REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(Coram: Kneller, J A, Chesoni and Nyarangi Ag JJ A)

CRIMINAL APPEAL NO 36 OF 1984

BETWEEN

MUITA THUMI …… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from an order of the High Court of Kenya at Nakuru (Masime J)

dated 10th October 1983 IN

Criminal Appeal No 196 of 1983

JUDGMENT OF THE COURT

Muita Thumi, the appellant, was convicted of indecent assault on a female contrary to Section144(1) of the Penal Code and sentenced to five years' imprisonment with hard labour and twelve strokes of corporal punishment. He appealed to the High Court against conviction and sentence on the grounds that, H.W (PW1) and R.W (PW2) lied to the court when they said that, when they responded to the complainant's cry for help they stood outside the appellant's house; there was no medical evidence of rape; there was no medical evidence to prove the charge of indecent assault; he was not allowed to defend himself; the trial court did not consider the fact that had it been true that he committed rape, the matter would have been reported immediately and the sentence is long. Masime J dismissed the appeal summarily under Section 352(2), but the appellant has not complained about the order for summary rejection in his appeal to this Court. The grounds that related to rape were irrelevant as the appellant was not convicted of rape. Reading all the grounds of appeal in the High Court one may summarize them into two. First, there was no medical evidence to support the conviction and secondly the sentence is excessive. The first ground can be described as attacking the conviction on the ground that it was against the weight of the evidence on record. Indeed, medical evidence is not necessary to convict on the charge the appellant faced.

In the appeal before us, the appellant argued that the trial magistrate did not consider the fact that, he told the Court that the complainant consented to his indecently assaulting her and the complainant was his friend. The last ground of appeal is on the sentence. At his trial the appellant told the Court, in his unsworn statement, that they had played peaceful sex and the complainant was his girlfriend. The complainant told the Court that she was 12 years old. Subject to the proviso to Section 144(1), which was not raised, it is no defence to a charge of indecent assault on a girl under age of fourteen years to prove

that she consented to the act of indecency. Even if the appellant had proved consent by the complainant, which he did not, that would not have afforded him a defence, in as much as friendship could not be a defence to the charge. The appellant was correctly convicted.

The sentence is lawful and though the term of imprisonment is the maximum under the section it was merited for the appellant's barbaric act on a female child of twelve years. There is no merit in the appeal which we order to be dismissed.

Dated and delivered at Nakuru this of September 24 1984.

A A KNELLER

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JUDGE OF APPEAL

Z R CHESONI

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AG JUDGE OF APPEAL

J O NYARANGI

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AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR