REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 273 OF 2010

DUNCAN MWAI GICHUHI…...……..….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 34 of 2009, Republic vs Duncan Mwai Gichuhi at Nyeri, delivered by M. Nyakundi S.R.M. on 29.10.2010).

JUDGEMENT

Duncan Mwai Gichuhi (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Senior Resident Magistrate in criminal case number **34** of **2010, Republic vs. Duncan Mwai Gichuhi** at **Nyeri** delivered on 29.10.2010 where he was convicted of two counts, **namely** the offence of defilement contrary to Section **8 (1)** as read with section **8 (3)** of the Sexual Offences Act[1] and count **two** committing an indecent act with a child contrary to Section **5 (1) (b)** of the said Act. (The correct section for the second count is Section **11 (1).** Section **5 (1) (b)** deals with the offence of sexual assault. I will revert to this issue later in the judgement.

The particulars of **count one** were that between 22nd November 2009 at around 2200hrs and the 1st day of December 2009 at around 2300 hrs in Kieni West District within Central Province, intentionally and unlawfully did an act of penetration to a girl namely **N N K** a girl aged fourteen years.

The particulars of count two were that between the 22nd November 2009 at around 2000hrs and the 1st of December 2009 at around 2300 hrs in Kieni West District within central Province, intentionally and unlawfully did an indecent act to **N N K** a girl under the age of 18 years by causing contact between his penis into her vagina.

The prosecution called a total of five **(5)** witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty to subject the evidence *submitted in the lower court to a fresh and exhaustive examination*[2]in line with the decision in the case of *Okeno v. R*[3] and also as was enunciated in the case of *Dinkerrai Ramkrishan Pandya vs. Republic*[4] where the court held that *"an appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect ……..."*

The first appellate court must itself weigh conflicting evidence and draw its own conclusions.[5] It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.[6]

PW1, N N K a minor then aged 14 years at the time of giving evidence and as the law demands the learned magistrate conducted a *Voire Dire* examination. At the beginning of the examination, the trial magistrate recorded as follows: - *"Court tests the witness credibility Evidence Act."* I will revert to this statement later because in my view, this is not the purpose of *voir dire* examination. After the examination, the court ruled that the minor gives unsworn evidence. She testified as follows:-

> *"…… I slept with the accused on the same bed. The accused played sex with me….. I did not scream. My father came on 23.11.09 at around 3.00pm. His grandmother locked me into the house and told my father that I was not present. I stayed there as his wife. The accused told me that I was his wife. I stayed at that place for one week. When my father came with police officer we were arrested the two of us. He slept with me on 22.11.09 only……"*

Upon cross examination by the appellant, the **PW1** stated *inter alia:-*

'……..You did not force me to sleep with you but we slept playing sex. I accepted to spend the night with you at your grandmother's house……for the five days you did not force me to stay there……..the police men found us asleep. I told the police officers that we were friends. I told my parents that if you wanted to marry me it could be after I finish school'.

PW2 F K father to the complainants' testimony was that **PW1** and the appellant were staying as husband and wife while **PW3 E N K,** mother to the complainant narrated how the child went missing and how they searched for her up to the appellants' grandmothers' house.

PW4 Michael Bowen, a police officer at Nairutia Police Station testified how they found the appellant and the complainant asleep on the same bed and arrested the appellant. On cross-examination he confirmed that he did not find the accused confined in any way.

P**W5 Dr. Alex Muturi** a Doctor at Nyeri Provincial General Hospital examined the minor. Her evidence was that *'this was coessential sex.'* There were pulse cell and spermatozoa.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211 C.P.C**. The accused elected to give sworn evidence and stated as follows:-

> *"……On 22.11.2009 I befriended a girl by the name N K. We had been friends for long. She used to love me so much and she used to visit me at my resident during day time. She was in school. I told her to complete her education. She completed her Primary Education and went to inform my parents that we wanted to get married. We informed them and stayed with them for eight days with the girl. We were spending the nights in the same bed and same house. At that time the girl had carried clothes in a bag. ….the intention was to just inform the parents of our intention. My parents proceeded to the girls' parents and they talked. The father of the complainant had called two elders whom I had sent. They met in a bar called Kabanderi and they talked. They demanded beer from my father and the elder I sent. The complainants' father is the one who asked for beer for the elders. They agreed that on a Tuesday I together with the girl and the elders would go to the girls' parents homestead and tell them what she wanted. Before we left to the girl's home at night people surrounded our homestead and called my grandmother and asked for us. They were police officers and the assistant chief plus the complainants' father. The police entered the house and found us asleep. <u>He asked the girl and she said I was her husband.</u> I was then handcuffed and escorted to the motor vehicle……the girl was asking them why they have arrested me…."*

It's important to note the appellant was not cross examined by the prosecutor and this testimony was not challenged by way of cross-examination.

DW2 Samwel Gichuhi Mwai the appellants' father testified that the appellant came home with a girl and informed them that he was now married. After two days the girls' father called him and asked for a

meeting, and after they met there were disagreements. He sent him to bring the girl back, but instead he came with the police and arrested the appellant. Similarly, this witness was not subjected to cross-examination.

DW3 Grace Wangui testified that the appellant came home with a girl, and after three days, three elders came inquiring about the girl and stated that they had been sent by the girls' father. The girl ran away and asked that she does not tell them she was around. On cross-examination the witness confirmed that the girl had carried three clothes.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence and correctly *at page J3 of the judgement observed that the two were living as husband and wife.* Having so concluded the magistrate proceeded to determine whether the minor had capacity to consent and if not then then in his own words *'the case of defilement is automatic."*

In my humble opinion the choice and use of the words" *the case of defilement is automatic"* is not only unfortunate in the circumstances but a serious misdirection on the part of the learned Magistrate because this statement shut out the available defence(s) in a case of this nature. For example there is the defence offered by the appellant and also the defence provided under Section **8 (5) & (6)** of the Act which the magistrate ought to have considered first before making such a conclusion. To me, such a statement is highly prejudicial and can be construed to mean predetermined opinion. After making the said statement, the learned magistrate concluded that the girl was under 18 years and that there was defilement and found the appellant guilty on both counts and convicted him accordingly and sentenced him to **20 years imprisonment.**

Even though the learned Magistrate convicted the appellant on both counts, he did not specify whether the twenty years imprisonment is for both counts and whether the sentence was to run concurrently. I will revert to this omission later in this judgement.

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence and raised the following grounds:-

i. *That there was consent between him and the complainant.*
ii. *That he was deceived on the complainants' exact age.*
iii. *That his defence was disregarded.*
iv. *That the sentence was harsh and long*
v. *That the learned Magistrate never considered his age*
vi. *His defence was disregarded without reasons being offered by the magistrate.*

The appellant was unrepresented in the lower court and the appeal was filed by him in person but at the hearing of this appeal, he was represented by **Mr. Wahome Gikonyo** Advocate while the state was represented by **Miss Jebet**.

At the beginning of his submissions, **Mr. Gikonyo's** urged the court to bear in mind that the appellant was unrepresented in the lower court and that he was fairly young and that the appeal falls under Section **8 (5)** of the Sexual Offences Act.

Mr. Wahome Gikonyo passionately urged the court to quash both conviction and sentence and referred the court to various excerpts of the evidence which essentially demonstrated that the complainant and the appellant were married and that the marriage and sexual encounters were all consensual and the complainants' parents were notified and even the father met some elders. The complainant had for all purposes agreed to be married and that the two were living as husband and wife for all purposes and even at the time of arrest the two were found happily sleeping in the same bed and as a confirmation for her willingness, she even carried clothes from home on the date she went to live with the appellant and also she ran away from her parents twice when they came looking for her at the appellants home.

Counsel also drew the courts attention to the appellants defence and the defence witnesses all of which

shows that the complainant and the appellant had agreed to get married and submitted that there was no *mens rea* on the part of the appellant who genuinely believed there was consent and secondly believed the complainant was of full age and capacity. In any event they had agreed to get married after she finished school and indeed she finished class 8.

Counsel relied of Section **8 (5)** of the Act which provides that:-

> *It is a defence to a charge under this section if-*
>
> a. *It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and*
> b. *The accused reasonably believed that the child was over the age of eighteen years.*

Counsel urged the court to consider the age of the appellant who was then around 21 years. He urged the court to take into account the punishment to youth offers bearing in mind the purpose of sentencing and punishment policy which cannot be correctly said to be aimed at ruining the lives of young people. Counsel cited the case of *JMA vs Republic**[7]*** and *David Omondi Adek vs Republic.**[8]***

Miss Chebet for the state vehemently opposed the appeal and referred the court to Section **8 (6)** of the Act which reads:-

> *"the believe referred to in subsection **(5) (b)** is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."*

Miss Jebet referred the court to the provisions of Section **111 (1)** of the Evidence Act[9] which provides that:-

> ***111(1)** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:*

In my view the above section needs to be read together with the two provisos to the said sections which read as follows:-

> *Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:*
>
> *Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of the offence.*

I will comment on the relevancy or otherwise of these two provisos later in this judgement.

Miss Jebet further submitted that the complainant had no capacity to give consent to the marriage or the alleged acts of defilement on account of her age, and further submitted that ignorance of the law is not a defence. Counsel was of the view that Section **8 (5)** of the Act was not raised in the lower court and cited the case of **Paul Munywoki vs Republic[10]** in support of this assertion. Counsel also submitted that *mens rea* is mostly in murder cases (a position I do not agree with because in all criminal cases the guilty intent *(mens rea)* and the illegal act *(actus reus)* must be established and these are not confined to murder cases only.

Counsel further submitted that the defilement was proved. In my view this is not disputed because both

the appellant and the complainant admitted that they were living as husband and wife. Finally counsel correctly distinguished the facts and circumstances of the authorities cited by the appellants counsel.

I find that the following are the issues for determination, namely:-

i. *Whether count two is defective in law.*
ii. *Whether the learned Magistrate was wrong in convicting the appellant on both counts.*
iii. *Whether the appellant reasonably believed that the complainant had granted her consent and whether he believed that she had the capacity to grant the said consent and or whether he reasonably believed she was of full age and capacity to contract a marriage*.

Before I address the above issues, it's important I address myself to the question **"what is the purpose of *voir dire* examination?**. The learned Magistrate recorded the following words before conducting *voir dire* examination *"Court tests the witness credibility evidence Act"*

In my view the purpose of *voir dire* examination *is for the court to form an opinion, on whether the child understands the nature of an oath in which event his sworn evidence may be received.* This was the holding in *Peter Kariga Kiume vs Republic**[11]*** It is not to establish the credibility of the witness.

Lord Justice Bridge put it in a more subtle manner in *R vs Lal Khan**[12]*** when he said:-

> *"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"*
>
> *There were therefore two aspects when considering whether a child should be sworn-: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"*

In *Gabriel Maholi vs R,**[13]*** East African Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

On count two, the statement of the offence reads *"indecent Act with a child contrary to section **5 (1) (b)** of the sexual offences Act."* The said section deals with sexual assault and the particulars in support of the said charge in my view review an offence under section **11 (1).** To me, that was an error in the statement of the offence but in my view, the said error is not fatal and can be cured under Section **382** of the Criminal Procedure Code which provides as follows:-

> *"Subject to the provisions hereinafter contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation under this code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

I now address the issue whether the learned Magistrate erred in law in convicting the appellant on both count counts. A close look at the particulars in both counts reveals that they are similar in both counts raising the question whether count two ought to have been an alternative count as opposed to a distinct count by itself.

The above scenario raises the question whether Parliament indented an accused person to be punished twice for the same conduct based on the same set of facts and supported by the same evidence. This brings into sharp focus *'the same evidence rule'* enunciated in the case of *Blockburger vs United States**[14]*** where it was held that the test to be applied is whether there are two statutory offences or only one and whether each requires prove of a fact which the other does not. The rationale is that no one should be punished twice for the same offence.

From the charge sheet the appellant faced count one as outlined earlier in this judgement and second count based on the same facts. This exposed the appellant to double jeopardy and the proper cause of action was for the prosecution was to prefer an alternative count of committing an indecent act. Even if I were to treat that error as capable of being cured under Section **382** of the Criminal Procedure Code cited above and treat count two as an alternative count, (which I am reluctant to because as already held the appellant was exposed to double jeopardy by being tried for two counts emanating from the same facts) there is yet another problem in that the learned magistrate convicted the accused on both counts. He said in the judgement as follows:-

> *"I will find him guilty on count 1 and count 11 and convict him under section 215 of the Criminal Procedure Code"*

Clearly, the above finding relates to both counts. There is no indication on the judgement whether the sentence imposed is for both counts. To me, this is a clear case of double jeopardy and the conviction cannot be allowed to stand. The omission was a serious mistake that is highly prejudicial to the accused person and vitiates the entire sentence. The double jeopardy rule protects an accused person against **(a)** retrial after an acquittal, **(b)** retrial after a conviction, **(c)** retrial after certain mistrials and **(d)** multiple punishments. This case falls under the last part.

Even assuming that count two is a curable mistake under section **382** cited above and assuming we can treat count two as an alternative count, it was error for the magistrate to convict on both counts. The act of convicting and sentencing an accused person on both the main count and the alternative count was erroneous as was held in the case of **Peter Mutua vs Republic.**[15]

In my view when charges are framed in the main and alternative, the accused has an election to either plead guilty to the main count or alternative count. He can plead not guilty to both counts, and **be found not guilty** on both the main count and the alternative **BUT** he may **not be found guilty on both counts**. Thus, where charges are preferred against an accused person in the alternative, a conviction should be entered on one only and that no finding should be entered on the alternative count. In **Republic vs Nasa Ginners Ltd**,[16] the magistrate convicted the accused on one count and acquitted him on the alternative. It was held that a more proper course would have been to make no finding on the alternative count. In my view, conviction on both the main count and the alternative count exposes an accused person to being convicted twice in the same case for the same offence.

The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent person or conviction of a person who has been subjected to double jeopardy. The court has to balance each situation depending on the facts at hand. I find that the court erred in convicting on both counts and treating them as independent counts as opposed to treating count two as an alternative count.

In my view, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the case of *Zahira Habibullah Sheikh & another vs State of Gujarat & Others*[17] where the Supreme Court of India stated:-

> *"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a*

miscarriage of justice has resulted.…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence.…The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"

In view of my foregoing conclusions and guided by the above cited authorities, my answer to issue numbers one and two above is in the affirmative.

I now turn to the third issue.The evidence of the complainant and the appellant is that they were living as husband and wife. In fact the defence evidence was that they had sent elders to the complainants' parents to discuss the issue and there is evidence they went and met the girls' parents but there was no agreement. The girl carried clothes from her home an indication that she was going to say. She was not forced either to enter into the marriage or to sleep with the appellant. I her own words she was living with the appellant as husband and wife. The appellant informed his parents that he had gotten married. There is evidence that the complainants' girl met elders sent by the appellants' father, they sat at a bar and he even demanded beer from the appellants' father and the elder the appellant had sent. There is evidence that it was the complainants' father who asked for beer which evidence was not disputed at all.

Dealing with a similar situation in a case involving a 15 year old girl in *Salim Owino Chitech vs Republic**[18]*** **Justice Said Chitembwe** had this to say:-

"Although the act of sexual intercourse did occur between the appellant and PW1, I do not find that the appellant had the intention of committing an offence of defilement.……Given a situation where the alleged complainant testified that she was not forced or lured in to the offence and he would still want to live with the accused person, it becomes difficult for the court to simply make a finding that the complainant is under eighteen and could not consent to the act and thereby convict the accused person. This is not a situation where the accused alleges that the complainant consented while the complainant denies such allegation. The complainant in this case maintains that she wanted to get married and wanted to live with the accused as her husband. …..The medical evidence shows that she seemed to have had sex before and her sexual organs were normal.

Given the circumstances of this case and there no being evidence that the appellant induced, lured, or manipulated PW1 into having sex with him, I do find that the defence provided for under Section 8 (5) and (6) of the Sexual Offences Act is available to the appellant. ……Justice would not be served if the appellant is put behind bars for 15 years……the appellant cannot be held to be someone who lures children, He believed he was in serious relationship with someone who was ready to get married"

The facts in the above case are similar and applicable in the present case. I fully associate myself with the above passage.

Similarly, **Said Chitembwe J** in the case of *Mohamed Makhokha vs Republic*[19] dealing with yet similar facts and circumstances as in the present case had this to say:-

"It is clear from the prosecution evidence that the complainant and the appellant had sex by consent. The relationship resulted to pregnancy. The trial court found that the complainant was still under 18 years old, and, could not have given consent and proceeded to sentence the appellant. While testifying the complainant referred to the appellant as her husband. She informed the trial court that she was married to the appellant. PW2, the complainant's mother testified that she had removed the complainant from the appellants' house several times. Although the trial court found that the appellant did not believe that the complainant was above 18 years old, I do find that the mere fact that the complainant made the appellant her boyfriend, had sex by

*consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girl ready to get married. It is also clear that the parents of the complainant were aware of that relationship. An abstract application of Sections **42, 43** and **44** of the Sexual Offences Act will lead to the conclusion that a girl who is under 18 years old cannot give her consent. Each case has to be evaluated according to its own circumstances. In this age where young girls are maturing fast and engage in sex knowingly and being aware of consequences, it will be unfair to sentence the boyfriend to 15 years imprisonment yet the two parties were aware of what they were doing. I do therefore find that the appellant herein does qualify to come within the ambit of the defence provided under Section **8 (5)** of the Sexual Offences Act. The appellant was made to believe that the complainant was over 18 years and was ready to be married"*

I now re-visit the provisions of Section **8 (6)** of the Sexual Offences Act referred to earlier which provides:-

> *"the believe referred to in subsection **(5) (b)** is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."*

Concluding whether belief is reasonable is to be determined by having regard to all the circumstances of the case. The test of reasonable belief is a subjective test with an objective element. This relates to the appellants capacity to evaluate the consent (the subjective test) and if so, did the appellant reasonably believe it. It is for the court to decide whether or not the belief was reasonable (the objective element). Further, the law imposes an evidential burden on the accused to adduce sufficient evidence to raise an issue that the complainant consented and whether or not the accused reasonably believed the complainant consented. The question whether the accused raised sufficient evidence to raise the issue is left to the court to determine. Once the accused does this it is for the prosecution to prove beyond reasonable doubt, that the complainant did not consent and that the accused did not reasonably believe that the complainant consented.

As pointed out above, it's for the court to examine the evidence adduced and satisfy itself that the accused reasonably believed that there was consent. In the present situation, the complainant confirmed she was living with the appellant as husband and wife, that the appellant notified his parents that he had married and as is the practice arrangements were made to notify the girls' parents. In fact the elders met and the girls parents demanded beer, it was agreed that the coming Tuesday, the appellant and the girl and elders would go to the girls' parents homestead so that the girl could tell them what she wanted. This evidence was not challenged. But that Tuesday never came. The police in the company of the girls' father raided the appellants home at night and arrested the appellant. At the time of arrest the girl asked the police why they were arresting the appellant and in court she admitted they were living as husband and wife and that she ran away when her parents came looking for her. I find nothing in the evidence to suggest that the appellant had reason to doubt the consent or her capacity to consent. There is nothing to show that the parents raised the issue of age during the discussions they had with the parents of the appellant and the issue of age only came out in the evidence at the trial.

It is necessary to examine whether the appellant had the necessary *mens rea* so as to be said he intended to commit the offence in question. *Mens rea* or criminal intent is the essential mental element considered in court proceedings to determine whether criminal guilt is present while *actus reus* functions as the essential physical element. These two elements, Latin terms for *'culpable mind'* and *'culpable action'* respectively, are required to establish the guilt of a defendant. The essence of criminal law has been said to lie in the maxim *'actus non facit reum nisi mens sit rea.'* There can be no crime large or small, without an evil mind.[20] It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.[21] I have evaluated the evidence tendered by the prosecution and the appellant in the lower court and I am persuaded that the same does not disclose a guilty intent on the part of the appellant. As mentioned above, he informed his parents that he had gotten married and arrangements were made to notify the girls' parents. In my view, the offence created under Section **8 (1)** of the Sexual Offences Act does not fall under the strict liability

offences in criminal cases where the *mens rea* is not required.

At this point it's important to re-visit the proviso to Section **111 (1)** of the Evidence Act.[22] The second proviso to the said section provides that the **"***person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of the offence."*

The evidence tendered in the lower court raises serious doubts as to the guilt of the appellant and I with tremendous respect find that the evidence adduced raises such serious doubts that it would be unsafe to allow the conviction to stand.

The legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**[23] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> *'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose.[24] The legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution.[25] The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt.[26] The question that follows is whether the prosecution in this case established its case beyond reasonable doubt. This calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused. In **Uganda vs. Sebyala & Others**,[27] the learned Judge citing relevant precedents had this to say:-

> *"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"*

A close examination of the defence offered clearly shows that it creates doubts on the strength of the prosecution case. It raises a defence of presumed consent. It raises a high degree of honesty in that the appellant said he had agreed with the complainant to get married, and that he dispatched his parents to inform the parents of the complainant and the complainant in her own words said they were living as husband and wife. Even with clear admissions on both sides, the court disregarded this defence and never considered the applicability or otherwise of the defence provided under Section **8 (5) (6)** of the Act yet it was evidently clear from the evidence adduced. It was a serious misdirection of the law and facts for the learned Magistrate to conclude that the offence of defilement was automatic.

In view of my above findings, I conclude that the answer to issue number three above is in the affirmative.

Before I conclude this judgement I find it absolutely necessary to point out non-compliance with the provisions of section **169 (2) & (3)** of the Criminal Procedure Code[28] in the lower courts judgement. The said section provides as follows:-

> **(2)** *In the case of a conviction, the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*

(3) *In the case of an acquittal, the judgement shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

In the judgement at page **J3** the learned Magistrate stated *"…… I find that the accused person is guilty of the offences as charged contrary to the Sexual Offences Act no 3 of 2006. I will find him guilty on count I and count 11 and convict him under section 215 CPC on both counts."*

Clearly, Section **169 (2)** of the **CPC** cited above provides that the trial court ought to specify in the judgement the offence of which, and the section of the Penal Code or other law which, the accused person is convicted and the prescribed punishment to which the accused is sentenced. I note that the learned Magistrate did not comply with the above section, even though I hold the view that the said omission is not fatal. In my view it is a requirement under the said section that ought to be complied with.

In view of my findings as enumerated in this judgement I find that that the conviction cannot be allowed to stand, I hereby allow the appeal, quash the conviction and set aside the sentence imposed and order that the appellant be released forthwith unless otherwise lawfully held.

Dated at Nyeri this **17th** day of **November** 2015

John M. Mativo

Judge

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[1] Act No. 3 of 2006

[2] See Pandya vs Republic {1957}EA 336

[3] {1972) E.A, 32at page 36

[4] {1957} E.A 336

[5] Shantilal M. Ruwala V. R (1957) E.A. 570

[6] see Peters V. Sunday Post (1958) E.A. 424

[7] Criminal Appeal No. 348 of 2007- Court of Appeal Nyeri.

[8] High Court Criminal Appeal No. 1 of 2014- Migori

[9] Cap 80, Laws of Kenya

[10] High Court Criminal Appeal No. 52 of 2012, Garissa

[11]Criminal Appeal No. 77 of 1982 (unreported)

[12]{1981} 73 Cr App R 190

[13] {1960} EA 86

[14] 284 U.S. 229, 304 {1932}

[15] Criminal Appeal No. 78 of 2012, Machakos

[16] {1955} 22 EACA 434

[17] AIR 2006 SC 1367

[18]{2012} eKLR

[19] {2013}e KLR

[20] Eugene J. Chesney, The Concept of Mens rea in the Criminal Law, 29 AM. Inst. Crim. L. & Criminology 627 {19381939}, Journal of Criminal Law and Criminology, Vol 29, Issue 5 January-February, Winter 1939

[21]Criminal Law, 9th Edition {1930} 287

[22] Supra

[23] {1935} A.C 462 at page 481

[24] See Halsburys' Laws of England, 4th Edition, Volume 17, paragraphs 13 & 14

[25] See Peter Wafula Juma & others vs REPUBLIC High Court Criminal Appeal no. 144 of 2011

[26] See Republic vs Derrick Waswa Kuloba {2005} eKLR

[27]{1969} EA 204

[28] Cap 75, Laws of Kenya