REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.194 OF 2009

MOSES NJOROGE MBUGUA…….....
…...APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

(An Appeal from original conviction and sentence in Naivasha P.M.CR.C.NO.506 of 2008 by Hon NDUKU NJUKI, Senior Resident Magistrate, dated 22nd April,, 2009)

JUDGMENT

After his trial for the offence of **attempted rape**, contrary to **section 4** of the **Sexual Offences Act** and in the alternative, **indecent act on female** contrary to **section 1(1)** of the **Sexual Offences Act**, the appellant, Moses Njoroge Mbugua was convicted and sentenced to ten (10) years on the main charge. I will revert to the charges shortly.

He was aggrieved and has brought this appeal on the grounds that, in my view, amount to mitigation except for one in which it is suggested that the sentence was harsh and/or excessive.

In his submissions before the court, he maintained that he did not commit the offence and that the prosecution evidence was full of falsehood. Learned counsel for the respondent for his part submitted that there was overwhelming evidence to prove the charge of attempted rape.

On first appeal, this court must re-evaluate afresh the evidence on record in order to arrive at an independent conclusion, bearing in mind that this court, unlike the trial court has not had the benefit of seeing and hearing the witnesses.

The complainant who gave her age as five years (confirmed by both her parents) recalled that on 31st March, 2008 while looking after their goats, the appellant made her to lie down on her back and then proceeded to remove her pants. He also removed his trousers and according to her, he:

"……used his urinating thing which he put into mine."

The complainant felt pain in her private part. P.W.2, M.M, heard the complainant crying and upon approaching where she was, she saw the complainant lying down on her back, without her pant while the appellant was standing over her with his trousers down. The appellant on seeing M.M fled.

The matter was reported to the complainant's parents who took her to Naivasha District Hospital after making a report to the police. At the hospital, she was examined by P.W.4, Jackline Gichana who

found the complainant's libia majora and libia minora normal. The vagina and cervix were normal while the hymen was intact. There was no discharge or spermatozoa. As I have explained, the appellant was charged with **attempted rape** and in the alternative with **indecent act with a girl**.

In his defence, the appellant denied the charges. However, in his cross-examination, he admitted that M.M found him with the complainant; and that the complainant had removed her pant in order to relieve herself.

Having found that the complainant was 5 years old, was it in order for the appellant to be charged with **attempted rape** contrary to **section 9(1)** of the **Sexual Offences Act?** The **Sexual Offences Act** creates both the offences of **rape and defilement** in **sections 8** and **4** respectively**.** The clear distinction from those provisions is that defilement is committed against children. It follows that the ingredients of **attempted rape** under **section 4** and **attempted defilement** under **section 9(1)** of the **Act** are different. The trial therefore proceeded on the wrong charge. The conviction for the offence of attempted rape was irregular, and is quashed.

Having so found, the next question is whether, from the evidence, the alternative charge was proved. It is an offence to commit an indecent act with a child. Indecent act is defined in **section 2** of the **Sexual Offences Act** as any unlawful intentional act which causes:

"(a) any contact between the genital organs of a person,

his or her breasts and buttocks with that of another

person.

(b) ……..."

The medical examination revealed that there was no evidence of penetration. From the testimony of the complainant, the appellant put his private part on hers; she felt pain; and he was interrupted when Mary Muthoni appeared. What the appellant did amounted to indecent act with the complainant.

His defence that the complainant had removed her pant to relieve herself was incredible. Why would the complainant completely remove her pant in order to relieve herself? It is unusual for one to relieve oneself lying on one's back. The appellant had his trousers down. All these matters go to show that he committed the alternative charge on which the learned trial magistrate did not make a finding pursuant to the provisions of **section 354(3) (a)(ii)** of the **Criminal Procedure Code**.

The sentence of ten years is maintained as it is neither excessive nor illegal and the appeal for the reasons stated is dismissed.

Dated, Signed and Delivered at Nakuru this 30th day of September, 2011.

W. OUKO
JUDGE