



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Criminal Appeal 29 of 1995

ISAAC MUIRURI
.....APPELLANT

AND

REPUBLIC
RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Mr. Justice D. M. Rimita) dated 23rd September, 1994

IN

H. C. CR. A. NO. 128 OF 1994

JUDGMENT OF THE COURT

This is a second appeal by the appellant Isaac Muiruri from his conviction and sentence by the Senior Resident Magistrate, Nakuru, on a charge of defilement of a girl under 14 years of age contrary to section 145(1) of the Penal Code.

The evidence adduced by the prosecution was that on 1st July, 1992 at about mid-day E.W (P. W. 1), an infant then aged about 2 1/2 years, upon her return from a nearby kiosk complained to her mother that "she had been done" by the appellant. The mother who was conceivably perturbed was curious and wanted to know what E.W meant. E.W then lifted her dress and showed her private parts. The mother observed male semen discharged within E.W's genitalia. On realising what had happened the mother rushed outside her house and begun screaming. The appellant who had been standing a few metres away outside his parents' gate fled. Within no time members of the public gathered and realising what had happened, gave chase and caught up with the appellant whom they administered some beating. He told K (P. W. 3) that he had committed the offence due to influence of bhang.

There is no room for doubt, having regard to the medical evidence, that the complainant was carnally assaulted, and the only question for determination is as to whether the appellant was her assailant. Learned counsel for the Republic has invited us to find that there is ample evidence to implicate the appellant with the commission of the offence.

Under section 124 of the Evidence Act, where the evidence of a child of tender years is admitted on

behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

The appellant and the family of the complainant were neighbours at [particulars withheld] Village. The appellant was standing by his parents' gate watching E.W enter her mother's house. On hearing screams he fled without enquiring the cause. He told K (P. W. 3) and others that he had defiled the girl.

It is worthy of note that E.W was not seen for about 25 minutes after failing to get money to buy sweets from the appellant's mother's kiosk. This was sufficient period, long enough for the appellant to commit the offence.

In our view, the irresistible inference from these facts, when considered in the light of other circumstantial evidence is that the appellant committed the offence with which he was charged. The record shows that in convicting the appellant, the learned trial magistrate warned herself of the need for corroboration of the evidence of the infant complainant in identifying the appellant as her assailant and came to the inevitable conclusion that the evidence of the complainant implicating the appellant was sufficiently corroborated. The learned judge in the superior court correctly concurred. The other complaints made by the appellant in this appeal were directed to showing that on the facts he should not have been convicted but the grounds raised no issues of law. We are unable to find that there was a question of law wrongly decided by either of the courts below. We think, therefore, that this appeal is devoid of merit and should be dismissed.

We are however not satisfied that enhancement of sentence was properly carried out. The reasons advanced by the prosecution for enhancement were not properly set out. We therefore restore the sentence of 6 years imprisonment, meted out by the trial court.

Dated and delivered at Nakuru this 1st day of March, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL