



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

Criminal Appeal 402 of 2003

**(From original conviction and sentence in Criminal Case No. 1988 of 2002 of the
Chief Magistrate's Court at Nakuru – Mrs. H. Wasilwa)**

HENRY MUSINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant has appealed against the original sentence and conviction of 7 years and 7 strokes of the cane that was passed on him in the Chief Magistrate's Court, Nakuru in **Criminal Case No. 1988 of 2002**.

In that case, the Appellant had been charged for the offence of defilement of a girl, contrary to **Section 145 (1) of the Penal Code**. The facts of the prosecution case as stated in the Charge Sheet are as follows:

“On the 11th October, 2002 at [particulars withheld] within Nakuru township in Nakuru District within Rift Valley Province unlawfully had carnal knowledge of M.N., a girl under the age of 14 years.”

The Alternative Charge against the Appellant is that of indecent assault on female, contrary to **Section 144 (1) of the Penal Code**. The facts of the above as stated in the Charge Sheet are as follows:

“On the 11th October, 2002 at [particulars withheld] within Nakuru township in Nakuru District of the Rift Valley Province unlawfully and indecently assaulted N.N by touching her private parts.”

During the hearing of the appeal, the Appellant never challenged the conviction. Instead, he dwelt on the sentence by stating that he had already served 2 years in jail. Besides the above, the Appellant also informed the Court that he had been trained in tailoring and attained Grade II. Apart from the above, the Appellant claimed to have been saved and that he intended to be a preacher on being released.

On the other hand, the State through **Mr. P. Gumo**, Assistant Deputy Public Prosecutor opposed the appeal on the ground that the victim of the sexual assault was a 6 years old child who will remain traumatized for the rest of her life. In addition to the above, Mr. Gumo submitted that the Appellant does **not** deserve any leniency. He concluded his submissions by urging the Court to uphold the sentence.

This Court has carefully perused the above, together with the record of appeal that contains the judgment of the learned Magistrate viz, **Hellen Wasilwa**. Having done so, I hereby find that the learned Magistrate

had evaluated the evidence of the **PW1, PW2 and PW3** properly and reached the correct conclusion. It is apparent from the evidence on record that the Appellant had attempted to defile the complainant without any success.

Fortunately, the Appellant either failed to rise to the occasion or alternatively the private parts of the young girl were too small for him to penetrate. The young girl should thank God for the above. In view of the above, I hereby find that the conviction is safe and well-merited. Under the circumstances, I hereby uphold the conviction.

As far as the sentence is concerned, the maximum sentence as provided by the law is 14 years imprisonment with hard labour. Given the above, I hereby confirm the sentence of 7 years imprisonment. Since corporal punishment was lawful by August, 2003, I hereby order that the appellant be subjected to the same.

The upshot is that the appeal is hereby dismissed since the same has no merits at all.

Right of appeal explained.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of the Appellant and

Mr. Njogu, State Counsel.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005