



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 37 OF 2008**

*(Appeal from Original Conviction and sentence of the Senior  
Resident Magistrate's Court at Mumias in Criminal Case  
No. 710 of 2007 [E. K. MAKORI Esq., Ag.PM])*

SHADRACK ASHIKA ..... APPELLANT  
VERSUS  
REPUBLIC ..... RESPONDENT

**JUDGEMENT**

1. The Appellant herein, **Shadrack Ashika**, was charged with the offence of defilement of a child contrary to S.8 (1) as read with S.8 (3) of the Sexual Offences Act. It was alleged that on 27.4.2007 in Butere-Mumias District within Western Province, he unlawfully had carnal knowledge of C.M., a girl aged 12 years. He denied the offence, was found guilty and was sentenced to serve 10 years' imprisonment for the alternative charge of an indecent act with a child contrary to S.11 (1) of the Sexual Offences Act. It was alleged that he ***"indecently and unlawfully assaulted C. A. aforesaid by touching her private parts namely thighs"***. He has appealed against both the conviction and sentence.

2. I am obligated to analyse the evidence afresh and reach my own conclusion and I note that in the Appeal, three issues are raised;

- i. that the evidence of identification of the Appellant was not water-tight;
- ii. that the charges were instigated by a grudge between the Appellant and the family of the complainant;
- iii. that the sentence imposed was manifestly excessive;
- iv. that the evidence and the charge were inconsistent.

3. I have read the charge sheet as well as the record and I note that the indecent act complained of was that the Appellant allegedly touched the complainant's ***"thighs"***. Further, an indecent act is defined in S.2 of the Sexual Offences Act as ***"any unlawfully intentional act which causes –***

***a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.***

***b) exposure of any pornographic material to any person against his or her will, but does not include an act which causes penetration."***

4. It is instructive that the Appellant was acquitted of the offence of defilement and so I cannot in this judgment delve into that charge. Can it be said that the charge of indecent assault was proved beyond

reasonable doubt? The only relevant evidence of the offence was tendered by the complainant, PW2. In her evidence, she stated that “the Appellant was someone she used to see as he used to work for the D.O. at Ibokolo and that she knew him physically thereafter. (That she) came to know him after he did commit the offence on me.” Further, that she identified him using moonlight before he dragged her to a house nearby and then forcefully undressed her before defiling her.

5. In his judgment, the learned trial magistrate said that the charge of indecent assault was proved beyond reasonable doubt because the complainant’s “buttocks” were touched but nowhere in the charge sheet nor in the evidence were “buttocks” mentioned. There is also no mention of “thighs” in evidence and that area was the bodily part specifically mentioned in the charge sheet.

6. Where the evidence and the charge do not match, then it would be difficult to prove the charge – see **Ochieng vs R. [1985] KLR 252** on charges and proof thereof generally.

7. In this case, it is saddening that the Prosecution committed two very serious blunders, whether deliberately or otherwise;

a) the medical evidence on the charge of defilement was completely lacking thus leading to an acquittal on the main charge;

b) the nexus between the charge sheet (the way it was drawn) and the facts in evidence was lacking and now I must acquit on the alternative charge.

8. I was tempted to look at the evidence in totality and say that where an offender penetrates a victim there may well be contact between his sexual organ and the thighs but I would be advancing a theory not canvassed in evidence.

9. My hands are tied and although on the face of it, the Appellant may have committed an offence against the complainant, the case against him was not properly handled and the victim, sadly, will bear the scars of that omission.

10. Very, very reluctantly, I must uphold the submissions by Mr. Musiega for the Appellant and will allow the Appeal. The conviction is quashed, sentence set aside and the Appellant shall be released unless he is otherwise lawfully held.

11. Orders accordingly.

***Delivered, dated and signed at Kakamega this 3<sup>rd</sup> day of March, 2011.***

**ISAAC LENAOLA  
J U D G E**