REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 79 OF 2011

MUSANGO KIMWELE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 6 of 2011 by Hon. S.K. Mutai, RM, on 30/3/2011)

JUDGMENT

1. **Musango Kimwele,** the appellant, was charged with the offence of **defilement** contrary to **Section 8(1) (4)** of the **Sexual Offences Act, No. 3 of 2006**. Particulars thereof being that on the **8th January, 2011** at around **4.00am** at ***[particulars withheld]*** **Village** in **Mathima Location** within **Kitui Country** defiled **S M** , a girl aged **16 years.** In the alternative, he was charged with committing **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence being that on the material day the appellant committed an **Indecent Act** with **S M** a child aged **16 years** by touching her private parts namely vagina and breasts.
2. Having pleaded not guilty the matter was heard. The appellant was convicted and sentenced to **15 years** imprisonment on the principal charge.
3. Being dissatisfied with the conviction and sentence the appellant appealed on grounds that; the medical evidence was adduced by a person who was not a medical officer; the complainant was examined after expiry of **24 hours** from the commission of the crime and he was not tested; that the trial learned magistrate erred in law and fact by shifting the burden of proof to the appellant; the appellant was not correctly identified as there was poor lighting; his constitutional rights were violated as he was detained for more than **24 hours** before being arraigned in court contrary to **Article 49(1) (f)** of the **Constitution;** the prosecution relied on hearsay evidence and finally the trial magistrate erred in failing to consider that there was no precise evidence regarding the owners of the clothes presented as exhibits.
4. The case as presented by the prosecution is that **S M** (*the complainant*), a **16 year** old girl in standard 7 slept in a room adjacent to her mother's with a small boy at 11.00pm. At 4.00am she felt some touch. She woke up, lit a touch but a person hit it. It fell on the floor. The person removed his pants and defiled her. She turned, slapped him and held his shirt. PW3, **K M** the mother to the complainant on arrival from the river went to her room and found therein the appellant. The complainant held his shirt. The appellant could not explain what he was doing inside the room. She took his shirt, cap and shoes and kept them. She took the complainant to hospital and reported the matter to the police.
5. PW2, **Daniel Mulwa,** a registered **Clinical Officer** at **Mutomo** Dispensary examined the complainant and found her with no injuries on external genetalia but she had minor tears on vaginal wall. There was a foul smelly discharge. There were many red blood cells and few pus cells. He concluded that there was forced penetration.

6. PW4, **J W K,** the Chief on receipt of the complaint sought the appellant and arrested him. PW5, **No. 85760 P.C. Dickson Kikenye** re-arrested the appellant. He investigated the case and caused the appellant to be charged.
7. In his defence the appellant said on the material date he went to sleep at 9.00pm and woke up at 6.00am. He went to water his vegetables. He was on his way home when he encountered the Chief and PW3 who arrested him for defilement.
8. This being the first appellate court, it is my duty to reconsider the evidence adduced in the Lower Court, evaluate it and draw my own conclusions as to whether the judgment of the trial court should be upheld. I must also remember that I had no opportunity of seeing or hearing witnesses who testified. (*see* ***Okeno versus Republic[1972) E.A. 32.***
9. PW2 who filled the P3 form was a registered Clinical Officer. It has been argued that he was not qualified to fill the P3 form as he was not a medical Officer. According to the **Section 2** of **Clinical Officers Act** (Training, **Registration** and **Licencing Act, Cap 260(K)** a Clinical Officer means;-

> ***"A person who having successfully undergone a prescribed course of training in an approved training institution is a holder of a certificate issued by that institution and is registered under the Act..."***

Section 7(4) of the **Act** provides;-

> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.***

Statute allows such officers to engage in private practice. They even practise medicine. ***(also see Raphael Kavoi Kiilu versus Republic, CA (Nbi)Criminal Appeal No. 198 of 2008(2010) eKLR.*** Being a midlevel practitioner of medicine he was qualified and indeed licenced to examine the complainant.

10. With regard to the issue of the complainant being examined after 24 hours from the commission of the offence. The P3 form indicates the complainant was sent to hospital on the **7th January, 2011**. It is indicated **Section B** was completed on the **7th January, 2011** while **Section C** was completed on the **10th January, 2011.** What is not in dispute is the fact that the complainant was examined on the **7th January, 2011**. The discrepancy on the date indicated on **Section B** and **Section C** is not material hence not detrimental to the prosecution's case.
11. It was alleged that the learned trial magistrate shifted the burden of proof to the appellant. The appellant faulted the trial magistrate because he stated thus:-

> *"**The accused failed to challenge the prosecution's case which I find credible and strong".***

12. Prior to making the statement the learned trial magistrate had analysed the evidence on record. He considered evidence and made a finding that the appellant had been controverted. This would not be viewed to be shifting of the burden of proof. The obligation to prove the case was on the prosecution, and it did remain with it. It did not shift and was discharged accordingly.
13. The issue of identification was in contention. The appellant per the evidence adduced was a neighbour to the complainant. He was well known. In her testimony PW3 stated:-

> ***"I asked Musango what he was doing there. Accused asked for forgiveness".***

14. The appellant having been well known to the complainant and her mother, this was a question of identification by recognition which in law has been found to be more reliable Than identification of a mere stranger, as was held by the Court of appeal in **Anjononi versus Republic [1980] KLR 59**. Further evidence adduced was that apart from the witnesses being well acquainted to the appellant, they had time to remove his shirt, cap and shoes which they retained as evidence of his

presence in the complainant's room. In his defence he made no comment on the items. There was no possibility of mistaken identity.

15. The appellant was arrested on **8th January, 2011** and arraigned in court on the **10th January, 2011.** It is now his contention that his constitutional rights were violated. The appellant did not raise the issue of breach of his rights upon his arrest in the Lower Court. He cannot purport to raise it at this stage, this being a court of record, the appellant should have raised the issue at the trial court so that the prosecutors would have been given an opportunity to explain the cause for the delay. In the case of ***Magbul Ahmed Butt versus Republic [2008) eKLR,*** the Judge stated thus:-

> "***The trial court conducting the trial is the tribunal of fact, and any factual matter which emerges, that might taint the regularity or propriety of the trial process is to be stated bona fide before the trial court which will then give an appropriate direction".***

16. Finally in this case it is important to point out that the appellant was charged with a principal charge and an alternative. The learned trial magistrate made a finding that the prosecution had proved its case of defilement and **Indecent Act** with a child. Consequently, he convicted the appellant on both charges. This was a misdirection. An accused cannot be convicted on both the main and alternative count. The evidence adduced proved the main count. A conviction would mean that a sentence be imposed. In this case the sentence passed, though was for only one count, duplication of convictions still stands which makes it wrong. In the premises, I do quash the un-procedural conviction, acquit the appellant on the alternative charge and convict him on the main charge.
17. On sentence, the appellant was charged with defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act.** The penalty provided is imprisonment for not less than **15 years.** The trial magistrate imposed the minimum prescribed sentence. This was within the law. I do confirm it.
18. In the premises the appeal is dismissed.

DATED, DELIVERED and **SIGNED** this **22nd day** of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE