



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 98 OF 2008

MUNYOKI MWATHA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. T.M. Mwangi (RM) delivered on 24/4/2008 in Kitui Senior Principal Magistrate's Court Criminal Case No. 1159 of 2006)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Munyoki Mwatha**, was charged with the offence of attempted defilement of a girl under the age of sixteen years contrary to **section 145 (2)** of the **Penal Code**.

The particulars of the offence were that on the 3rd day of November 2006 at around 3.00 p.m. at *[particulars withheld]* village, **Nyanyaa Sub-location, Yatta Location** in **Kitui District** of the **Eastern Province**, attempted to have carnal knowledge of **M M** a girl under the age of sixteen years.

2. In the alternative, the Appellant was charged with the offence of indecent assault on female contrary to **section 144 (1)** of the **Penal Code**.

The particulars of the offence were that on the 3rd day of November 2006 at around 3.00 p.m. at *[particulars withheld]* village, **Nyanyaa Sub-location, Kitui District** of the **Eastern Province** unlawfully and indecently assaulted **M M** a girl of 11 years by touching her private parts namely breasts.

3. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted under what the trial magistrate referred to as "transitional provisions made pursuant to **section 48** of the **Sexual Offence Act**" for the offence of attempted defilement under **section 9 (1)** as read with **section 9 (2)** of the **Sexual Offences Act**. The Appellant was sentenced to ten years imprisonment.

4. The Appellant was dissatisfied by both the conviction and sentence and appealed to this court on the following grounds:-

- **That there was no proof beyond reasonable doubts.**
- **That the Appellants constitutional rights were violated due to overstay in police custody.**

- **That some crucial witnesses were not called.**
- **That the burden of proof was shifted to the Appellant.**
- **That the Appellant was ignorant of the law and did not know how to defend himself.**

5. During the hearing of the appeal, the Appellant relied on his grounds of appeal and written submissions. The submissions essentially expounded the grounds of appeal.

6. The learned counsel for the State opposed the appeal. It was submitted that the complainant's evidence was that of recognition in broad daylight. The court was referred to the transitioned clauses under **section 48** of the **Sexual Offences Act** and urged to sentence the Appellant under the **Penal Code** as charged.

7. 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**.

8. The case for the prosecution was that on the material day the complainant, PW2 **M M**, an eleven (11) year old standard seven (7) pupil arrived home from school at about 3.00 p.m. That her grandmother sent her to tell the Appellant who was their employee to set the cows free. The complainant went to the Appellant's house which was in the same homestead and gave him the grandmother's instructions. That the Appellant instead of going on his errand got hold of the complainant and placed her on the bed. That the Appellant undressed the complainant then unzipped his trousers and lay on top of the complainant and started to defile her. The complainant screamed and the Appellant then got up.

9. The complainant got up, opened the door and went outside. The complainant saw her mother, PW1 **M M N** outside and ran to her and explained to her what had happened. The mother reported the matter to the father. The father escorted the Appellant to **Kwa Vonza Police Patrol Base**. The complainant was escorted to **Kitui Police Station** where she was issued with a P3 form and taken to **Kitui District Hospital** for treatment.

10. The complainant was examined by a Clinical Officer and the P3 form filled in. The Clinical Officer arrived at the conclusion that no penetration had taken place. After investigations the Appellant was charged.

11. When called upon to defend himself, the Appellant elected to remain silent.

12. The court carried out a *voire dire* before receiving the complainant's evidence. This was superfluous. The complainant gave her age as 11 years.

13. **Section 19** of the **Statutory Oaths and Declarations Act Cap 15 Laws of Kenya** provides that:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”

14. Under **Section 2** of the **Children's Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (See also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).

15. The complainant's evidence details what transpired when she went to call the Appellant. Her evidence is that the Appellant removed her trouser. She further stated that she had not worn anything

underneath the trouser. That the Appellant unzipped his trouser and lay on top of her and started defiling her but that she screamed and he stopped. This narrative leaves little to the imagination. The Appellant's intention was to defile her. The complainant's report to her mother soon after the incident is consistent with the complainant's evidence in court.

16. The medical evidence by the Clinical Officer, PW4 **Joseph Katothya** is that there was no evidence of defilement, hence the charge of attempted defilement. The P3 form gave the complainant's age as eleven (11) years. The Investigating Officer PW3, **Beatrice Koshe** gave evidence that confirms a report was made to the police and investigations carried out.

17. The trial magistrate believed the complainant's evidence, hence the conviction. The offence took place in broad daylight. The Appellant was known to the complainant as their family's employee. There is therefore no possibility of any mistaken identity. The complainant's mother (PW2) also confirmed that the Appellant was their employee at the material time.

18. The Appellant in his defence opted to remain silent. The prosecution evidence however has proved the offence charged beyond reasonable doubts.

19. Nothing turns on the issue of overstay in police custody. That point is now moot. The Appellant's remedy lies in a civil action. ((See for example **Julius Kamau Mbugua –vs- Republic - Criminal Appeal Nrb. 50 of 2008**).

20. Ignorance of the law is also no defence. After evaluating the evidence on record, I am satisfied that the Appellant was convicted on sound evidence. However, the trial magistrate fell into error when he convicted the Appellant under **section 9 (1) (2)** of the **Sexual Offences Act**.

21. Under **section 48** of the **Sexual Offences Act**, the transitional provisions under the first schedule in **section 3** provides as follows:-

“Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.”

22. With the foregoing, I correct the record to reflect the conviction to be under **section 145 (2)** of the **Penal Code**. The sentence of ten years is within the law. Consequently, I find no merits in the appeal and dismiss the same.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of July 2014.

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B. THURANIRA JADEN

JUDGE