REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 4 OF 2013

MUSEMBI MUTISO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No.1988 of 2011 by

Hon. P.M. Mugure RM on 16/1/2013)

J U D G M E N T

1. **Musembi Mutiso,** the appellant was charged with two (2) counts:

i. Defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on diverse dates between **6th** and **19th December 2011** at **[Particulars Withheld]** in **Machakos District** within **Eastern Province,** intentionally and unlawfully caused his penis to penetrate the anus of **A M** a child aged **two years.**
ii. Committing an unnatural offence contrary to **Section 162 (a)** of the **Penal Code.** Particulars of the offence being that on diverse dates between **6th** and **19th December 2011** at **[Particulars Withheld]** in **Machakos District** within **Eastern Province,** had carnal knowledge of **J K** against the order of nature.

2. Having denied the charges, the appellant was found guilty on both counts. He was convicted and sentenced as follows:

Count 1 – To serve life imprisonment.

Count 2 – Held in abeyance.

3. Being dissatisfied with the conviction and sentence thereof the appellant appealed on grounds that:

i. The learned trial magistrate erred in law and fact by failing to note that the provisions of Section 162 and 166 of the Criminal Procedure Code were not complied with.
ii. The learned trial magistrate erred in law and fact by failing to note that there was contravention of the appellant's constitutional right to a fair trial under Article 5 of the Constitution.
iii. The learned trial magistrate grossly erred in law by concluding that the prosecution case was proved beyond any reasonable doubt, failing to note that the same remained unproved as required by the law.

4. Briefly the facts of the case are that PW1, **J K** cohabited with the appellant for two (2) weeks. She had a child aged **one year, five months.** In the course of their stay they were molested. She reported the matter to the Area Assistant Chief. They sought treatment at **Machakos District Hospital.** The appellant was arrested and charged.
5. In his defence the appellant stated that he disagreed with PW1 who told him that she would go back to her maiden home. He was arrested in the month of **October 2011** and taken to the police station. Stating that the charges were mere allegations, he said that he lived with his mother **Joyce Mutiso, J K** (PW1) and **A M,** his daughter. He stated that there was no relationship between him and PW1.
6. At the hearing of the appeal it was submitted by learned counsel for the appellant, **Mr. Otola** that the court observed that the appellant's mental status was to be examined as he appeared to have a mental problem. An order was made to have him committed to **Mathare hospital**. Thereafter the matter was set down for hearing. The court however failed to comply with **Sections 162** and **166** of the **Criminal Procedure Code.** The court failed to ascertain the appellant's fitness to stand trial which contravened **Article 50** of the Constitution as the appellant could not reasonably prepare for his trial. He abandoned the third ground of the appeal.
7. In response thereto, **Mrs. Saoli,** learned counsel for the state opposed the appeal. She argued that in the eyes of the court, the appellant was fit to plead. Therefore, due process was followed. Further, she stated that the appellant was charged after conclusive investigations were carried out. She urged the court to uphold the sentence imposed.
8. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (***See Okeno versus Republic [1972] E.A. 32).***
9. A perusal of the court record indeed shows that following the learned trial magistrate's observation the appellant's soundness of mind was in doubt. Consequently the appellant was examined by **Doctor Kokonya,** a psychiatrist based at **Machakos Level 5 Hospital.**
10. It is argued that after the court referred the appellant for treatment, it did not make any finding as required by **Section 162** of the **Criminal Procedure Code.** It is apparent that the appellant was on medical treatment. This would mean that the learned trial magistrate was required to make a special finding to that effect.
11. I have perused the entire lower court record. There is a letter dated **13th July 2012** indicating the appellant had responded well to treatment and was now fit to follow court proceedings, understand charges against him and to generally to plead in a court of law.
12. When the case came up for hearing on the **17th July 2012** the court did not make a remark to that effect but a date was fixed for hearing. The case having proceeded against a person whose mental status was questioned and had to undergo treatment for seven (7) months prior to being declared fit to stand trial, it was mandatory for the trial magistrate to comply with the provisions of **Section 166** of the **Criminal Procedure Code.** Non compliance with the law was an error on the part of the court.
13. Looking at the evidence adduced in the lower court afresh – the appellant was charged with defilement. It was stated that he caused his penis to penetrate the anus of **A M. A** was a child aged **1 5/12 years** per the medical report. The child was examined by a medical officer, **Dr. Ogeto** who found her having sustained laceration on the anus. The mucus membrane were broken but were healing. The injury was caused by some penetration.
14. In the second count the complainant, PW1 was subjected to examination and found to have sustained anal fissure. The 4th and 6th muscles had lacerations. Both complainants were examined on the **22nd December, 2011**.
15. According to particulars of the offences the act was done on diverse dates between the **6th** and **19th December 2011.**
16. In convicting the appellant the court cautioned itself of the need to examine evidence on record with a lot of care as the offence was serious. In reaching her findings the learned trial magistrate stated thus:

> ***"I find there was penetration in both complainants in the two (2) main counts and the accused person having been known to the complainant in count II and***

positively identified as the person who committed the alleged offences, I find the accused guilty of the offences as charged..."

17. The issue to be determined is whether the penetration in the circumstances was done by the appellant?
18. It is trite law that in sexual offences before conviction is made there need not be corroboration in the material particulars of the evidence of the complainant (victim). The court may convict on the evidence of the complainant (victim) alone after due warning has been taken by the trial magistrate of the danger of doing so **(See Chilla –vs- Republic (1967) E.A 722).** Bearing in mind the law, I do note that PW1 cohabited with the appellant for two (2) weeks, his identity would not be in question. There is however an issue with the way evidence was adduced. PW1 the sole eye witness stated thus:

> ***"The accused was my husband for around 2 weeks but we no longer stay together. We got married when I had a child. My child was born in January 2009. When we were married the accused person would molest me and the child. This went on for a while. We went to hospital and were examined. My baby would not sit and would cry the whole time.... I had stayed with the accused for 2 weeks and he claimed not to have known a woman's body at all..."***

19. The evidence adduced was not specific as to what the appellant did and when it happened. She did not state when she left the appellant's home. She went on to state that she stopped to stay with the appellant after the molestation. Anal fissure or laceration may not necessarily be caused by penetration of a male organ. It is common knowledge that it may be caused by excessive dilation of the anus due to constipated stool. It is for this reason that the prosecution had to discharge its duty of proving the case beyond any reasonable doubt. They had to adduce evidence of how the penetration occurred, when and where it happened. This was not done. Therefore, believing that the appellant was the culprit who committed the heinous offence was a misdirection on the part of the court.
20. A re-evaluation of evidence adduced shows that there was a gaping doubt in the matter. The benefit should have gone to the defence.
21. The appeal therefore succeeds. The conviction is quashed on both counts and sentences imposed set aside. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **26TH** day of **NOVEMBER, 2014.**

L.N. MUTENDE

JUDGE