



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 7 OF 2016**

**PETER MWENDWA ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**(From the conviction and sentence in Kyuso PM Criminal Case No. 134 of 2014 – B. M. Mararo PM)**

**JUDGMENT**

The appellant was charged in the magistrate's court at Kyuso with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 5th April 2014 at about 2pm in Tseikuru District within Kitui County intentionally attempted to cause his penis to penetrate the vagina of MK a child aged 12 years. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place and time intentionally touched the breasts of MK a child aged 12 years with his hands.

He pleaded not guilty to both counts. After a full trial he was convicted on the alternative count of committing an indecent act with a child and sentenced to serve 12 years imprisonment.

Dissatisfied with the decision of the trial, the appellant has come to this court on appeal. He filed his initial petition of appeal in May 2015. He however later filed a hand written petition of appeal and written submissions both of which were in Kiswahili language. He stated in court during the hearing of the appeal that he relied on the written submissions. I have perused and considered the said written submissions.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal and said that the alternative count was proved. Counsel submitted that the appellant in his defence did not contradict the prosecution evidence.

In response to the Prosecuting Counsel's submissions, the appellant submitted that Pw1 and Pw3 tendered contradictory evidence. He said that a woman who was mentioned in the evidence of the prosecution was not called to testify. He asked the court to find out the truth as he had been framed for the offence.

In brief the facts of the case are that the complainant Pw1 was a school going girl in class 2. The appellant was a person known to her and on the 5th of April 2014, the appellant was told by the mother of the complainant Pw2, to send two jericans of water to their home. When the appellant arrived he met the complainant and another child Pw3 N M. He then asked Pw3 to go and get fire from Kasyoka's home and when the complainant entered to the house, the appellant followed her, got hold of her breasts and fell her down where upon she screamed and the other child Pw3 came back. The appellant then ran away.

The incident was reported to the mother of the complainant Pw2 M M. The appellant was then traced and arrested and charged.

When put on his defence, the appellant gave an sworn statement. He denied committing the offence and said that the mother of the complainant Pw2 was previously his lover and that they parted ways. He stated that the police man who arrested him was the person who became the lover of the mother of the complainant.

This is a first appeal. As a first appellate court I am required to re-examine all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance to that fact. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. I have considered the submissions of the appellant and the prosecuting counsel, both oral and written. I have also perused and considered the judgment.

It is clear that the appellant and the complainant knew each other well before. It is also clear that the appellant was known by the mother of the complainant before. The evidence on record is that he was actually sent on that day to bring jericans of water to their house. The appellant said that he knew the mother of the complainant before but his story was that they were lovers whose relationship had broken.

It is clear therefore that there could not be any possibility of mistaken identity. In my view it was established that the appellant was at the home of the mother of the complainant and met the complainant Pw1 on that day in the afternoon at around 2pm.

In cases of indecent act the age is not a material factor. In my view the appellant indeed committed an indecent act with the complainant Pw1. With such an indecent act, medical evidence also does not play a big role, as usually there will be no traces of injuries caused by an indecent act which is principally caused by a mere touch.

When the appellant talks of a grudge due to a relationship gone sour with Pw2 the mother of the complainant, that story in my view was an afterthought and farfetched. Though appellant cross examined Pw2 the mother of the complainant suggesting that they were lovers, from the record the appellant was actually at the house when the incident occurred and Pw2 was not at home. In my view it was very unlikely that the girl Pw1 and her sister Pw3 would have fabricated a story against the appellant in the absence of the mother Pw2. In my view the conviction was very founded.

The minimum sentence for the offence was 10 years imprisonment. The appellant was sentenced to serve 12 years imprisonment. I find no aggravating reason to justify the sentence above the minimum sentence. I will set aside the sentence and impose a sentence of 10 years imprisonment.

I dismiss the appeal on conviction. I however set aside the sentence and order that the appellant will serve a sentence of 10 years imprisonment from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa this 2nd day of September 2016**

**GEORGE DULU**

**JUDGE**