



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

**Criminal Appeal 132 of 2006**

**ALEX MWAGURE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Mombasa (Maraga, J) dated  
22<sup>nd</sup> November, 2004**

**in**

**H.C. Cr. Appeal No. 17 of 2003)**

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**JUDGMENT OF THE COURT**

Alex Mwangure, the appellant herein, was charged with and tried on one count of indecent assault contrary to section 144(1) of the Penal Code wherein it was alleged that on 8<sup>th</sup> day of November, 2003 at Migadini Village, Changamwe in Mombasa, the appellant indecently and unlawfully assaulted NN, a girl of the age of seven years, by touching her private parts. Upon conviction by a Senior Principal Magistrate at Mombasa, on 21<sup>st</sup> January, 2004, the appellant was sentenced to fifteen years imprisonment. The typed judgment of the magistrate shows at the end of it that the judgment was dated on 21<sup>st</sup> January, 2001, but that is obviously a typing mistake because the offence itself was alleged to have been committed on 8<sup>th</sup> November, 2003; the appellant’s trial started on 17<sup>th</sup> December, 2003 and was concluded on 7<sup>th</sup> January, 2004 when the appellant made his unsworn statement. The notes of the magistrate show that he reserved the judgment to 14<sup>th</sup> January, 2004 but it is obvious from the magistrate’s record that he was unable to deliver the judgment on 14<sup>th</sup> January, 2004 and was only able to deliver it on 21<sup>st</sup> January, 2004. This is confirmed by the warrant committing the appellant to prison for fifteen years, a copy of which is available in the magistrate’s file and is dated 21<sup>st</sup> January, 2004. So the date 21<sup>st</sup> January, 2001 appearing at the end of the magistrate’s judgment is clearly a typing mistake and it does not and has not in fact occasioned to the appellant any failure of justice. He did not raise any complaint in that regard.

Following his conviction and sentence by the trial magistrate, the appellant appealed to the superior court, but that court (Maraga, J) by its judgment dated and delivered on 22<sup>nd</sup> November, 2004, confirmed the appellant’s conviction by the magistrate; the learned Judge also confirmed the sentence of fifteen years imprisonment and thus dismissed the appellant’s entire appeal. The appellant now appeals to this Court for the second time and that being so, the Court can deal only with matters of law – see section

361(1) of the Criminal Procedure Code.

The brief facts upon which the prosecution relied in support of its charge against the appellant were that the girl – named in the charge-sheet as NN, was the daughter of JN (P.W 3) who was a neighbour to RNO (P.W 2). On the day in question at about 12.30 p.m., Nelly (P.W 1) who was aged seven years, was playing outside their house with another young girl. The appellant passed by and NN said that the appellant, in order to entice her, gave her Shs 4/= for buying “*fried potatoes*”. The appellant took the girl into a building which was under construction and according to NN, the appellant removed his trousers and then removed her knickers. He placed her on his lap. RN went out of her house to throw out some dirty water. She saw the dress of NN and became suspicious. She moved nearer to the building under construction and when she looked inside she saw the appellant who had lowered his trousers; she swore that she even saw the appellant’s male organ. The appellant was holding NN on his lap and NN’s knickers had been removed. RN summoned JN and they raised an alarm. The appellant abandoned the young girl and he started to run away. Neighbours caught him and he was taken to the police and charged. NN was subsequently examined by a doctor but nothing significant was noticed; that was not surprising because the appellant, by the time RN intervened, had not done anything to the young girl, apart from removing her under-pant and placing her on his lap.

The appellant’s answer to all these was that he had only gone into the building being constructed to urinate; that some women came and alleged that he had wanted to defile a girl; that they took his Shs 2,500/=, beat him up and delivered him over to the police. That was the position before the trial magistrate. Having set out the two conflicting versions put before him, the trial magistrate then found as follows:

**“The evidence of P.W 1 and that of P.W 2 clearly shows that the accused had removed his trouser. He was half-naked. He had removed the young girl’s underpants. He had placed her on his laps. The girl was naked. One wonders what intention the accused had.**

Obviously it was to commit a sexual offence. The accused ran away on seeing people rushing to where he was. He has denied the charge and given his side of the story. However, I find his defence to be a made up story hence reject it. There was corroboration on material evidence. The prosecution evidence was consistent, weighty and direct and points to the guilt of the accused person. All in all therefore, I find the accused guilty of the offence with which he is charged hence convict him as charged.”

And on the first appeal to it, the superior court, for its part, delivered itself thus:-

“I have carefully examined the lower court record and the evidence adduced before the trial magistrate. P.W 1 stated that the appellant removed her underwear after removing his own trousers and underwear. P.W 2 also saw the complainant child, P.W 1, without an underwear. She also saw the appellant’s penis. Like the trial magistrate I also believe the evidence of P.W 2 and see no reason why she would give false testimony against the appellant. The allegation that she held a grudge against him, raised for the first time in this appeal is clearly an afterthought and has no basis. Whether the appellant completely removed his trousers or lowered it is immaterial. As I have already said, I believe the evidence of P.W 2 which corroborates that of the complainant that the appellant exposed his penis and also removed the underwear of the complainant. With that evidence the charge of indecent assault against the appellant was clearly proved and I therefore dismiss the appeal against conviction.”

These are concurrent findings of fact by the two courts below. In his appeal before us, the appellant merely handed over to us hand-written submissions the contents of which he confessed not to be familiar with. We have looked at the written submissions and all they attempt to show was that the evidence of the prosecution witnesses was unworthy of belief. We do not agree with the appellant. The evidence of the prosecution witnesses was not in any way discredited and on the record before us, we have not been convinced that that evidence was of such a nature that no reasonable tribunal properly directing itself as to that evidence and the applicable law could have believed it. The evidence was clearly believable and was rightly believed by the trial magistrate and the learned Judge who heard the first appeal.

Issues like medical examination of the young complainant revealing nothing do not really carry the matter any further. Nobody alleged that the appellant had defiled the young girl. But the appellant removed his own trousers, removed the complainant's underwear; held her on his lap and showed her his penis. If those actions do not amount to an indecent assault, we do not know what would ever amount to one. In our view, the appellant was convicted on sound evidence which proved the charge against him beyond any reasonable doubt. The sentence imposed on him was lawful and cannot be a matter for this Court. The appeal, accordingly, wholly fails and we order that it be and is hereby dismissed. That shall be the order of the Court.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of July, 2006.**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**