



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 195 OF 2011**

**BETWEEN**

**MICHAEL MUGO MUSYOKA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Siakago Criminal Case No 833 of 2010 by S.M. Mokuia P.M on 14<sup>th</sup> October, 2011)*

**JUDGMENT**

1. At the Magistrate's court, the appellant faced two charges. The first charge was attempted defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act** and the second one was an alternative charge of indecent assault with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The appellant was convicted of the alternative charge and sentenced to imprisonment for a period of 10 years. He appeals to this court against the conviction.
2. The prosecution case was the appellant was an employee of the mother of the child, PW 2. PW 2 testified that on the material date, 14<sup>th</sup> October 2010 at about midday, she sent the appellant to go to the house to collect batteries with the child. The child at the material time was 2 ½ years old. Once they were in the house which is about 50 meters away, she heard the child screaming. The appellant alleged that the child refused to sleep while the child told her that she had been hit by the appellant. The child demonstrated how the appellant hit her. PW 2 testified that the child's private parts were wet and had tears. When confronted, the appellant denied having committed the offence. She took the child to Kiritiri Health Center, reported the matter to the police and was issued with a P3 form.
3. PW 1, a female Clinical Officer based at Kiritiri Health Center testified that the child was brought by the mother on 14<sup>th</sup> October, 2010. She examined the child. She noted that the child had a tear on the vagina, the cervix was intact and there was no vaginal discharge. She stated the child complained of pain while passing urine. She confirmed that there was no penetration. She accordingly filled the P3 form dated 18<sup>th</sup> October, 2010.
4. As the child was of tender years, the learned Magistrate conducted a voir dire but concluded that the child could not communicate well nor understand what may have transpired. The child did not testify.
5. PW 3 the father of the child and a miraa businessman, was called after the incident. He rushed

- back to Kiritiri and organized for the child to be taken to hospital. He testified that he looked at her private parts and saw some bleeding.
6. Based on the evidence of the witnesses, the learned Magistrate concluded that the charge of defilement had not been established but that the alternative charge of indecent assault of a child had been established beyond reasonable doubt.
  7. As this is a first appeal I am obliged to re-evaluate the evidence and reach an independent conclusion bearing in mind that I did not see or hear the witnesses. It was proved that the child was 2 ½ years old at the time of the incident. PW 2, the mother produced the notification of birth which showed the child was born on 18<sup>th</sup> April 2008. The relative age was also corroborated by the examination by Magistrate who concluded that the child was not fluent in communicating and was thus unable to testify.
  8. The identity of the appellant was not in doubt as he was known to the child's mother as the house boy. At the time the act was committed, he was the only one with child and he was caught by PW 2 holding the child. The indecent act was proved by the evidence of PW 1 and PW 3 who saw the condition of the child's private parts and the evidence of PW 1 who examined the child.
  9. The appellant's unsworn statement confirms that he worked for the family of PW 2, he knew the children and he knew the child was about 2 ½ years. His denial was overwhelmed by the prosecution evidence.
  10. The prosecution proved the case against the appellant beyond reasonable doubt. The sentence imposed was the minimum provided by the law.
  11. The appeal is dismissed.

**DATED, SIGNED and DELIVERED at EMBU this 30<sup>th</sup> day of October 2013**

**D. S MAJANJA**

**JUDGE**