



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 66 OF 2000**

(From Original Conviction and Sentence in Criminal Case No. 298 of 1999 of the Resident Magistrate’s Court at Makueni, G. J. Kiia Esq. on 22.3.2000)

**JOSEPH MUTINDA KALUNGU ::: APPELLANT**

**VERSUS**

**REPUBLIC ::: RESPONDENT**

Coram: J. W. Mwera J.

Appellant absent

Orinda State Counsel for Respondent

C.C. Muli

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**JUDGEMENT**

The appellant was charged under S. 145(1) Penal Code in that on 29.11.99 at 5 p.m. at Kinze sublocation, Athi Location Makueni, he had carnal knowledge of Nduku Kiteto a girl under the age of 14 years. There was an alternative charge under S. 144(1) Penal Code – indecent assault.

After hearing six (6) prosecution witnesses and the appellant the Learned Trial Magistrate rose, wrote and later delivered a judgement in which the appellant was found guilty of the main charge. He got 12 years, 6 strokes of the cane plus hard labour.

This appeal was that the prosecution did not move its case beyond a reasonable doubt and that the lower court relied on weak evidence. That the defence case was not properly considered.

The appellant was unable to attend the trial of his appeal at his own expense. Thereat, the Learned State Counsel submitted that evidence from the complainant (P.W.1) her brothers (P.W.3 and 4), buttressed by with medical evidence (from P.W.5) supported the charge in all respects. That the sentence fitted the serious offence.

On reviewing the whole of the lower court record this court is of the view that the conviction was on consideration of all evidence carefully. The Learned Trial Magistrate wrote a long and analytical judgement looking at both the prosecution and defence cases. He was satisfied that the appellant was

guilty under S.145(1) Penal Code and this court agrees.

The Learned Trial Magistrate was satisfied that the complainant was too young to understand the nature of testifying on oath. She gave a long and detailed unsworn statement, how the appellant a stranger, met her by the roadside herding at about 4 p.m. He held slapped and caught P.W.1's throat so that she could not scream. He had carnal knowledge of her. She felt pain and bled seriously. When the appellant left taking a certain road to Kalawa P.W.1 informed her mother of the incident and she in turn instructed her 2 sons to follow this man. The rapist had some missing teeth, he wore a jeans long trousers, a striped shirt and carried a small radio a black bag and wore a cap. After P.W.1 testified (unsworn) it may have been in error going by the typed record of the lower court, that she was cross examined. However she seemed to have answered the appellant squarely.

The medical evidence (Exh.P8, P3) showed that the complainant was 13 years of age and Dr. Joseph Mavangi (P.W.5) examined the complainant who had been sexually assaulted 4 days earlier. So as at this point it can be said that the complainant a female aged below 14 years of age had been sexually assaulted. Next is by who?

Benedict Mumo (P.W.3) and Geoffrey Muange (P.W.4) and others got the story and description of the strange child molester, that the appellant was from P.W.1. They followed and caught up with him on the way to Kalawa. When stopped the appellant appeared ready to strike his arresters. He denied molesting Nduku but he was held. He fought and ran into the bush. His red cap fell and P.W.3 took custody of it.

The following day the hunt continued and the appellant was arrested when he was about to board a matatu at Kiholekyani. All this and more was carefully set out in the lower court judgement. Ultimately in police custody, P.W.1 recognized her assailant. He was charged accordingly. The defence evidence was also laid out by the Learned Trial Magistrate.

Having done what ought to be done on this first appeal this court is satisfied that conviction was on proper evidence. It was reliable and it is consistent inspite of the course the – appellant was followed and arrested. There is no error as regards his identity or the offence he committed. P.W.1 suffered grievous harm. The Learned Trial Magistrate heard all in mitigation and set out that the offence was aggravated and serious. AIDS was much around and that the law ought to protect young girls.

Under S. 145(1) Penal Code the maximum sentence is 14 years, hard labour with strokes. Here 12 years was handed down plus 6 strokes and hard labour. This court has no reason to interfere in it.

In sum this appeal is dismissed in its entirety.

Judgement accordingly.

Delivered on 26th March 2001.

**J. W. MWERA**

**JUDGE**