



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITUI**  
**CRIMINAL APPEAL NO. 91 OF 2015**

**D.M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's*

*Court Criminal Case No. 448 of 2007 by Hon. T. M. Mwangi S R M on 30/04/10)*

**J U D G M E N T**

1. **D.M**, the Appellant was charged as follows:-

**Count 1: Incest by Male** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **8<sup>th</sup>** day of **May, 2007**, at around **11.00 p.m.** in **Kitui District** of the **Eastern Province**, he had sexual intercourse with **M.M**, aged **12 years** who to his knowledge knew was his daughter.

2. On alternative he was charged with the offence of **Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **8<sup>th</sup>** day of **May, 2007**, at around **11.00 p.m.** in **Kitui District** of the **Eastern Province**, he committed an act of indecency with **M.M**, a child aged **12 years** by touching her private parts namely vagina.

3. **Count 2: Attempted Incest** contrary to **Section 20(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **11<sup>th</sup>** day of **May, 2007**, at around **8.00 p.m.** in **Kitui District** of the **Eastern Province**, he attempted to have sexual intercourse with **M.M**, aged **12 years** who to his knowledge was his daughter.

4. On the alternative he was charged with the offence of **Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **11<sup>th</sup>** day of **May, 2007**, at around **8.00 p.m.** in **Kitui District** of the **Eastern Province**, he committed an act of indecency with **M.M**, a child aged **12 years** by touching her private parts namely vagina.

5. He was tried, acquitted of the **1<sup>st</sup>** count and the alternative, then, convicted on the **2<sup>nd</sup>** count. No finding was made on the alternative count. Subsequently, he was sentenced to serve **eighteen (18) years imprisonment**.

6. Being dissatisfied with the judgment and conviction, the Appellant appealed on grounds that:

- Evidence adduced was in respect of defilement but not attempted defilement.
- No exhibit was availed to support the prosecution's case.
- Accepting evidence of PW2, the mother of the Complainant whom the Appellant had quarreled with a few hours prior to the alleged crime was erroneous.
- Failure to find that the Appellant's rights were infringed as he was detained and arraigned in court past the required time was erroneous.

7. The case as presented by the Prosecution was that on the **8<sup>th</sup> May, 2007**, at night PW1 **M.D.M** a child aged **13 years old** was asleep in their room when the Appellant, her father carried her to his bedroom and had carnal knowledge of her. After the act, he took her back to her bed. She bled from her vagina following the incident but had a bath. Her mother who was away from home returned the following day, the **9<sup>th</sup> May, 2007**, but she did not tell her what transpired.

8. On the **11<sup>th</sup> May, 2007** she was at the Appellant's shop when he asked her to carry some items to the house. In the course of ferrying the items as instructed, the Appellant told her to go and remove the posho mill's conveyor belt and take to him. She complied and started pushing a wheelbarrow. Subsequently the he Appellant seized the opportunity to carry her off on his shoulders. He took her to his posho mill and as he removed her underpants she heard her mother calling her. PW2, **A.K.M**, her mother eventually found them at the posho mill and demanded to know what was happening. The child explained what had happened.

9. On the **12<sup>th</sup> May, 2007** she was treated at **Kitui District Hospital**. Further investigations carried out culminated into the arrest of the Appellant who was subsequently charged.

10. When put on his defence the Appellant stated that his house had one bedroom and one sitting room. His children used to sleep with their paternal grandmother except their last born. Denying having engaged in sexual intercourse with the Complainant, he stated that on the material date she was with her grandmother. He alluded to having seen the Complainant at **8.30 p.m.** at his mother's kitchen in her presence. The following morning he saw her as she was going to school.

11. Further, he testified that on the night of **11<sup>th</sup> May, 2007** the Complainant went to assist him carry some goods. They put the items on the wheelbarrow and closed down the shop. He left her outside as he closed his posho mill. He was inside the posho mill with the watchman, **Kittho Muthemi** as the Complainant waited outside. He heard the Complainant crying, on going outside she said that she had been beaten by her mother (PW2) who had told her to allege that he had defiled her. He concluded his testimony by alleging that by then he had a sour relationship with his wife as she was carrying on business without his permission.

12. He called his mother, **K.M** as a witness who testified that on the **8<sup>th</sup> May, 2007** she slept with the Complainant and her siblings at her house as usual as her parents' house is small. She denied the allegation that the Appellant took away the Complainant.

13. Regarding the **11<sup>th</sup> May, 2007**, she stated that PW2 was the one cooking. On finishing she went to check on PW1 as she had been away for long. All over a sudden she heard PW1 screaming. She went to find out what was happening. On asking what the problem was PW2 told her that the Appellant had defiled the Complainant. She asked the Complainant to confirm the allegation but she denied. The Appellant was in company of another person.

14. DW3 **Kittho Kithemi**, stated he was a watchman and was on duty at the posho mill on the material date. It was his testimony that as the Appellant closed down the business, his daughter the Complainant

went to assist him carry goods home using a wheelbarrow. The Complainant stopped as the Appellant returned to the posho mill to disengage the belt conveyor. He went in with the Appellant and while inside he heard a child scream. On going outside they found PW2 with PW1. The Appellant enquired what was wrong only to be told by PW1 that she had been beaten by PW2. He denied having seen the Appellant defile the Complainant.

15. The learned trial magistrate considered evidence adduced and found that the child was examined four (4) days later; there was no proof of penetration hence acquitted the Appellant on the 1<sup>st</sup> count and its alternative.

16. On the second count she found that the Appellant attempted to penetrate the Complainant. She cautioned herself and convicted the Appellant on the main count and made no finding on the alternative count.

17. This being the first appeal my duty is to re-evaluate evidence adduced at trial and to draw my own conclusions bearing in mind the fact that I neither saw nor heard witnesses who testified (**See Njoroge vs. Republic (1987) KLR 99**).

18. On the first count, it was not in doubt that the Complainant was the Appellant's daughter. It was alleged that the Appellant had sexual intercourse with the Complainant on the night of **8<sup>th</sup> May, 2007**. PW2, the Complainant's mother was away from home then. The Complainant stated that she did not divulge the information to any person because she feared she would be assaulted by the Appellant.

19. The Complainant was subjected to medical examination. Her hymen was broken which was a sign of forced vaginal penetration. No injuries were however seen in the genitalia. The child was taken to hospital for treatment four (4) days after the alleged incident. PW5, **Charles Mutuku Muturi** one of the Clinical Officers who examined the Complainant stated that he was not able to tell what duration of time had passed from the time the hymen broke. He went on to state that:

***“Once hymen is broken that would be cut wound. The breaking produces a tear and I cannot tell if there was a tear.”***

On cross examination he stated that it could not be ascertained whether or not the hymen was freshly broken or not.

20. PW6 **Martin Njue**, another Clinician who produced medical documents in evidence stated that from the findings of one **Kamweya** a clinician who first saw the Complainant there was no direct evidence of penetration.

21. Based on evidence adduced the trial magistrate made a finding that penetration was not proved. Consequently acquitted the Appellant. There was no evidence adduced to support the alternative count hence she also acquitted him of the charge. I have absolutely no reason to fault the learned magistrate on that finding.

22. With regard to the second count it is stated in particulars of the offence that the Appellant attempted to have sexual intercourse with the Complainant. Evidence adduced was that the Appellant owned a shop that was situated near his homestead. On the material date the Complainant had gone to assist the Appellant to carry home some items using a wheelbarrow. She was sent to the posho mill to disengage a belt conveyor from the machine. Having done so as she pushed the wheelbarrow the Appellant lifted her, put her on the shoulders and took her to the posho mill. He started removing her underpants and she heard her mother calling her. Later on her mother demanded to know what was happening and she disclosed that the Appellant attempted to remove her underpants. PW2 on the other hand stated that as she looked for PW1 and the Appellant whom she had gone to assist she heard PW1 crying from inside the posho mill and when she called out she answered and later told her that the Appellant had attempted to remove her panty.

23. The contradiction in evidence is noted. Whether or not the Appellant attempted to remove the Complainant's pants is evidence of PW1. In her judgment the trial magistrate appreciated the fact that there was no independent eye witness to the removal or attempted removal of PW1's pants by the Appellant. She cautioned herself on that fact and went on to state thus:

*“..... I find DW1 had attempted to penetrate PW1. I have warned and cautioned myself further that I did not see or hear PW1 as her evidence was taken by another magistrate but nevertheless I had no reason to dispute her evidence. In fact it's clear from the record that PW1 had remained steadfast and consistent despite her thorough and extended cross examination by the defence. The accused was represented by counsel so the accused cannot be heard to say that this court did not comply with provisions of Section 200 of the Criminal Procedure Rules when I took over this case.” I invoke Section 124 of the Evidence Act and I state that for all the reason given in my judgment that I had no reason to disbelieve the evidence of PW1 who was the victim of the Sexual Offence.”*

24. When the learned magistrate took over the case from **M. O. Kizito R M** there was no compliance with **Section 200** of the **Criminal Procedure Code** as she appreciated in her judgment. She had no opportunity of observing PW1's demeanor therefore it would be difficult to assess her as witness considering the fact that her predecessor did not record anything to do with her demeanor.

25. That notwithstanding, attempting to have sexual intercourse would mean attempting to penetrate the Complainant's genitalia using the Appellant's genital organ. No evidence of such an attempt was adduced.

26. With regard to the alternative count of committing an indecent act with a child, it is stated that the Appellant touched the Complainant's private parts namely vagina. In her evidence the Complainant made no allegation of the Appellant having touched her private parts. Therefore there was no evidence to support the charge.

27. It has been submitted that the Appellant should have been acquitted on grounds that his constitutional rights were infringed. The charge sheet shows that the Appellant was arrested on **15<sup>th</sup> May, 2007** and arraigned in court on **23<sup>rd</sup> May, 2007** when the plea was taken. It has been held now and again that an allegation that constitutional rights have been breached does not result into an acquittal (**see Julius Kamau Mbugua vs. Republic (2010) eKLR**).

28. From the foregoing, it is apparent that the conviction of the Appellant was unsafe. In the result, the appeal is allowed. The conviction is quashed and sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

29. It is so ordered.

**Dated, Signed and Delivered at Kitui this 9<sup>th</sup> day of March, 2016.**

**L. N. MUTENDE**

**JUDGE**