REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Criminal Appeal 480 of 2008

VUNDI MALUKI ……..APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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(From the original conviction and sentence in Criminal Case No. 2387 of 2007 of the Chief Magistrate's Court at Thika by Hon. B. A. Owino – Resident Magistrate on 2/10/2008)

JUDGMENT

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1. The appellant **Vundi Maluki,** was convicted of the offence of defilement contrary to **Section 8(4) of the Sexual Offences Act No. 3** of **2006.** It had been alleged that on 3rd May 2007 at around 4.00 p.m., at Umoja Estate, Thika, the appellant committed an act which caused penetration with E.K.P. (identity concealed on account of her being a minor) a child under the age of 18 years.

2. In the alternative, the appellant faced a charge of compelling indecent act contrary to **Section 6(a)** of the **Sexual Offences Act No. 3** of **2006**. It had been alleged that on 3rd May 2007 at Thika, the appellant compelled E.K.P to engage in an indecent act with the appellant and touched the genital organs of the said E.K.P.

3. Upon conviction on the main charged the appellant was sentenced to 15 (fifteen) years imprisonment. He thereafter filed an appeal in which he contended that he was prosecuted by a police officer who was not gazetted under **Section 85(1)** and **Section 88** of the **Criminal Procedure Code**. He also contended that the particulars in the charge sheet were at variance with the evidence in relation to the victim's age.

4. The appellant maintained that the charge of defilement was not proved beyond reasonable doubt, and that an adverse inference should have been drawn from the failure by the prosecution to produce one Esther as a witness.

5. The state opposed the appeal through learned state counsel, Miss Kuruga on grounds that the charge sheet was correct as **Section 8(4)** of the **Sexual Offences Act** caters for children under 18 years of age. The complainant was 17 years old at the time of the assault. Miss Kuruga gave a summary of the prosecution case and submitted that the learned trial magistrate had not err in convicting or sentencing the appellant as she did.

6. I have reappraised the evidence on record to draw my own conclusions and make my own findings. The facts from the proceedings are that one Esther lured the complainant into her house to greet her cousin. She then locked the two in the house and that cousin, who is the appellant herein, defiled the complainant.

7. The complainant's testimony was corroborated by **PW1** her aunt, who testified that she came home from the market to find the complainant missing. Upon making enquiries she was informed that a neighbour called Esther had been seen with the complainant. **PW1** went to the house of the said Esther and found the appellant and the complainant in bed naked. Esther had locked the two inside the house from the outside.

8. Further corroboration came from the evidence of **PW3**, Dr. Eric Osoro of Thika District Hospital. He testified that he examined the complainant a short while after the sexual assault and confirmed that the complainant had suffered penile penetration. The complainant's genitals had bruises, the hymen was freshly torn and there was presence of blood and spermatozoa.

9. According to **PW4**, CPL. Lydia Mutinda of Kasarani Police Station, the complainant made a report of the defilement and was able to identify the appellant at the police station when he was arrested.

10. The appellant's sworn defence was that **PW1** seduced him and when he declined her advances, she raised this complaint. A scrutiny of the record shows that the appellant did not raise these allegations of spurned romantic advances when he cross-examined **PW1**.

11. On his contention that the said Esther was not called to testify, it was the testimony of **PW4,** that Esther was arrested but released because she was heavily pregnant. Thereafter she disappeared and could not be traced to testify.

12. On identification, **PW2** confirmed that she did not know the appellant prior to this offence. However, the incident took place during the day and I am satisfied that the complainant was well able to identify her assailant. To lend credence to her evidence was the testimony of **PW2** who found both the complaint and the appellant in bed naked. The appellant was therefore properly identified and placed at the scene of the offence. His alibi defence is untenable in the circumstances. In my view, the allegations of spurned romantic advances from **PW1** are a figment of the appellant's imagination, and coming at the last stage in the trial, are an afterthought merely intended to exonerate him.

13. On the sentence, **Section 8(4)** of the **Sexual Offences Act** stipulates that a sentence of not less than 15 years if a person is convicted of defilement and the victim is a child between the age of sixteen and eighteen years. From the evidence of **PW1** and **PW3** and from the P3, the complainant herein was aged 17 years at the time of the offence. The learned trial magistrate did not therefore misdirected herself in a assessing the evidence or in sentencing the appellant. There was also no variance between the charge sheet which stated the complainant's age to be below 18 years and the evidence which showed that she was 17 years of age.

14. The only ground advanced by the appellant which was successful and upon which the whole appeal succeeds was that his case was prosecuted by an officer who was not competent. The proceedings indicate that in the beginning the case was prosecuted by one Mr. Muthuri, a police officer of the rank of Inspector. Halfway through the trial CPL Mutisya took over and prosecuted the case to the end.

15. In **Sinaraha & another v Republic [2004] 2 KLR**, which is of persuasive import the High Court held as follows:

"She is a police officer of a rank lower than that of an assistant Inspector of Police. She was not

authorised to prosecute as provided by the provisions of section 85(2) and section 88 of the Criminal Procedure Code which provides that only police officers of the rank above that of an Assistant Inspector of Police can be authorised to prosecute criminal cases before a magistrate's court. In Roy Richard Eliremah & Anor versus Republic [2003] KLR 537 and Silvester Keli Kakumi Cr. App No. 142 of 2992 (Mombasa) (unreported) the Court of Appeal held that where such an incompetent police officer prosecutes a criminal case before a magistrate's court, the proceedings thereto will be a nullity."

I am bound by the decision of the Court of Appeal.I hereby declare the proceedings before the trial magistrate in the instant appeal to be a nullity, as a consequence of which I allow the appeal, quash the conviction of the appellant and set aside the sentence imposed.

16. The question that remains therefore, is whether or not to order a re-trial. The principles upon which a court should order a re-trial were restated in the case of **Fatehali Manji v Rep [1966] EA 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 its 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 and an order for retrial should only be made where the interests of justice require it;"

17. These principles were reiterated in the more recent case of **Muiruri v Republic [2003] KLR, pg 552**, where Kwach, Githinji & Waki JJA said:

"It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's.

18. Generally therefore, whether a re-trial should be ordered or not must depend on the circumstances of the case. The alleged offence herein occurred on 3rd May 2007 within Thika, and I have not been told that it would be difficult to trace the four main witnesses for a re-trial. Although the trial was defective, there was overwhelming evidence on the part of the prosecution and the mistakes leading to the quashing of the conviction were not entirely of the prosecution making. Taking into account the circumstances of this case, and the principles set out above, the order which does commend itself to me, and which I now make is that there shall be a re-trial.

I therefore quash the conviction, set aside the sentence and order a re-trial.

SIGNED DATED and **DELIVERED** in open court this **17th day** of **April 2013**.

L. A. ACHODE
JUDGE