



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 319 OF 2010

MUNYAO KITHEKA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. T.M. Mwangi (RM) delivered on 11/11/2010 in Kitui Senior Principal Magistrate Criminal Sexual Offence Case No. 8 of 2010)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Munyao Kitheka** was charged with the offence of **attempted defilement** contrary to **section 9 (1) (2) of Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 11th March 2010 at about 11.00 p.m. in **Kitui District** of the **Eastern Province**, unlawfully and intentionally attempted to have a carnal knowledge of **K K** a girl aged 14 years.

2. In the alternative the Appellant was charged with the offence of **indecent act** with a girl contrary to **section 11 (6) of Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on 11th March 2010 at 11.00 p.m. in, **Kitui District** of the **Eastern Province** committed an act of indecency with **K K** by touching her private parts namely vagina.

3. When arraigned before the trial court, the Appellant pleaded not guilty. The case proceeded to a full trial.
4. The case for the prosecution was that on the material day at about 11.00 p.m., the complainant, PW1 **K K** a 14 year old girl was in her room sleeping. The Appellant who was their family employee entered the room and asked her to remove her panties. The complainant refused. The Appellant then proceeded to remove the complainant's panties and started touching her vagina. Another domestic employee, PW3 **Eliud Shiundu** entered the room and switched on the solar lights. He saw the Appellant under the bed and asked the Appellant what he was up to. The Appellant then tried to convince him not to tell their employer anything.
5. The matter was however reported to the child's mother, PW1 **T K**. A report was made to the police. The Accused was arrested and subsequently charged with the present offence.

6. When put on his defence, the Appellant stated that he was arrested on grounds of drunkenness. The Appellant further stated that he wanted to leave his employment. He stated that he had not been paid arrears of Kshs.14,400/=. The Appellant blamed this case on bad blood that developed after he made the demand to his employer for payment of the arrears.
7. The trial court found the prosecution case proved beyond reasonable doubts. The Appellant was convicted for the offence of sexual assault contrary to **section 5 (1) (a) (i)** as read with **subsection 2** of the **Sexual Offences Act**. The Appellant was sentenced to 12 years imprisonment.
8. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-
 - a. **That the date of plea was taken and the coram was not reflected.**
 - b. **That the trial was not conducted in a language understood by the Appellant.**
 - c. **That there was lack of corroboration.**
 - d. **That the sentence imposed was harsh and excessive.**
9. The appeal was canvassed by way of written submissions which I have duly considered.
10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
11. The complainant's evidence is that the Appellant removed her underwear and started touching her vagina with his hands. The complainant's evidence is corroborated by that of PW2, **Eliud Shiundu**. PW2's evidence is that he went looking for the Accused and found him in PW3's room. It was PW2's evidence that he switched on the solar lights in the complainant's room and saw the Appellant and even conversed with him.
12. The complainant's mother, PW1 **T K** shows consistency between what the complainant told her at the material time and what the complainant's evidence in court.
13. The evidence of the Investigating Officer, PW4 **PC Joseph Karuu** confirmed that a report was made to the police station and investigations commenced.
14. The Clinical Officer PW5, **Michael Makau** produced a P3 form which confirmed the complainant's age as 14 years. The Clinical Officer found injuries on the complainant's female genitalia and came to the conclusion that there was no penetration.
15. The defence of a frame up due to a grudge due to non-payment of salary arrears was not convincing. The issue was not raised when the complainant's mother testified. Likewise, no issue of any grudge was raised when PW2 **Eliud Shiundu** testified. The evidence of the complainant is that she had lived in harmony with the Appellant. The trial magistrate who had the advantage of seeing the witnesses testify believed the complainant. I have no reasons to differ with the findings of the trial magistrate. The Prosecution case discharged their burden of proof. The defence raised did not cast any doubts on the same.
16. On whether the coram and the date of plea were reflected, the first line of the proceedings seems to have gotten worn out. It is however clear that the plea was taken.
17. The language of the court is reflected as **Kiswahili** and **Kikamba**. The Appellant participated in the proceedings and even carried out cross examination. There was a court clerk present throughout the proceedings. As stated by the court of Appeal in **Said Hassan Nuno v Republic (2010) eKLR:-**

“We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case.”
18. On sentence, I note that the Appellant was convicted under **section 5 (1) (a) (i)** as read with **section 5 (2)** which provides for a sentence of not less than ten (10) years. However, the evidence on record proves the offences charged. There was therefore no reason to convict for a different offence. I will correct that position. Consequently, the Appellant is convicted on the main count of attempted defilement contrary to **section 9 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The sentence meted out is within the law even for the offence of defilement. This court will therefore not interfere with the same.
19. The appeal has no merits and is dismissed.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 11th day of February 2015.

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JUDGE