



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.202 OF 2005**

**BETWEEN**

**THOMAS MWAMBUMWENYI..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case No.597 of 2004*

*in Nanyuki CM's court dated 8th June, 2005, Hon. P.C. Tororey, SRM)*

**JUDGMENT**

1. The Appellant THOMAS MWAMBUMWENYI was charged with the offence of defilement of a girl contrary to **Section 145(1)** of the **Penal Code** the particulars of which saw that on the 14th day of April 2004 in Meru Central, Meru Central District had carnal knowledge of JKM a girl under the age of 16 years.
2. He faced an alternative charge of Indecent Assault on a female contrary to **Section 144 (1)** of the **Penal Code** the particulars of which were that on 14th day of April 2004 in Meru Central, Meru Central District unlawfully and indecently assaulted JKM a girl under the age of sixteen years by touching her private parts.
3. He pleaded not guilty, was tried, convicted and sentenced to life imprisonment on Count 1 and Seven (7) years imprisonment on the alternative charge. Being aggrieved by the said conviction and sentence the appellant filed the appeal.
4. When the appeal came up for hearing before me, the appellant who was unrepresented filed an amended grounds of appeal and written submissions which he relied upon while Miss Maundu appeared for the State opposed the appeal.
5. Submissions
6. On behalf of the appellant, it was submitted that the prosecution case was full of contradictions, inconsistencies and doubt. He submitted that PW1 contradicted the evidence of PW2 and that the benefit of doubt should have been given to the appellant. It was further submitted that PW3's and PW6's evidence was hearsay since they were not at the place of the commission of the offence.
7. It was further submitted that the trial court failed to comply with **Section 19 of Oaths and Statutory Declarations Act** while taking the evidence of PW1 and PW2 since they were minors under the age of 18 years. It was further submitted that their evidence required corroboration. Reliance was placed on the case of **Abel Monari Nyanamba & others -vs- R. Criminal Appeal NO.86 of 1994.**
8. It was submitted that no evidence was tendered by the prosecution to prove the two counts. It was submitted that no incriminating first report was made to the police and that according to PW8 the report talked of a neighbour. It was submitted that the appellant's defence was not taken into

account.

9. Miss Maundu for the State submitted that there was contradiction between the evidence of PW1 and PW2. On whether they were offered eggs to eat or whether they found the appellant peeling potatoes in his house bar. That the said contradiction was not material since both PW1 and PW2 aged eight (8) were consistent in their testimony on how the appellant called them to his house and put both on his lap, removed their clothes and inserted his fingers in their private parts.
10. On the issue of *voire dire*, it was submitted that the records shows that upon examining the minors she accepted that they be affirmed but did not record the questions which was a procedural technicality. It was further submitted that both the appellant and complainant were examined and found to have sexually transmitted disease. It was submitted that whereas PW2 went to PW4's shop and informed her about the appellant and PW1 were sleeping together, she rushed to the house where she found PW1. She told her that the appellant had defiled her.
11. It was submitted that the appellant's defence was considered by the trial court and dismissed as fabrication since the court held that both PW1 and PW2 were telling the truth.

#### 12. Evidence

13. This being a first appeal, the court is under duty to restate all the evidence tendered and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.
14. PW1 aged 8 years old having been affirmed stated that she was at home playing with PW2 when the appellant called them and showed them two Kshs.20/= coin and told them to enter the house where he cooked for them eggs which they did not eat. He picked them up and put them on his lap, removed their pants and put his fingers inside their private parts. She stated that he told PW2 to sit on the chair while he took PW1 to bed and defiled her having covered her mouth with his hand and warned her not to tell anyone.
15. It was PW1's evidence that she went to PW4's house and told her and under cross examination stated that she had been to the appellant's house many times before but that was the first time he defiled her and that she was aware that her father and the appellant had differences.
16. PW2 SK also aged 8 years testified that she saw the appellant show PW1 two 20/= coin and she went into the house. He put both of them in his lap and put his fingers in her private part before taking PW1 to his bed and defiled her having covered her mouth at that stage PW2 ran out. Under cross examination she stated that she saw what the appellant did to PW1.
17. PW3 SKM stated that PW1 was aged eight (8) years stated that she was told that PW1 who was her daughter had been defiled by the appellant who was a neighbour and under cross examination stated that she was not aware of any difference between her husband and the appellant. PW3 MM stated that at 1.00 p.m PW2 went to her shop and informed her that the appellant and PW2 were sleeping together and she went towards the appellant's house and met PW1 who informed her that the appellant had defiled her.
18. PW5 Dr. Geoffrey Mwirichia – clinical officer confirmed the age of the complainant as 8 years and confirmed bruises in the external genitalia, she had a bacterial infection while PW7 Pauline Lekore examined the appellant and confirmed that he had sexually transmitted infections.
19. When put on his defence, the appellant gave a sworn testimony and stated that at one time the father of PW1 brought his brother to take over his job and that on 14th April 2014 he was at work when at 10.00 a.m the complainant came with her mother and a police officer who arrested him. Under cross examination he stated that there had never been a disagreement between them.
20. From the proceedings herein and submissions the court has identified the following issues for determination:-

- a. *Whether failure to record the voire dire questions prejudiced the appellant.*
- b. *Whether the prosecution case against the appellant was for proved beyond reasonable doubt.*

1. Under **Section 19** of the **Oaths and Statutory Declaration Act Cap 15** where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not in the opinion of the court or such person understands the motive of oath his evidence may be received though not given upon oath if in the opinion of the court or such a person he possesses a sufficient intelligence to justify the receipt of the evidence and understands the duty of speaking the truth his evidence in any proceeding against

any person or any officer though not given on oath but otherwise taken and tendered into writing in accordance with **Section 232 of Criminal Procedure Code** shall be disposition within the meaning of this section.

2. The procedure to establish the above was set out in **Fransio Matove -vs- R [1961] E.A 260.**
3. **“1) the trial magistrate should question the child to ascertain whether the**
4. **child understand oath and**
5. **2) if the court does not allow the child not be sworn, it should record**
6. **whether or not in the opinion of the court the child is possessed of**
7. **sufficient intelligence to justify the reception of evidence and understands**
8. **the duty of speaking the truth.”**
- 9.
10. In this present case whereas the record does not show the question asked the record shows *“that upon examination of the minor I do accept her affirmation”* and in the judgment the court had this to say:-
  1. **“It is no doubt the two children were telling the truth.”**
11. I therefore take the view that whereas the trial court did not follow the procedure outlined in the case of **Fransio Matove -vs- R** (supra) the same complied with the provision of **Section 19** of the **Oaths and Statutory Declaration Act** and further note that the said section is for the benefit of the court and therefore the appellant was not prejudiced.
12. From the evidence tendered as reconsidered herein and in particular the evidence of PW1 and PW2 which although requiring no corroboration was corroborated by the medical
13. evidence of PW5 and PW7. I find that the prosecution case against the appeal was proved beyond reasonable doubt and therefore his conviction was safe.
14. On the issue of the appellant's defence, I agree with the submissions by Miss Mandu that the same was considered by the trial magistrate as follows:
  1. **“If indeed there was a grudge between the father of PW1 and himself what motive would PW4 MM neighbour have for stating she saw him washing clothes that morning outside his house at about 11.00 a.m. And also stating that she saw PW1 leaving his house.”**
15. I therefore find no merit on the appeal herein which is hereby dismissed.

**Signed and dated day of 2014**

**J. WAKIAGA**

**JUDGE**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

**J. NGAA**

**JUDGE**

In the presence of:-

Appellant in person and

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