THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 44 OF 2011

TIMOTHY KATANA KAZUNGU...............................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence in Cr. Case No.1467 of 2007 by the Hon. W. N. Kaberia, Senior Resident Magistrate, in Kajiado delivered on 21st February, 2011)

JUDGMENT

The appellant, **Timothy Kazungu Katana** was charged before the Senior Resident Magistrate's Court at Kajiado with the principal offence of defilement of a girl contrary to Section 8(2) of the Sexual Offences Act. The particulars of the charge were that on the 10th day of December, 2007 in Kajiado District within the Rift Valley Province, he unlawfully had carnal knowledge of **S.M.O** a child aged seven years.

In the alternative, he was charged with committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge being that on the 10th day of December, 2007 at in Kajiado District within Rift Valley Province the appellant committed an Indecent Act to

S.M.O by touching her private parts. The appellant denied both counts.

The prosecution called a total of five witnesses. Their case was that on the 10th day of December, 2007, at around 7.30 a.m. the appellant visited the home of **V.I.O** (PW.3) where he had gone to look for work. He was warmly received by PW.3 who gave him a cup of tea. PW.3 later went out to fetch water. When she returned thirty (30) minutes later, she found her daughter **S.M** (PW.1) lying on the sofa set on her back crying. When she inquired from her what had happened, the girl told her that the appellant had defiled her.

PW.3 immediately called her husband who had left for work in Nairobi. The husband then called S's uncle, **A.O.N** (PW.2) who rushed to **V's** home. He found the appellant there and

took him to Kitengela Police Post where he was placed in the cells. He also took S to Kitengela Health Centre where she was treated.

S.M (PW.1) testified that the appellant removed her skirt and pant and defiled her on a sofa set.

PW.5 **Joseph Biwott** a Clinical Officer at Kajiado District Hospital examined her on the 11th day of December, 2007 and noted tenderness on the lower abdomen and there was bleeding around the labia. The hymen was also perforated. The appellant was subsequently charged with the offences.

Put on his defence, the appellant testified that he went to **V's** home on the 10th December, 2007 at 7.00 a.m. He went there to build a chicken pane. He was served with tea by **S's** mother (PW.3) after which he left for his home. However, when he arrived home he discovered that he had left his key at **V's** home. He therefore went back where he found **V** who alleged that he had defiled S. Soon thereafter, S's uncle (PW.2) came and he was taken to Kitengela Police Post where he was locked up in the cells. He denied defiling **S** though.

The learned magistrate having evaluated the evidence tendered found for the prosecution, convicted the appellant and sentenced him to twenty five (25) years imprisonment.

Aggrieved by the conviction and sentence, the appellant through **Messrs Madzayo Mrima and Company Advocates** lodged the instant appeal on 15 grounds to wit:-

"1. That the learned trial magistrate erred in law and fact by conducting a trial, convicting and sentencing the Appellant pursuant to a trial which condoned the contravention of the Appellant's constitutional rights as provided under section 72(3) of the Constitution (now repealed) without explanation whatsoever by the prosecution, whether justified or not.

2. That the learned trial magistrate erred in law and fact in failing to comply with the provisions of section 19 of the Oaths and Statutory Declarations Act before admitting the evidence of PW.1.

3. That the learned trial magistrate erred in law and fact by relying on the uncorroborated evidence of PW.1 in convicting on the Appellant herein without complying with section 124 of the Evidence Act Cap 80 Laws of Kenya

4. That the learned trial magistrate erred in law and fact in failing to adhere to the mandatory provisions of section 77(2) (b) of the Constitution (now repealed) in conducting the trial.

5. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution had not established its case beyond reasonable doubt.

6. That the learned trial magistrate erred in purporting to impose a burden on the appellant to prove his alibi.

7. That the learned trial magistrate erred in holding that the Appellant had penetrated the victim without a scintilla of evidence to support the finding.

8. That the learned trial magistrate erred in law and fact in holding that the complainant was a minor aged 8 years without evidence either medical or otherwise to support the finding.

9. That the learned trial magistrate erred in failing to find that the ingredients forming the offence under section 18(2) of the Sexual Offences Act were not (sic**) proved beyond reasonable doubt.**

10. That the learned trial magistrate erred in failing to take into account that no exhibit was produced in court at all to warrant the conviction of the appellant.

11. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding this case.

12. That the learned magistrate misdirected himself in convicting the Appellant herein notwithstanding the gaping holes in the prosecution case following the failure of prosecution to call crucial witnesses.

13. That the learned trial magistrate erred in law and fact in failing to appreciate that the

Appellant's conduct at the time of arrest was inconsistent with criminal behaviour.

14. That the learned trial magistrate erred in law and fact in relying on inconsistent and massively contradictory evidence to convict the Appellant.

15. That the conviction is unsafe and against the weight of the evidence."

When the appeal came up for hearing before me on 19th January, 2012, **Mr. Mwenda**, learned State counsel conceded the appeal on the ground that the appellant was charged under the penalty section as opposed to the section creating the offence. He however, sought a retrial.

Though **Mr. Kimani,** learned counsel for the appellant welcomed the State's gesture, in conceding the appeal he was nonetheless opposed to a retrial. He submitted that the initial trial had taken inordinately too long to conclude, the mistake leading to the State conceding to the appeal had nothing to do with the appellant, the State will seek to fill the gaps in their case if a retrial is ordered and finally that the evidence adduced during the trial could not have resulted in a conviction.

In response, **Mrs. Gakobo**, learned Senior State Counsel who had stepped in for **Mr. Mwenda** submitted that the error in the charge sheet was not fatal. It was curable under section 382 of the Criminal Procedure Code. The evidence on record was strong and if the self-same evidence was re-tendered at the retrial, a conviction was likely to result. The charges were serious. A retrial will avail justice to both the complainant and the appellant. The appellant had been sentenced to 25 years imprisonment. He had only served one year. He cannot therefore claim prejudice if a retrial was ordered as he had not served a substantial portion of the sentence. Witnesses were readily available.

The discretion of the court to order a retrial is one that ought to be exercised with great care and circumspection. It should not be done randomly but on well grounded and formulated principles. There are several factors to be considered when the court is deciding whether or not to order a retrial. Some of these factors have been spelt out in the case of **Fatehali Manji Vs. Republic (1966) E.A. 343**. In general a retrial will not be ordered when the original trial was illegal or defective. However, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it. Again a retrial will not be warranted merely because of insufficiency of evidence. The evidence on record must be such that if the self-same was re-tendered at the retrial, a conviction would most likely result. Further a retrial will not be ordered; if by so doing an injustice will be caused or occasioned. Similarly a retrial will not be ordered if it will enable the prosecution to fill up gaps in its evidence at the first trial.

See also **Ahmed Ali Dharamshi Sumar Vs. R (1964) E.A. 481, M'Kanake Vs. R (1973) E.A 67** and **Merali and others Vs. R. (1971) E.A. 221.**

Therefore, it is within the court's discretion, whether or not to order that a case be retried. This discretion as can be seen is exercised on solid principles. Although a retrial will not be ordered merely on account of irregularities, it is well settled, that if such procedural irregularity have indeed gone into the core of the matter and have occasioned an injustice or miscarriage of justice, nothing will deter the court

from ordering a trial de novo. A retrial therefore becomes an important safeguard where an earlier trial had been vitiated by miscarriage of justice.

I have considered the record of this case and I am satisfied that the defects in the charge-sheet in charging the appellant under the section creating the offence was fatal. It was not curable under section 382 of the Criminal Procedure Code as submitted by **Mrs. Gakobo**. The particulars set out as constituting an offence, however clearly stated, by themselves cannot create an offence. To my mind, the error was fundamental one in law in that the appellant was charged with a non-existent offence. It cannot be said that such an error did not occasion injustice to the appellant.

In the premises the State was right in conceding to the appeal. This appeal must then be allowed. I have however anxiously considered the plea for retrial, but have come to the conclusion that it will not be in the interest of justice to order the same. To do so will give the prosecution opportunity to correct the omission committed with regard to the receipt of the evidence of the minor. The complainant allegedly gave evidence under oath. She was then aged 8 years. She was therefore a child of tender years. The trial magistrate ought to have complied with section 19 of the Oaths and Statutory Declarations Act before the reception of the evidence of the complainant. The record of the subordinate court shows that the complainant was not subjected to *voire dire* examination to determine whether or not she understood the nature of the oath or if not, whether she was possessed of sufficient intelligence to justify the reception of the evidence or understood the duty of telling the truth to justify again reception of her evidence. Failure to strictly comply with the procedure may in appropriate case as this one vitiate the conviction. In my view, in the absence of an inquiry and finding that the complainant was possessed of sufficient intelligence and understood the duty of speaking the truth, it cannot be said that the complainant was a competent witness or that her evidence had any probative value. In the event then that a retrial is ordered, opportunity will have been created for this omission to be corrected. That will occasion injustice and prejudice to the appellant.

In the result, I allow the appeal, quash the conviction and set aside the imprisonment imposed. The appellant should be set free forthwith unless otherwise lawfully held.

Ruling dated signed and delivered in **Machakos** this **29th** day of **February**, 20**12**.

ASIKE-MAKHANDIA

JUDGE