

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.89 OPF 2000

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.3665 of 1999 of the Chief Magistrate's Court at Mombasa –Ms. B. Maloba, SRM)

BENARD MAITHYA MUTUKU APPELLANT

- versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was charged with an offence of attempted defilement of a girl contrary to Section 145(2) Penal Code, with an alternative count of indecent assault contrary to Section 144(1) Penal Code. After trial he was found guilty and convicted and sentenced to the second count. He now appeals against the conviction and sentence. He complains that the trial magistrate misdirected herself by convicting on the evidence of PW.1 only without corroboration, that trial magistrate erred in convicting where there were no injury seen by medical examiner, and that the sentence is excessive.

I have perused the record and the evidence of prosecution. The evidence of the complainant PW.1 is credible. She could not scream because the Appellant held and covered her mouth with his palm. However she managed to get out and she immediately reported to her father. Her father got hold of the appellant and he and complainant and a neighbour proceeded to police station. On the way the appellant escaped and ran away. However the report was made. The fact that she was seen by her father getting out of the house of the appellant and that she told her father without hesitation what had happened to her is in her favour. Also that she was ready to report to police immediately goes to strengthen her evidence.

The offence as charged of touching the private parts of the complainant is indecent assault. I see no merit in the complaint. Considering all the evidence and the circumstances surrounding, I find no merit in the Appellant's grounds of appeal. The sentence of 4 years and 2 strokes of the cane is not harsh or excessive and I decline to interfere with the trial magistrate's discretion in sentencing. The appeal is hereby dismissed.

Dated at Mombasa this 21st Day of November, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in present of Appellant and State Counsel Ogoti.

J. KHAMINWA

COMMISSIONER OF ASSIZE