



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 463 of 2010**

**JOSPHAT PETER KISANO ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was sentenced to 12 years imprisonment for the offence of Indecent Assault on a female contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 5<sup>th</sup> day of October 2008 at Mbale Location in Taita-Taveta District County, he unlawfully and indecently assaulted JNM by touching her private parts namely vagina.

In his grounds of appeal the Appellant questions the conviction on account of the weight of evidence adduced, stating that evidence adduced was contradictory. In his submissions he abandons the appeal on conviction and dwells on the sentence.

In the substantive charge he had been charged with rape. This is what the complainant told the trial Court at page 6 line 27-

“My names are JM, I live at Pembeni. I am a farmer. On 5<sup>th</sup> October 2008 at 8.00am I was at my home when Kisano, the Accused appeared and told me that he wanted to sleep with me. He took a nylon paper bag used to pack sugar and inserted his penis inside. He lay me on the bed and removed my pants. I refused. He had a knife. He laid himself on top and raped me. ... I became sick and was taken to hospital, my private parts were swollen. The plastic was removed. I was experiencing difficulties in walking. I was referred to Wesu Hospital. I was admitted for many days.”

The Clinical Officer (PW4) upon examining the complainant found bruising around the vulva. Her urine had pus cells which indicated bacterial infection.

In his defence the Accused denied having raped the complainant.

At page 36 line 22 the trial Magistrate had this to say-

**“The evidence on record is consistent and corroborated. It is no doubt that PW1 had swollen parts and when she was taken to hospital, she was found with bruise on her vulva which is evidence that**

**her private parts were interfered with. PW1 mentioned that the Accused used a nylon paper to rape her and the nylon paper was removed in hospital. No medical notes were produced to confirm that there were polythene papers that were removed from PW1's parts."**

She later proceeded to find the Appellant guilty of the alternative Count of indecent assault on a female and convicted her.

It is quite apparent from the evidence adduced before the trial Court that the complainant did not report the incident till her private parts got swollen and had difficulties in walking. The trial Magistrate took this as an indication of consent. The complainant's son (PW2) did testify that the complainant was not mentally stable. No other witness mentioned complainant's mental instability in their evidence. It's not conceivable how a normal person can consent for the use of a nylon paper bag on her private parts. It's either she was not mentally stable as alleged by her son or there was force used as she alleges. Either way there was no consent and I find no reason to interfere with the conviction for indecent act.

However, on the same issue it's noted that the conviction was under Section 11(1) of the Sexual Offences Act which provides for indecent Act with a child. The complainant is an adult and the proper provision of the law which the Accused should have been charged with to the alternative is Section 11A which provides-

**"Any person who commits an indecent act with an adult is guilty of an offence and is liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or both."**

It is noted that the Appellant had been sentenced to 12 years imprisonment. That sentence is revised and reduced to a term of five years.

The Appellants will now serve a term of five years from the time of his conviction. To that extent only does the appeal succeed.

**Judgement read and delivered in open Court this 14<sup>th</sup> day of May, 2013.**

**M. MUYA**  
**JUDGE**

**In the presence of:-**

**Mr. Dzumo for the State**

**Appellant - present**

**Court clerk – Mr. Musundi**