



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 170 OF 2012

MUSYIMI MBULI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. A.G. Kibiru Principal Magistrate delivered on 7/11/2012 in Kitui Principal Magistrate Criminal Case No. 43 of 2012)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Musyimi Mbuli** was charged with the offence of **attempted defilement** contrary to **section 9 (1)** as read with sub-section (2) of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence are that on the 11th day of November 2012 at about 9.00 a.m. at *[particulars withheld]* village, [Particulars Withheld] Location in Katulani District within Kitui County, intentionally attempted to cause his penis to penetrate the vagina of **G K M**, a child aged 10 years.

2. In the alternative the Appellant was charged with the offence of **indecent act** with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.
3. The Appellant pleaded guilty to the charge and was sentenced to ten (10) years imprisonment. The Appellant appealed to this court on both the conviction and sentence. However, during the hearing of the appeal, the Appellant withdrew his appeal against conviction and gave his mitigation. He prayed for leniency. The withdrawal of the appeal on conviction was proper. **Section 348** of the **Criminal Procedure Code** states as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent of legality of the sentence.”

4. The plea was unequivocal. The charge was read out in both **Kiswahili** and read out again in **Kikamba** which languages the Appellant understood. The facts were read out to the court and the Appellant accepted the same as correct. The facts reflect an offence of attempted defilement. The Appellant had removed the complainant's clothes and was attempting to insert his penis into her vagina when he was caught red handed. The complainant's age was given as ten (10) years. A Birth Certificate was produced.

5. The trial court adhered to all the procedures for plea taking as set out in **Adan vs R (1973) EA** where the Court held as follows:-
- i. **“The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
 - ii. **The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
 - iii. **The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
 - iv. **If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**
 - v. **If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”**
6. However, the trial magistrate failed to indicate whether the Appellant pleaded guilty in the main count or in the alternative count. However, the facts read out clearly reflect that the offence committed was that of attempted defilement. The sentence of ten (10) years imprisonment is within the law and is the minimum sentence provided for by the law.
7. The appeal has no merits and is dismissed. The conviction and sentence by the lower court is upheld.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of February 2014.

B. THURANIRA JADEN

JUDGE