



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 24 of 2005**

**JACKSON MATU MURIITHI.....APPELLANT**

*Versus*

**REPUBLIC.....PROSECUTOR**

*(Being appeal against the conviction and sentence by M. R. Gitonga, Principal Magistrate, in the Chief Magistrate's Criminal Case No. 3497 of 2004 at Nyeri)*

**JUDGMENT**

The Appellant in this case was charged in the lower court with a count of defilement of a girl contrary to *Section 145(1)* of the Penal Code. He also faced an alternative charge of indecent assault on a female contrary to *Section 144(1)* of the Penal Code. The particulars of the first count are as follows:

***“JACKSON MATU MURIITHI: On the 20<sup>th</sup> day of September 2004 at Nyeri district within Central Province, had carnal knowledge of “[Particulars withheld pursuant to section 76(5) of the Children Act, 2001]” a girl under the age of sixteen years.”***

As can be seen the particulars of that count fail to state that the defilement was unlawful. In the case of **ACHOKI -V- REPUBLIC (2002) 2 E.A. 283**. The Court of Appeal considered an appeal under *Section 141(1)* of the Penal Code. The finding of the Court in respect of that appeal where as similar to this case the particulars had not stated that the rape was unlawful, the court had the following to say:

*“Whether the charge be one of rape under section 140 or attempted rape under section 141 of the Penal Code, the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl.*

*The particulars of the offence of attempted rape upon which the Appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without the consent of Caren Kemunto Kombo (PW 1). That charge did not disclose an offence known to the law and the Appellant was wrongly convicted on it.”*

Section 144(1) of The Penal Code provides:-

*“Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty one years.”*

Accordingly the conviction of the Appellant under count one for defilement was wrongful for the prosecution's failure to state in the particulars that the defilement was unlawful. The Appellant additionally faced an alternative charge of indecent assault. What the court needs to do is to go through the evidence to determine whether the charge of indecent assault was proved. P.W. 1, a four year old girl stated that she knew the Complainant. She gave her name as A M the daughter of M. She also knew the Appellant. She pointed him out in the dock. She said that the Appellant's residence is near M's residence. On the 20<sup>th</sup> September 2004 she, in the company of the Complainant, were at a place where a church was being constructed. They were playing. The Appellant called both of them. He requested

them to take care of a radio. The radio was outside the house. P.W.1 and the Complainant as they were there the Complainant began to cry. The Appellant asked why the Complainant was crying and he then came and took the Complainant into the house. On P.W.1 following them he pushed her out and then sent her to call a person called E. He told her to go and tell E that she was being called by another lady. P.W.1 said that there was no such lady. She then returned to the Appellant's house and she found the Complainant crying and holding her private parts. The Complainant said that her stomach was paining and she was still holding her private parts. They went to the Complainant's home and the Complainant was put to bed but she was refusing for anyone to touch her private parts. On being cross-examined, P.W.1 confirmed that the Appellant pleaded with the Complainant and said that he would buy her sweets.

P.W.2 is the mother of the Complainant. She said that the Complainant is 2½ years old. She confirmed that she knows P.W.1. On the material date she had left her daughter playing in the company of P.W.1. She left them playing at P.W.1's house. She returned from the shamba at midday and she found her daughter was crying and holding her private parts. On taking her home, she discovered that her daughter had been defiled and she had blood. P.W.1 later told her of what the Appellant had done. P.W. 3 is a Police Officer who confirmed that he recorded a statement in this matter. He also arrested the Appellant and took the Complainant to hospital where her P3 form was filled. He confirmed that she was walking with difficulties. P.W.4 the clinical officer recalled seeing the Complainant on the material day at 6.45 p.m. She reported to her being defiled at noon. She looked sick and was irritable. She had changed her clothing. He noted that she had no physical injury but her hymen had been ruptured with a tear. She also had white discharge. He did not find sperm but concluded that there was forced penetration and that sexual assault had taken place. In his defence the Appellant stated that on the material day he had gone to get grass for the cows. On his return he found people at his home who told him that he was wanted. He denied seeing the Complainant and P.W.1.

As can be seen the evidence of P.W.1 is clear and firm. She stated that the house of the Complainant's parents and the Appellant was close. The Appellant did not cross-examine her on this issue yet in his defence he said that it was not near. The evidence of P.W.1 was corroborated by the mother, the investigating officer and the clinical officer. The same sufficiently proves a case beyond reasonable doubt. The Court finds that that evidence sufficiently proves the charge of indecent assault. The court therefore dismisses the appeal against conviction on that charge.

In respect of the sentence of the lower court of 20 years imprisonment, the court takes into account that the Appellant was a first offender. At the same time the court takes into account that the Complainant was a 2½ years old girl. The court reduces the sentence of the Appellant to eighteen years imprisonment which sentence will begin to run from the date of conviction.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of October 2007.***

**MARY KASANGO**

JUDGE