



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 56 OF 2007

MUKUTI MWINZI MUSYOKI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. T.M. Mwangi Resident Magistrate delivered on 30/10/2007 in Kitui Senior Resident Magistrate Criminal Case No. 1522 of 2005)

(Before Hon. B. Thurania Jaden J)

R U L I N G

1. The Appellant, **Mukuti Mwinzi Musyoki** was charged with the offence of **defilement** contrary to **section 145 (1)** of the **Penal Code**. The particulars of the offence were that on the 17th day of October 2005 at about 5.00 p.m. at *[particulars withheld]* **village, Musembo Sub-location, Musengo Location** in **Kitui District** of the **Eastern Province**, had carnal knowledge of **K D** a girl aged nine years.
2. In the alternative, the Appellant was charged with the offence of **indecent assault** on a female contrary to **section 144 (1)** of the **Penal Code**. The particulars of the offence were that on the 17th day of October 2005 at about 5.00 p.m. at *[particulars withheld]* **village, Musembo Sub-location, Musengo Location** in **Kitui District** of the **Eastern Province**, unlawfully and indecently assaulted **K D**, a girl aged nine years by touching her private part namely vagina.
3. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After a full trial, the Appellant was convicted for the offence of attempted defilement under **section 8 (1)** of the **Sexual Offences Act** and sentenced to twelve years imprisonment.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-
 - v. **That the charge sheet was defective.**
 - v. **That there was no proof beyond reasonable doubts.**
 - v. **That the arresting officer did not testify.**
 - v. **That crucial witnesses were not called.**
 - vi. **That the defence of alibi was not taken into account.**
 - v. **That the plausible defence was not considered.**
 - v. **That the burden of proof was shifted to the defence.**

- v. **That the Appellant was convicted for the offence of attempted defilement which he was not charged with.**
 - v. **That the provisions of Article 77 (2) (a) (c) (d) (e) and (f) of the old Constitution as read with section 107 and section 198 of the Criminal Procedure Code Cap 75 Laws of Kenya were violated.**
5. During the hearing of the appeal, the Appellant relied on his written submissions. The said submissions essentially expounded the grounds of appeal.
 6. The learned counsel for the State opposed the appeal. It was submitted that the offence was committed in broad daylight; that the complainant's evidence was corroborated and that the trial magistrate considered the defence case also.
 7. 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.**
 8. The case for the prosecution was that on the 27/10/2005, PW1 **F K D** was at the river when she received a tip off that her child, **K D** (PW3) had been defiled by the Appellant. PW1 looked for her child (PW3) and asked her what had happened. The child started to cry. PW1 examined the child's (PW3's) private parts and confirmed that the child had been defiled. The complainant then explained how the Appellant who had a stick in his hands entered their house and told her to lie down on the bed and pulled up her dress, then removed her underpants and removed his trouser then put his genital organs inside her genital organs. That the Appellant then threatened her to keep quiet about it or he would beat her.
 9. The mother also received a firsthand account of the incident from one **M W** (PW1) who was an eye witness. PW1 narrated to PW2 and to the trial court what she had witnessed. PW1 testified that the Appellant had followed the complainant (PW3) into their house and when she became curious and peeped inside the house through the window, she saw the Appellant who had removed his trousers lying on top of the complainant with the complainant crying telling the Appellant to get up because she was feeling pain. That PW1 intervened and called the Appellant and told him to get up and leave. The Appellant then tried to persuade PW1 not to let anybody know about the incident.
 10. The matter was reported to the area chief and then to the police. The child was issued with a P3 form and taken to hospital for examination and treatment. The Appellant was subsequently arrested and charged.
 11. When put on his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant denied the charge. He stated that on the material day he was very far as he had been sent to **Kabati market** by his employer. He termed the talk in the village about defilement as mere gossip and lies. The Appellant further stated that this case was framed up against him and that **Muthengi** (PW1 the eye witness) wanted him to lose his job and had threatened to teach him a lesson and to defame him.
 12. The trial court carried out a detailed *voire dire* and found the complainant (PW3) understood the meaning of oath. The complainant proceeded to testify on oath and gave her age as ten years. The complainant in her evidence described what transpired between her and the Appellant. The complainant's evidence left no doubt that she was defiled. She described the Appellant as having put his male genital organs inside her female genital organs. The complainant maintained her evidence during cross-examination and stated that she did not tell her mother or her grandparents what had happened because the Appellant had warned her against doing so. It is evident that the complainant knew the Appellant well. According to the complainant's evidence, the Appellant worked for her uncle in the same neighbourhood.
 13. The complainant's evidence is corroborated by that of the eye witness (PW1). According to PW1's evidence, he was grazing cattle near the complainant's home when he became attracted to the scene by ongoing activities. PW1's evidence is that of an eye witness who peeped through the window and caught the Appellant red handed on top of the child (PW3) and heard the child crying saying that she was feeling pain. PW1 hailed from the same village and knew both the complainant and the Appellant. During cross-examination, PW1 denied the existence of any grudge between him and the Appellant and also denied having attempted to have the Appellant sacked from his employment. It is clear from both the complainant's (PW3) evidence and that of the eye witness (PW1) then the offence occurred in broad daylight. The recognition was therefore

- free from any possibility of errors.
14. The complainant's mother (PW2) took action and reported the matter to the authorities after she had received an account of the incident from the complainant and the neighbour who had witnessed the same (PW1). Although the mother's evidence is that she examined the child (PW3) and saw some injury and discharge on her female genitalia, no medical evidence was availed. The mother did not give the age of the child and the only evidence on record relating to the complainant's evidence comes out from the *voire dire* when the complainant stated that she was ten years old and in standard four. Although PW4 **PC Veronica Kapoko**, the Investigating Officer stated that the child was examined and treated at **Kitui Hospital** and a P3 form filled in, the said form was not produced in court as an exhibit.
 15. On the other hand, the Appellant denied the offence. The defence that the Appellant was far away at **Kabati market** at the material time did not dislodge the strong prosecution case. Nothing emerges from the evidence of the complainant (PW3) or the eye witness (PW1) that shows that they would have any reason to frame up the Appellant as alleged in the defence case.
 16. Having evaluated the entire evidence on record, I am satisfied that the offence of indecent assault under **section 144 (1)** of the **Penal Code** was proved beyond reasonable doubts. Under **section 144 (1)** of the **Penal Code**, the issue of age does not arise. Under the said provision, the offence of indecent assault can be perpetrated on a female, whether a woman or girl.
 17. The trial magistrate erred when he convicted the Appellant under **section 48, First Schedule section 3** of the **Sexual Offences Act** and failed to note that the same was amended by **Legal Notice No. 47/07** which provides as follows:-

“Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.”

18. On the issue raised concerning the violation of Constitutional rights, the Appellant's remedy lies in a civil suit. (See for example **Julius Kamau Mbugua –vs- Republic - Criminal Appeal Nrb. 50 of 2008**).
19. I have considered the charge sheet and found no defects in the same.
20. With the foregoing, I convict the Appellant for the offence of indecent assault contrary to **section 144 (1)** of the **Penal Code**. The sentence for the said offence is 21 years. I therefore confirm the sentence of twelve (12) years that was meted out by the lower court. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of February 2014.

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JUDGE