



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 10 OF 2011

KIEMA MUTIE APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M. Kimemia Senior Resident Magistrate delivered on 12/1/2011 in Kitui Principal Magistrate Criminal Case No. 3 of 2010)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Kiema Mutia**, was charged with the offence of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 31st day of January 2010 at about 2.00 p.m. in **Kitui District** of the **Eastern Province**, unlawfully and intentionally had carnal knowledge of **S K** a girl aged 12 years.

2. In the alternative, the Appellant was charged with the offence of indecent assault of a girl contrary to **section 11 (1)** of **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 31st day of January 2010 at about 2.00 p.m. in **Kitui District** of the **Eastern Province**, unlawfully and indecently assaulted **S K** aged 12 years by touching her private parts namely vagina.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to 22 years imprisonment.
4. The prosecution case was that on 31/1/2010 at about 2.00 p.m, the complainant, a 12 year old standard 6 girl was in the sitting room of their home doing her homework. The complainant's mother, PW2 **H M** had gone to church. That the Appellant who was employed by the family told the complainant to sleep with him. The complainant refused. The Appellant forcefully pulled her to the bedroom, removed his underwear, then removed the complainant's panty and closed her mouth and told her not to speak. The Appellant then did what the complainant described as "**bad things**" to her.
5. When the complainant's mother came from church, she found the door to the house open. She heard the complainant crying in the children's bedroom. She saw the Appellant coming out of the

- same bedroom. The complainant informed the mother that the Appellant had slept with her. The matter was reported to the area chief and to the police. The Appellant was arrested. The complainant was issued with a P3 form and escorted to hospital for examination and treatment. The Appellant was subsequently charged with the offences herein.
6. In his defence, the Appellant stated that he was employed by the complainant's family. He further stated that he had gone to the barber shop when he was arrested without being told the reasons for the arrest. That he was surprised to hear the charges in court. The Appellant stated that this case was framed up on him because he was demanding for his unpaid dues from the complainant's mother. He denied the offence.
 7. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **The prosecution case was not proved beyond reasonable doubt.**
 - v. **The case was framed up against the Appellant.**
 - v. **The medical evidence was inadequate.**
 - v. **Part of the trial was conducted by an unqualified prosecutor.**
 8. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded on the grounds of appeal.
 9. The learned counsel for the State opposed the appeal. It was submitted that the complainant's evidence is that of recognition and was corroborated by the mother's evidence and the medical evidence. The defence case was termed as a mere denial.
 10. 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.**
 11. The complainant, PW1 **S K** gave sworn evidence after the trial court conducted a *voire dire* and found that she understood the meaning of oath and the importance of telling the truth. The complainant went ahead to narrate to the court how the Appellant did **“bad things”** to her after taking her to the bedroom and removing his underwear and her pants.
 12. The complainant's evidence is corroborated by that of the mother, PW2 **H M K**. According to the mother's evidence, she found the complainant crying in the bedroom and the accused coming out of the same bedroom. The complainant then explained to the mother that the Appellant had slept with her.
 13. The Clinical Officer, PW5 **Michael Makali** testified that the complainant was twelve (12) years old. That upon examination the complainant's genitalia had bruises and the hymen was torn. The complainant was taken to the hospital on the day of the offence and examined on the same day. Thus the medical evidence confirms the defilement occurred on the material date. The treatment notes and the P3 form were produced as exhibits.
 14. Based on the medical evidence, I hold that is the **“bad things”** described by the complainant and what the complainant's mother described as the Appellant had **“slept”** with the complainant was indeed an act of penetration as defined under the provisions of **section 2** of the **Sexual Offences Act** which stipulates as follows:-

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

However, trial courts should not shy away from eliciting details from witnesses to expound on terms like **“bad things”**, **“bad manners”** or **“slept with me”** to get a clear picture of what the child is talking about. However, in the instant case it is clear from the complainant's evidence, the complainant's mother's evidence and the medical evidence that the complainant was defiled.

15. The offence herein took place in broad daylight. The complainant's evidence is that of recognition. It was the complainant's evidence that she knew the Appellant as their employee. The complainant's evidence is corroborated by that of the mother. According to the mother she found the complainant in the bedroom crying and the Appellant came out of the same bedroom. The medical evidence as analysed above established that the complainant had been defiled. The defence by the Appellant that this case was framed up against him because of unpaid dues is

- therefore not convincing in view of the strong prosecution evidence adduced against him.
16. The Appellant has raised the issue of the proceedings having been partly conducted by an unqualified prosecutor who was below the rank of an Assistant Inspector of Police. The words “**not being a police officer below the rank of Assistant Inspector of Police**” were deleted from **section 85** of the **Criminal Procedure Code** by **Legal Notice No. 7 of 2007**. That topic is now moot.
17. With the foregoing, this court’s conclusion is that the Appellant’s conviction was based on sound evidence. The sentence is within the law. Consequently, I uphold the conviction and sentence. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 31st day of October 2013.

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B. THURANIRA JADEN

JUDGE