



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS**

CRIMINAL APPEAL NO. 1011 OF 2000

PAUL MUSANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The appellant Paul Musango was convicted of the offence of defilement contrary to section 145(1) of the Penal Code by the senior Resident Magistrate Kajiado and sentenced to serve 4 years in prison and to receive 2 strokes of the cane.

He appeals against both conviction and sentence.

The complainant in this case was a seven (7) year old girl. The appellant had two sons of a similar age and the three attended the same school. The appellant who is a trained teacher helped the complainant and the two boys with their homework.

On 9th March, 2000, the complainant went to the appellant's house for the studies. On reaching the appellant's house she found that the appellant's two sons were there. The appellant was also in the house but was sleeping on his bed. The appellant then woke up and sent his two children to fetch water. The complainant remained in the house with the appellant. The bed was behind a curtain. The appellant called the complainant. He was seated on the bed. The appellant removed her panties and trousers. Next he unzipped his trousers and removed his penis which he inserted into the complainant's private parts while she was standing and then the appellant held her and placed her on his legs. He had carnal knowledge of her. She felt pain. The appellant then returned to bed and the complainant continued reading.

Subsequently the complainant's mother called her. The complainant's mother gave evidence as P. W. 2. The complainant's mother noticed that the complainant's trousers were wet. She asked of the complainant what the matter was and was informed of what had happened. The mother ended up with the police and the appellant was charged and dealt with as earlier stated at the beginning of this judgement.

When put on his defence the appellant denied the offence. One of the grounds of Appeal is that the appellant was not allowed to cross examine the complainant.

I have perused the record and found that while the learned trial magistrate followed the right procedure in finding out whether the complainant should have been sworn or not, she erred in ordering that complainant should not be cross-examined. Only accused persons have a right of not being cross-

examined if they choose to give an unsworn statement in their defence.

However, this does not extend to witnesses. See section 77 of the constitution and sections 147 and 166 of the evidence Act Cap 80 Laws of Kenya.

Denial of the accused person to cross-examine prosecution witnesses makes the whole trial worthless. The complainant in this case was the most important witness. The rest of the evidence cannot stand without her evidence. The appellant has served 11/2 years. The punishment for the offence under the section is 14 years imprisonment. I think justice can only be done in the case if a retrial is ordered.

The appellant's conviction is set aside, so is the sentence of 4 years and 2 strokes of the cane.

The appellant will be retried before a different magistrate of competent jurisdiction.

The matter will be mentioned before the senior Resident Magistrate Kajiado on 11. 2. 2002 for taking of the plea and further directions.

I order the Deputy Registrar Nairobi to send a copy of this judgement to the trial Magistrate to avoid a further repeat of the error.

Dated and delivered at Nairobi this 31st day of January, 2001.

D. M. RIMITA

JUDGE