

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 486 OF 2013

(FORMERLY NYERI HCC CRIMINAL APPEAL NO. 106 OF 2006)

(Appeal against conviction and sentence in Kigumo Criminal Case No 469 of 2005 – L. Nyambura,
SRM

FRANCIS MBURU MUKURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Francis Mburu Mukuria**, was convicted after trial of the alternative charge of **indecent assault on a female** contrary to **section 144(1)** (now repealed) of the **Penal Code**. He was on 06/04/2006 sentenced to serve three (3) years imprisonment. He was acquitted of the main charge of defilement contrary to section 145(1) (also since repealed) of the Penal Code. He has appealed against both conviction and sentence. On 28/06/2006 he was admitted to bail pending disposal of the appeal.
2. The man challenge to the conviction is on evidence. Learned counsel for the Appellant submitted that there was not sufficient evidence to sustain the conviction in that the testimonies of the witnesses were conflicting and contradictory.
3. Learned prosecution counsel conceded the appeal upon the basis of lack of proof beyond reasonable doubt. Counsel also pointed out that no proper **voire dire** examination of the complainant, a child of tender years, was conducted by the trial court.
4. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusion regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses, and I have given due allowance for that fact.
5. The complainant (PW1) gave unworn testimony. She stated that she was 12 years old; however, she also stated that she was in primary school standard 2. Ordinarily therefore she would have been about 8 years old. There is no record of a proper **voire dire** examination. The trial court simply stated: **“Witness does not understand the meaning of the oath. She will give unsworn statement.”** There was no other evidence of the complainant’s age.
6. I note from the evidence placed before the trial court that report of the alleged offence was made more than one month after the fact. It is also interesting that the Appellant was arrested and charged after he complained to the area Assistant Chief (PW3) and the area Chief (PW4) that his name was being besmirched by the complainant’s mother (PW6) and PW2 (a friend of PW6) to the effect that he had defiled the complainant. Although PW2 had held herself out as an eye-witness to the defilement (which she said she reported to the complainant’s mother - PW6 – after 2 weeks), her testimony is contradicted by the complainant’s mother (PW6), and it is doubtful that she was the eye-witness who she held herself out to be.
7. I am not satisfied that the offence of which the Appellant was convicted was proved beyond reasonable doubt. The conviction is unsafe and cannot be supported. Learned prosecution counsel properly conceded the appeal.

8. In the result I will allow this appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence imposed against him set aside. He shall be set at liberty unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 2ND DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 3RD DAY OF MARCH 2017