



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 122 OF 2008

PETER MWANGI NGAREAPPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. E.J. Osoro , Senior Resident

Magistrate Nyeri in Criminal Case No. 2843 of 2007)

JUDGMENT

1. The Appellant **PETER MWANGI NGARE** was charged with the offence of attempted defilement contrary to section 9(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 24th day of September 2007 in Nyeri District within Central province unlawfully and intentionally attempted to commit an act which caused penetration to J.M.W. a child below the age of eleven years.
2. He faced an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 24th day of September 2006 at [particulars withheld] in Nyeri District within Central Province committed an indecent act to J.M.W. a child under the age of 11 years by touching her sexual organs.
3. He pleaded not guilty to the charges was tried and acquitted on the main charge but convicted on the alternative charge of indecent act with a child and sentenced to serve 10 years imprisonment.
4. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds of appeal.
 1. ***His constitutional rights were violated in that he was not taken to court within the time stipulated in the then section 72 (b) of the Constitution.***
 - 2.
 1. ***The prosecution case was not proved to the required standard.***
 - 2.
 1. When the appellant appeared before this court for trial he submitted that he was only appealing against the sentence.
 2. Mr. Njue for the state submitted that the appellant was charged under Sexual Offences Act and convicted and sentenced to ten (10) years.
 3. It should be pointed out that this court can only interfere with the sentence of a trial court if and only if the same is illegal or excessive.
 4. The appellant herein was convicted of the offence of indecent act with a child and sentence provided for under the said charge is a maximum ten (10) years.
 5. I therefore find no merit in the appeal herein against sentence and would dismiss the appeal.
 6. I however must point out that this being a first appeal the court is entitled to reevaluate the evidence tendered before the trial court which I hereby do.

7. P.W.1 DR. BETTY CHEROTICH stated that the complainant's genital was red and no tears while it was P.W.2's evidence that the appellant requested her to remove a thorn from his foot and thereafter told her that he had seen a snake at the spot and asked that they shift from that spot and in the process pulled her into the bush.
8. The appellant undressed her and when she tried to shout he pinched her mouth and at that point P.W.3 E N N passed by and saw the appellant running away holding his trousers up.
9. It is therefore clear from the prosecution evidence that the appellant should have been convicted of the offence of attempted defilement.
10. Since the state did not cross appeal and further the appellant was not put on notice to enhance the sentence I would therefore dismiss the appeal herein.
11. Dated, signed and delivered at Nyeri this 28th day of March 2014.

J. WAKIAGA

JUDGE

1. Court: Judgment read in open court in the presence of the appellant and in the absence of the state.
- 2.

J. WAKIAGA

JUDGE