence in Criminal Case No. 260 of 2008 of the*

*Senior Resident Magistrate's Court at Yatta, A. W. Mwangi, Ag. SRM)*

**MESHACK KIMEU MUTEMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant, Meshack Kimeu was charged with the offence of incest by male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence are that on the 20<sup>th</sup> day of March 2008 at in Yatta District within the Eastern Province being a male person had carnal knowledge of M K a female juvenile who is to your knowledge your daughter.

2. In the alternative the Appellant was charged with the offence of indecent acts with a child contrary to Section II(1) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence are that on the 20<sup>th</sup> day of March 2008 at Yatta District within the Eastern Province committed an indecent act with M K by touching her private parts namely vagina.

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 PW2 E N K the complainant's mother is a wife to the Appellant. By the material day they had been married for about four years and were blessed with two children aged 5 and 2 years. On the material day the mother was at the shamba and had left the complainant with her step mother. The complainant's mother stayed in the shamba up to 10.00 a.m. then went home. She found the complainant with the Appellant (*father*) in bed. The mother went to the kitchen then returned to the bedroom. She found the Appellant had left and the complainant was alone in bed crying. The mother checked the complainant. The complainant did not have her underpants on and had some discharge from her vaginal area. The discharge was also on her clothes and buttocks. The child had been defiled. The mother suspected the husband (*Appellant*) as he was the only one at home. When the husband (*Appellant*) returned home she questioned him about it but he denied.

5. The mother took the child to hospital. The complainant was examined and it was confirmed that she had been defiled. The complainant's mother informed the grandfather about the matter. The matter was reported at Matuu police station. The Appellant who had been escorted by the elders to the police station was detained and after investigations he was charged accordingly.

6. In his defence the Appellant gave unsworn evidence. No witnesses were called. The Appellant stated that he was in the shamba when he was arrested by the people. He was then escorted to Matuu police station and charged with the offence herein. The Appellant prayed for leniency from the court.

7. The trial magistrate found the Appellant guilty of the offence of incest and convicted him. The Appellant was sentenced to life imprisonment.

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 the trial magistrate relied on hearsay evidence.
- b. That crucial witnesses were not called to testify.
- c. That the prosecution evidence was contradictory.
- d. That crucial exhibits were not produced in court.
- e. That there was no document to confirm that the Appellant had committed the offence.
- f. That the evidence of a confession was called upon without due regard to the provisions of the Evidence Act, Cap. 80 Laws of Kenya.

9. During the hearing of the appeal, the Appellant relied on his written submissions. The said submissions essentially expound the grounds of appeal.

10. The appeal is opposed. The learned counsel for the State submitted orally on the sufficiency of the prosecution evidence.

11. This being the 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 mother (PW2) testified that the Appellant was the only one at home and that when she returned home she found the complainant on the bed with the Appellant. This on its own may not have raised any alarm. However, when the Appellant left the complainant on the bed she was crying. When the mother checked the complainant she saw signs of defilement. Although the complainant's mother in her evidence mentioned her step-mother, one E N as the one she had initially left the complainant with was not called to testify, the said step-mother could not have defiled the child and left her with the whitish discharge.

13. The evidence of the Clinical Officer, PW1 Benjamin Maingi was that he examined the complainant and found her hymen was torn and had raw edges and there was a whitish vaginal discharge but no spermatozoa. The Clinical Officer produced a P3 form which gave the complainant's age as two years. This corroborated the mother's (PW2) evidence that the complainant was about two years old.

14. The evidence of the investigating officer PW3 Cpl. Peter Ng'ang'a of Matuu police station confirmed the making of the report and the investigations carried out.

15. During his defence case, the Appellant talked about his arrest and asked for leniency. The defence is not convincing in view of the strong prosecution evidence. The complainant's mother gave unchallenged evidence that she had not quarreled with the Appellant. There are no reasons that emerge from the

record why the complainant's mother would give false evidence against her husband and the father of her children.

16. The complainant's mother gave circumstantial evidence. As stated by the Court of Appeal in the case of **Daniel Muthomi M'arimi v Republic [2013] eKLR** while quoting **Abanga Alias Onyango** case

***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

I am satisfied that the circumstantial evidence herein points to the guilt of the Appellant.

17. All the prosecution witnesses allude to a confession by the Appellant. Any evidence of a confession ought not to have been admitted without compliance with Section 25A of the Evidence Act, Cap. 80 Laws of Kenya which provides that a confession is not admissible unless it is made before a Judge, a Magistrate or a Police Officer not below the rank of an Inspector of Police.

18. However, this court has not considered the evidence of the confession alluded to in the evidence of PW1, PW2 and PW3. It is however noted that the Appellant during mitigation asked the trial court for forgiveness and stated *inter alia*, that he did not know what got into his mind. That is an admission of the matters in question.

19. On the production of exhibits, the Appellant has raised an issue that the complainant's clothes which were said to have some secretions were not produced. However, the Clinical Officer's evidence confirmed the defilement. The lack of forensic evidence is not fatal to the prosecution case.

20. I have considered the ground of appeal raised by the Appellant that crucial witnesses e.g. one E N and the elders mentioned by the complainant's mother (PW2) and the investigating officer (PW3) were not called to testify. It is however noteworthy that according to evidence of the complainant's mother, she found the Appellant and the complainant alone on the bed and nobody else was at home. The elders came in after the event.

As stated by the Court of Appeal in the case of **Bukenya & Others -vs- Uganda (1972) EA 549, page 550:-**

***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution."***

20. Having re-evaluated the record afresh, I am satisfied that the prosecution case was proved beyond reasonable doubts. The sentence is within the law. Consequently, I find no merits in the appeal and dismiss the same.

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**B. THURANIRA JADEN**

**Dated** and delivered at Machakos this 28<sup>th</sup> day of October, **2015**

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**B. THURANIRA JADEN**

**JUDGE**