



**IN THE COURT OF APPEAL**

**AT NAKURU**

**( Coram:Kneller JA, Chesoni & Nyarangi Ag JJA )**

**CRIMINAL APPEAL NO. 36 OF 1984**

**BETWEEN**

**MUITA THUMI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the High Court at Nakuru, Masime J)**

**JUDGMENT**

Muita Thumi, the appellant, was convicted of indecent assault on a female contrary to section 144(1) of the Penal Code (cap 63) 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 Hanah Wanjiku (PW 1) and Richard Wandiga (PW 2) 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, inasmuch 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 24th day of September 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

**DEPUTY REGISTRAR**