No. 383/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 75 OF 2012

JAMES KILAVI MBILU……..….....APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 654 of 2011 by Hon. R. Yator, RM on 7/6/2011)

J U D G M E N T

1. The appellant was charged with the offence of defilement of a girl under the age of **11 years** contrary to **Section 8(2)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars thereof being that on the **24th** day of **November,** 2011 at ***[particulars withheld]* Village** in **Makueni District** within **Eastern Province,** unlawfully caused penetration with his male genital organ to **F M K** a girl aged **five (5) years.**
2. In the alternative, the appellant was charged with indecent assault of a girl contrary to **Section 11 (1)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars thereof being that on **24th** day of **November, 2011** at ***[particulars withheld]* Village** in **Mbooni District** within **Eastern Province,** unlawfully indecently assaulted **F M K** by touching her private parts.
3. He was tried, convicted on the main charge and sentenced to serve **life imprisonment.**
4. Being aggrieved by the conviction and sentence thereof he now appeals on grounds that:-

i. The trial was a nullity as a substantial part of it was conducted by a police prosecutor not gazetted which was in violation of **Section 85(1)** and **88** of the **Criminal Procedure Code.**
ii. The learned trial magistrate erred in both law and fact and misdirected herself by holding that the prosecution had proved the case beyond reasonable doubt whereas the standard of proof had not been discharged.

5. The case as presented by the prosecution was that on the **24th November 2011** at about **2.30pm, PW1, B K** left her children, **F M** (PW2) with another aged 5 months at home as she went to the '***shamba*'.** PW3, **M M M M** who was passing by heard a child crying. He went to check only to find the appellant with trousers removed defiling the child. He locked him inside the kitchen and called PW1. People were called. They arrested the appellant and took him to the police station. The police took possession of the bloodstained pant the child had worn and a pair of trousers the appellant had which had stains of blood. The child was examined, investigations conducted and

the appellant was charged.

6. In his defence the appellant denied having committed the offence. He stated that the charges were trumped up and the allegation that his pair of trousers was stained was untrue.
7. At the hearing of the appeal the appellant relied upon his written submission.
8. In response thereto, **Ms Maingi** learned State Counsel submitted that the appellant was positively identified. Evidence adduced by the complainant was corroborated. The act of penetration was committed by the appellant.
9. The duty of the first appellate court has been re-stated in many authorities. It is duty bound to re-evaluate evidence afresh and come up with its own decision on evidence by drawing its own conclusions. An allowance must be made for the fact that the trial court did not have the advantage of hearing and seeing witnesses who testified (***see Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1972] E.A. 32).***
10. It was submitted that a substantial part of prosecution's case was conducted by a Police Sergeant who was not gazetted as a public prosecutor which makes the trial a nullity. **Section 85(1) (2)** of the **Criminal Procedure Code** provides thus:-

> ***"1). The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.***
>
> ***2). The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case".***

11. In her response the learned state counsel was silent on whether or not the public prosecutor who prosecuted the case substantially was gazetted or not, hence being qualified to prosecute the case?
12. The duty was upon the trial magistrate to ascertain the qualification of the prosecutor who conducted the case. A Police Prosecutor of any rank is at liberty to prosecute a case as long as he is gazetted by the requisite authority. Today he would be gazetted by the Director of Public Prosecutions. To establish whether or not the officer was gazetted the State Counsel ought to have responded to the ground of appeal raised. Without such response, this court cannot tell if indeed he was gazetted.
13. The learned magistrate having not considered whether or not the Police Sergeant was competent to prosecute the case and the State Counsel having not clarified the same, the ground of appeal must succeed. The case was a nullity.
14. The next issue to be determined will be the consequences of such an order. The error occasioned was by the court. Would a retrial be ordered? In the case of ***Fatehali Manji versus Republic [1966] E.A. Pg 343*** the Judges of Appeal – ***Sir Clement de Lestang, Ag. P. Spry, Ag V-P*** *and* ***Law J.A.*** had this to say;-

> ***"in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. It does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances. An order for retrial should only be made where the interests of justice require it".***

15. In the case of ***Mwangi versus Republic [1983] KLR 522*** the Court of Appeal held:-

> "***We are aware that a retrial should not be ordered unless the appellant court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant".***

16. I have re-evaluated the evidence adduced, there was proof of penetration, the age of the child, and the appellant was found in the act of coitus and locked up in the kitchen with the child. The appellant has been in custody for two (2) years. This is an appropriate case for a retrial.
17. In the result, I do quash the conviction and order the appellant to be retried. He will remain in custody and be produced before the **Makueni Principal Magistrate Court** on the **1/10/2014** to plead to the charges.
18. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE