

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 163 OF 1987

MUSYOKA..... APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

September 3, 1987 **Torgbor J** delivered the following Judgment.

The appellant was convicted for indecent assault and sentenced to 18 months imprisonment and 10 strokes of the cane.

The appellant counsel confined himself to grounds 1, 2 and 5 only in the supplementary petition of appeal. The complainant's evidence was not corroborated as it should have been in a sexual offence case, that the complainant, being a minor, her evidence required corroboration as matter of law and that there was no medical evidence incrimination the appellant.

The record shows that the complainant was a minor, her age being recorded by the trial magistrate as 10 years. Her evidence was received after the magistrate appeared to have satisfied himself that the complainant though of tender years, was intelligent and understood the significance of giving evidence on oath. The complainant's evidence was that she was in the company of another girl called Mbula when they were accosted at the material time by the appellant who was their neighbour; that after ordering Mbula to go away, the appellant dragged the complainant into a nearby bush and after threatening her with a panga he carried, sexually assaulted her by putting his penis into her anus. She screamed and Mutunga PW 2 and Munyaka PW 3 came to her rescue whereupon the appellant ran away but was caught by PW 2 and PW 3 and other members of the public. The complainant was escorted to Matuu Health center and later gave statement to the police. Mbula (PW 5) also testified but it is observed that as her age was recorded as 13 years and she did not actually see the assault she could not in law and in fact after the corroboration required and may for that purpose be discounted.

PW 2 and PW 3 were both adults. On their way home on the material date and time they heard a girl screaming in a bush near the road. They entered the bush and found the appellant lying on the complainant. They found the appellant without his trousers and he was holding a panga and he ran away on seeing the said witnesses. They reported the incident to the complainant's father and to the local Kanu Youthwingers. Later they all followed and found the appellant at Kithioko an arrested him. They knew the appellant very well because they had been school mates and was also a neighbor.

In my view the evidence of PW 2 and PW 2 two adults who actually found the appellant without his trousers lying on top of the complainant and whom they found upon hearing the screams of the complainant at the material time would corroborate the complainant's evidence as to the indecent assault on her, and I am satisfied that the absence of a medical report about semen or physical injury on the complainant is not vital to conviction for the offence charged though it might have been desirable for the prosecution to produce such evidence if it existed.

The evidence of PW 4 the headman of the area who went and found the complainant in the said bush and crying and who told the headman that she had been assaulted by young man carrying a panga in part

corroborates the complainant's story as to the assault itself though not of the assaulter. It was also the headman's evidence that there was grass on the back of the complainant's head and her dress and buttocks were wet.

The unsworn evidence of the appellant was that he never saw the complainant on August 5, 1986. On his way home from work he was arrested. He said he had a grudge against the complainant's father who wanted him to be imprisoned. He added that the doctor had confirmed that he the appellant had not committed rape. There is no doctor's evidence or statement on the record before me. The trial magistrate did not accept the appellant's story and neither do I. He was seen at the scene of the crime during its commission by two persons. PW 2 and PW 3 who knew him well. He was arrested soon afterwards. On the evidence I am satisfied therefore that the conviction was proper and it is upheld. There is no merit in this appeal on the issues raised concerning corroboration and medical evidence. The sentence of the trial court not being excessive in all the circumstances of the case is upheld.

The appeal is dismissed.

September 3, 1987

TORGBOR

JUDGE