



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 146 OF 2011

K M..... APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. A.G. Kibiru Principal Magistrate delivered on 8/7/2011 in Kitui Senior Magistrate Criminal Case No. 35 of 2010)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **K M**, was charged with the offence of attempted defilement contrary to **section 9 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 4th day of September 2010 at about 6.00 p.m. at **[particulars withheld] village, Endau Location in Kitui County** attempted to commit an act which causes penetration with **M A** a girl aged 16 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**.

The particulars of the offence were that on the 4th day of September 2010 at about 6.00 p.m. at **[particulars withheld] village, Endau Location in Kitui County** did an act of indecency with **M A** a girl aged 16 years by touching her private parts namely vagina, breasts and buttocks using his hands.

3. The Appellant pleaded not guilty. After a full trial the Appellant was convicted in the main count of attempted defilement and sentenced to ten (10) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the prosecution case was not proved beyond reasonable doubt.**
 - v. **That the case against the Appellant was a frame up.**
 - v. **That the trial magistrate failed to consider the plausible defence offered by the Appellant.**
4. During the hearing of the appeal, the Appellant relied on written submissions. The written submissions essentially expound on the grounds of appeal.

5. The State was opposed to the appeal. **Ms. Maingi**, learned Counsel for State submitted that the evidence of the complainant is that of recognition. That the offence was committed in broad daylight and that the charge was proved.
6. The complainant, PW1, **M A**, a sixteen (16) year old primary school girl narrated to the court the events of the material date. It was PW1's evidence that on 4/9/2010 at about 6.00 p.m., she was unwell and was in her room sleeping. Her brother, PW2, **B M** who was ten (10) years old was at the nearby farm grazing goats. Her mother PW3 **E M K** had one to the river to fetch water.
7. That the Appellant who is her step father entered her room. That the Appellant touched her on the breasts and thighs and removed her pants telling her that he loved her. The Appellant removed his shorts and wanted to lie on her. PW1 screamed and her little brother (PW2) came to the room. The Appellant then walked out. The mother was informed by her children what had transpired. A report was made at the police post. The Appellant was arrested and was subsequently charged with the offences herein.
8. In his defence the Appellant gave sworn evidence. No witnesses were called. He stated that he is a businessman. That on the material date, his wife refused to greet him and asked him where he had spent the night. The wife accused him of seeing another woman. The Appellant then left the house to go and charge his phone and see his girlfriend. When he returned home in the evening he found his wife taking '**karubu**' and '**miraa**'. The wife then started abusing him before the children and refused to allow him to sleep in their bedroom. The Appellant then went to sleep at the home of the wife's cousin. Later that night the Appellant was woken up and arrested on allegations of having defiled the complainant. The Appellant denied the charge. He denied the charges against him and termed the same as a frame up due to the disagreement with the wife.
9. The complainant's evidence is that of recognition. It was the complainant's evidence that the Appellant is her step father and that the offence took place in broad daylight at about 6.00 p.m. The complainant narrated to the court what transpired. The complainant testified that the Appellant entered her room where she was sleeping, touched her thighs and breasts and removed her pants. That the Appellant told her that he loved her and removed his shorts and was on the bed and wanted to lie on top of her but she started screaming and the brother walked in.
10. The brother (PW2) who was ten years old then gave sworn evidence after the court conducted a *voire dire*. His evidence was that he caught the Appellant red handed when he rushed to the house in response to the screams. According to PW2, he found the Appellant without shorts lying on the complainant who was on her bed.
11. Both PW1 and PW2 gave a consistent account of evidence. Their evidence was not shaken during cross-examination. The mother (PW3) gave evidence and confirmed that she cohabited with the Appellant. She also testified that both PW1 and PW2 informed her had happened and she reported the matter to the police and the Appellant was arrested. It was PW3's evidence that although they had domestic wrangles with the Appellant, she did not frame him up with this case.
12. PW4, **PC Reuben Ngeno**, gave evidence that confirms that the report was received on the night of the material day and the Appellant arrested. PW4 produced an age assessment report that confirmed the complainant's age as below 18 years at the material time.
13. Although the Appellant denied his offence and stated that the case was framed up against him by his wife (PW3), who had accused him of infidelity, there are no reasons that emerge from the record why PW1 and PW2 would plant this case against him. The trial magistrate believed the complainant's evidence. The Proviso to **Section 124**, of the **Evidence Act, Cap 80 Laws of Kenya** provides as follows:-

“ Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

14. The trial court also had the advantage of observing the demeanour of all the witnesses. I have no reason to disagree with the findings of the trial court. In my view, the Appellant's conviction was based on sound evidence. The sentence is within the law.
15. The appeal has no merits and is dismissed. I uphold the conviction and sentence of the lower court.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 20th day of February 2014.

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B. THURANIRA JADEN

JUDGE