REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 78 OF 2011

EZEKIEL SAMMY MBUVI …….... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 34 of 2009 by Hon. S. Gacheru, SRM, on 3/3/2011

JUDGMENT

1. **Ezekiel Sammy Mbuvi**, the appellant was charged with the offence of defilement contrary to **Section 8(3)** of the **Sexual** Offences Act No. 3 of 2006. Particulars of the offence being that on 31st day of August, 2009 in Machakos District, he unlawfully and intentionally committed an act which caused penetration with the genital organ of **D**
2. **MM** a girl aged 12 years.
3. In the alternative he faced a charge of committing an indecent Act with a child aged 12 years by touching her vxxxx using his pxxxs.
4. He was tried convicted and sentenced to twenty (20) years imprisonment on the main coun.t
5. Being aggrieved by the decision of the court, he appeals on the grounds that the trial magistrate erred in law by allowing the trial to proceed without adhering to the provisions of **Section 85(2)** and **88(1)** of the **Criminal Procedure Code;** and convicting and sentencing in the absence of crucial or uncalled witnesses, namely, the arresting officer.
6. At the hearing of the appeal, the appellant relied upon written submissions. In response thereto learned State Counsel, **Ms Karani** opposed the appeal. She summarized the case as presented by the prosecution and stated that penetration had occurred as there was a healing bruise on the vagina and the hymen was perforated; the age of the child was proved and the appellant was positively identified. She dismissed the appellant's defence as having lacked any probative value and called upon the court to uphold the conviction and sentence that was within the law.
7. This being the first appellate court, it has the duty to subject evidence adduced at trial to fresh and exhaustive examination so as to reach its own independent conclusion as to the guilt of the appellant. ***(See Okeno versus Republic (1972) E.A. 32).***
8. With regard to the first ground of appeal, it is a requirement for a person prosecuting a case to be appointed by the relevant authority. Previously it was the Attorney General who was required to make the appointment. Today the appointing authority is the Director of Public Prosecutions.
9. In his submissions the appellant faults the learned magistrate for failing to adhere to **Section 85(1)** of the **Criminal Procedure Code**. He stated thus:-

"Public Prosecutors appointed under Section 85(1) -

I quote "all police officers of the rank of Assistant Inspector or above are appointed public

officers for Kenya generally" This was under Legal Notice No. 234 of 1972"

10. This was the law prior to amendment in 2007. Following the amendment of the law, a Public Prosecutor means "… any person appointed under **Section 85** of the **Criminal Procedure Code"** . (See **Section 2** of the **Criminal Procedure Code**). The only requirement by **Section 85** of the **Criminal Procedure Code** is for the appointment to be by way of a notice in the Kenya Gazette.
11. **P.C. Muyei** is faulted to have prosecuted the case while he was of a lower rank than an Assistant Inspector. It has not been alleged that he had not been gazetted as a public prosecutor. This particular issue having not been raised, it is presumed that **P.C. Muyei** did prosecute the case in his capacity as a Public Prosecutor.
12. On the second ground of appeal the magistrate has been faulted for failing to warn himself that the arresting officer was crucial in the case. The prosecution called PW6, No. 91893 **P.C. Grace Otieno** who investigated the case and formed an opinion to charge the appellant. She stated that the appellant was arrested by her colleague **P.C Wachira** and taken to the Police Station and she was assigned duties of investigating the case. The fact of arrest was not in dispute.
13. In the case of ***Alfred Bumbo and Others versus Uganda Criminal Appeal No. 28/94 (SCU)*** it was held:-

> "***while it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All may depend on the circumstances of each case whether the police evidence is essential, in addition to prove the charges".***

14. The Investigation Officer investigated the case after the appellant was placed in custody. He was in custody following an arrest having been effected. There was no time he was released after his arrest on the 10th September, 2009. He was arraigned in court on the 14th September, 2009. Therefore failure to call the police officer who arrested him was not fatal to prosecution's case and by extension to his conviction.
15. A re-consideration of evidence adduced proves beyond any reasonable doubt that the complainant herein was a child aged twelve (12) years having been born on the 6/11/1997(vide child health card).
16. **Dr. Edwin Mwachama** examined her and found that indeed the vagina and hymen were penetrated. Her evidence that the perpetrator of the offence of defilement was the appellant was corroborated by that of **PW3, Peter Musyoka Sikuku** who found them in the act. The appellant's unsworn defence was considered by the trial magistrate and dismissed for lack of probative value
17. The trial magistrate having evaluated evidence adduced and having reached a proper conclusion, I have no basis of interfering with the decision. The sentence meted out is confirmed. Consequently, I find the appeal lacking merit. Accordingly, it is dismissed in its entirety.

DATED, SIGNED and **DELIVERED** at **KITUI** this **12TH** day of **FEBRUARY, 2015.**

L.N. MUTENDE

JUDGE