



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 438 of 2010

(From Original Conviction and Sentence in Criminal Case No. 170 of 2010 of the Chief Magistrate’s Court at Mombasa – T. Ole Tanchu (SRM))

GODWIN MWABILI.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was sentenced to ten (10) years imprisonment for the offence of indecent act of a girl contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 17th day of December 2009 at Blaze Hills Academy Mtopanga area in Bamburi Location in Mombasa District of the Coast Province unlawfully and intentionally caused his penis to touch the vagina of E.K.K. a girl aged 5 years.

The Accused was a caretaker at Blaze Hills Academy at Mtopanga – Mombasa. It is in the kitchen of the school that the alleged indecent act was committed.

The complainant a child aged 5 years gave unsworn evidence. During *Voire dire* examination the trial Magistrate noted that she did not understand the nature of an oath.

In her evidence she appeared hesitant to narrate what took place on the material day. This is what she told the Court at page 7 line 6, **“he also removed his clothes. He told me to lie down on the bed. Bed was in the bedroom where children normally sleep. I don’t know what he then did.”**

Court – child continued to keep quiet. When told what happened after further proceeding by the Prosecutor, child says-

“And also slept. He slept on me. Another girl came and opened the door and saw us. She asked me where my home was. After he slept on me, I felt pain on my leg. I don’t know what the Accused did to me.”

From the above it is quite clear that the child was not categorical as to what took place and her evidence cries for corroboration. The trial Magistrate found corroboration from the evidence of PW3 and PW1.

At page 23 line 19 he observed, **“Even though the complainant was not very clear in her evidence, in**

my view due to her tender age, she gave evidence which was fully corroborated by that of PW3 who stated that she found PW2 in the Accused person's place where he used to sleep in the classroom as a caretaker. The evidence of PW3 is that of an eye witness who claimed she found Accused with his pants down while the child was naked at the place where he sleeps."

The defence by the Accused is that of trumped up charges by reason of a grudge existing between him and PW3. During cross-examination he did broach the issue of the grudge. PW3 did testify that it was true that there was a dispute between her and the Accused over a jerrican but it was not true that she was annoyed that the Accused was employed by the School where she was a former employee.

The trial Magistrate did consider the Doctors evidence (PW1). The Doctor had told the Court that upon examination, the complainant's vagina had no tears or bruises but her hymen was perforated and since her hymen was not intact there was a likelihood that she had been defiled. He had examined her eleven days after the alleged incident.

Upon evaluating the evidence before him the trial Magistrate came to the conclusion that the alternative count of indecent act on a girl contrary to Section 11(1) of the Sexual Offences Act had been proved and proceeded to convict the Accused accordingly.

Having evaluated the evidence before the trial Court I am satisfied that the conviction was safe and I find no good reason to disturb it. The Appeal fails on both conviction and sentence and it's accordingly dismissed.

Dated and delivered at Mombasa this 8th day of March, 2013.

**M. MUYA
JUDGE**

Dated and delivered in open court in the presence of:-

Oyodo for State

Appellant in person

Court clerk - Benta

**M. MUYA
JUDGE**