



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 75 OF 2011

JOHN ITHALII MUGAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No 422 of 2010 of the Chief Magistrate's Court at Maua by Hon. R. Makungu – Senior Resident Magistrate)

JUDGMENT

The appellant, **JOHN ITHALII MUGAMBI**, was Charged with an Offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 24th day of January 2010 at *[particulars withheld]* village, in Igembe within Eastern Province intentionally caused his penis to penetrate the vagina of **M.N** a child aged 7 years. Alternatively, he unlawfully and intentionally touched the complainant's vagina.

The appellant was tried and was convicted in the alternative charge and sentenced to fifteen years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person and raised two grounds of appeal namely;

1. That the trial magistrate did not consider his defence.
2. That the learned magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

The state conceded to the appeal and was represented by Mr. Musyoka, the learned counsel.

The facts of the case are briefly as follows:

When the complainant went to fetch water, the appellant followed her from behind. He pulled her near some bananas, removed her clothes, lay on her and started to have sex with her. He left her when he saw Muturii.

The appellant denied the allegation and contended that he was framed up due to a land dispute.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

Immediately one reads the complainant's evidence, it emerges that one needs to tread with a lot of care. She talks casually about the appellant having sex with her. Ordinarily one would expect a child of this age to give a narrative that would be interpreted as having sexual intercourse. It is worth noting that nowhere does she talk of any pain. This is a seven years old child allegedly having sex with an adult!

The version of **P.W (2)** is very different from that of the complainant. According to him, it was the appellant who suggested to the complainant that they go and fetch some water. When the two took long to return, he went to check on them. He found them in a banana plantation. The appellant had placed the complainant on some banana leaves and he was on top of her. When the appellant saw him, he pulled up his pair of trousers and went to close the tap. He (the appellant) then went away. Unlike the complainant, he did not testify of the appellant having promised them any money if they did not inform anybody.

Other than the HIV status the medical examination did not reveal anything to suggest that the complainant was defiled contrary to what she testified.

The Court of Appeal in the case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held: **“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”**

PW1 and PW2 painted a picture of themselves as such a witness. The learned trial magistrate had no evidence at her disposal on which to convict the appellant. I therefore agree with the learned state counsel when he threw in the towel and conceded the appeal. Consequently I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 11th day of May 2016

KIARIE WAWERU KIARIE

JUDGE