THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 14 OF 2008

S.K……..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence of in criminal case No.1661 of 2005 at Kitui Resident Magistrate's Court delivered by Hon. T. M. Mwangi Resident Magistrate on 24th May, 2007)

JUDGMENT

The appellant was charged before the Principal Magistrate's court at Kitui with the offence of defilement of a girl under the age of 16 years contrary to Section 145(1) of the Penal Code. Particulars given were that the appellant on 24th July, 2002 at about 1.00 p.m. in Kitui District of Eastern province, unlawfully had carnal knowledge of **K.J** a girl of 9 years. Alternatively, he was charged with indecent assault on a female contrary to section 144(1) of the Penal Code in that on the same day time and place, he unlawfully and indecently assaulted **K.J** a girl of 9 years by touching her private parts namely, vagina. The appellant denied both counts and his case proceeded to trial. The prosecution called a total of 4 witnesses; **B.J** (PW.1), **K.J,** (PW.2) **the complainant, PC George Nyagah** (PW.3) and **Clinical Officer Evelyn Makau** (PW.4).

The complainant stated that on 24th July, 2002 at about 1 p.m. she left School for home in the company of another pupil called B. On the way, they met the appellant who asked her to drop her school bag at home and then go to his house which she did. At the house, the appellant asked her to accompany him to the swamps so that he would cut for her some sugar cane. The two left for the swamps and on reaching there, the appellant held the complainant and forced her to lie down on her back. He removed her pant then his long trousers and underwear. He then lay on top of the complainant and defiled her. Done, he put on his underpants and trousers and left telling her to go back home. Pw.2 put on her underpants and her skirt and left for home. As a result of the incident the complainant was injured in her vagina which was bleeding and was also feeling pain therefrom. She met PW.1 her mother to whom she reported that the appellant had defiled her. PW.1 in turn went to the appellant's father and complained to him with regard to incident. The two came back to PW.1's house. PW.1 examined the complainant and saw that her private parts had been injured. The complainant was then taken to Kitui District Hospital for treatment on the same day and a report made to Kitui Police Station. The report was received by PW.3 who issued the complainant with a P3 form. The same was filled at the hospital by PW.4 and returned to the police station.

The complainant's mother on her part testified that she had returned home at 3 – 4 p.m. on 24th July, 2002 only to find 3 out of her four children. The children told her that the fourth child, the complainant was not at home because she had been called by the appellant as he wanted to send her somewhere. PW.1 is a cousin of the appellant, therefore the appellant is an uncle to the complainant. That afternoon when the complainant eventually came home she was crying and informed her that the appellant had done something bad to her.

Upon examining her, PW.1 noted some bleeding from her vagina which was ruptured and had mucous-like substance. She went to the appellant's father's home and reported to him what the appellant had done to PW.2. The two came back together to her house. She then took the complainant for treatment at Kitui District Hospital thence to Kitui Police Station where she reported the incident. A police officer accompanied PW.2 to hospital where she was treated. A P3 form was later filled at the same hospital and returned to the Police Station.

PW.3 testified that the complainant accompanied by her mother reported to him at 7.30 p.m. on 24th July, 2002. They claimed that the complainant had been defiled by a person known to her. PW.2 was taken to hospital and treated. Upon further investigations he established that the appellant had committed the offence. He caused him to be arrested and charged.

PW.4 testified that she examined and filled the P3 form on 29th July, 2002 belonging to the complainant. She consulted treatment cards of the complainant at the time of filling of the P3 form. PW.2 had during her initial treatment reported to hospital with a blood stained underwear. Her hymen was broken and had sought treatment only 5 hours after her defilement. She established that the nature of offence committed upon the she was defilement as she had a tender and bruised vagina numerous epithelial cells meaning that her vagina covering was broken may be due to inflammation. Defilement could have caused inflammation since it is trauma by itself. No spermatozoa was observed. That hymen can be broken through sexual intercourse but not by inserting fingers in vagina. Patient was 9 years old at the time of defilement.

Having heard the prosecution's case, the trial court ruled that the appellant had a case to answer. The appellant elected to remain silent even after he had been informed by the trial court, that he had a right to adduce evidence in rebuttal.

The learned magistrate having carefully evaluated the case for the prosecution as well as the defence, found for the prosecution. She accordingly convicted the appellant and sentenced him to 12 years imprisonment. Aggrieved by the conviction and sentence aforesaid, the appellant mounted the instant appeal on the grounds that the proceedings were marred by fatal procedural irregularities, the prosecution case was not proved to the standard required and finally that there was no link between the appellant and the offence committed.

When the appeal came up for plenary hearing before me on 16th February, 2012, the appellant opted to canvass the same by way of written submissions.

The appeal was opposed by **Mrs. Gakobo**, learned Principal State Counsel. She submitted that the trial court erred in convicting the appellant under the Sexual Offences Act when he had been charged and tried under the Penal Code. She therefore urged the court to correct the anomaly. Otherwise the offence was committed in broad day light and the complainant knew the appellant. Recognition of the appellant was thus free from possibility of error. After all, the appellant was an uncle of the complainant. The evidence of the complainant was well corroborated by the evidence of her mother. The complainant was examined shortly after the incident and features consistent with defilement were noted. All in all, she submitted that the evidence on record upon which the appellant was convicted was credible.

I have anxiously considered the evidence on record, the judgment of the learned Resident Magistrate, the grounds of appeal, the rival written and oral submissions as well as the authorities to which I have been referred. In a first appeal as this one, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts ought to be revisited and analyzed afresh.

It is apparent that in the course of the trial of the appellant in the subordinate court, the trial magistrate committed two fundamental irregularities that go to the root of the trial and were thereby fatal. The entire trial was therefore rendered a nullity. Those procedural irregularities are captured partially in ground 1 of the appellant's Petition of Appeal.

The first procedural irregularity was failure by the learned magistrate to read and explain to the appellant the substance of the charge when the hearing of the case commenced de novo. The record shows that initially the hearing commenced before the same magistrate on 6th June, 2006. Half way through the complainant's testimony she was stood down on the ground that she had become too shy and or reluctant to give evidence. On being gently urged on by the court, she indicated that she wished to withdraw the case against the appellant as their families had sat and agreed on reconciliation. The application by the complainant to withdraw the complaint was however rejected by the trial court and rightly so in my view. The trial magistrate then ordered for the hearing to continue on 3rd October, 2006. On that day the proceedings are recorded thus:

"3.10.06

Before me T. M. Mwangi RM

Court clerk – Janet

Prosecutor – C.I. Regina

Accused – present

Prosecutor: I have two witnesses and I am ready to proceed.

Accused – I am ready to proceed.

Court: case to start de novo.

PW.1 an adult female upon being sworn states as follows in Kiswahili ....."

The order that the case starts de novo meant that the hearing of the case was to start afresh and whatever had transpired earlier in the case was invalid and belonged to the dust bin of history. According to **Blacks Law Dictionary**, a de novo trial is described as;

"a new trial on the entire case, that is on both questions of fact and issue of law, conducts as if there had been no trial in the first instance ..."

This means then that a fresh plea ought to have been taken. The trial magistrate should not have relied on the earlier plea which was taken in the initial proceedings which had been invalidated by the order that the case commences de novo. Thus the substance of the charges ought to have been read and explained to the appellant afresh on 3rd October, 2006 as the earlier plea taken on 19th May, 2005 had been invalidated by the court's order for the trial to start de novo. There was a lapse of 17 months from the date when the original plea was taken and therefore for the appellant to be brought up to speed, a fresh plea ought to have been taken. The omission was fatal and occasioned a miscarriage of justice. The omission is not even curable under section 382 of the Criminal Procedure Code. The appellant was thus prosecuted for an offence he did not know nor pleaded to. Prosecution witnesses started testifying on 3rd October, 2006, but for what specific offence were they testifying in respect of and against whom? Section 207 (1) of the Criminal Procedure Code is in mandatory terms –

"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admit or denies the truth of the charge".

It would appear therefore that trial commenced before the accused has taken a plea as in this case is invalid for all intents and purposes and I so hold. No wonder in his defence, the appellant elected to keep quiet.

However, that election should not have attracted the wrath of the learned magistrate. In the course of her judgment, the learned magistrate observed that the appellant did not adduce evidence in the course of his defence meaning that he was aware that the evidence against him was overwhelming. In law, it was the appellant's fundamental right to have opted to remain silent. That should not have been the subject of adverse comments by the learned magistrate. Indeed by such said observation the learned magistrate appears to have shifted the burden of proof to the appellant whereas in law the burden is always on the prosecution and never shifts to the accused save in a few exceptional cases which this one was not.

Lastly, PW.3 the Investigating Officer of the case testified and produced the P3 form of the complainant purportedly under section 77 of the Evidence Act. The appellant objected and wanted the maker to testify and produce the same. The learned magistrate overruled him. This was wrong and gross misdirection in law. Section 77 of the Evidence Act allows in Criminal proceedings for the use of any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistic expert, document examiner or geologist, and that such documents may be produced in evidence by any other witness and not necessarily the maker.

However, this has to be with the consent of the accused. In the event that the accused objects to such production as the appellant did, in this case, his wishes must be respected and the maker of the document called to testify and tender in evidence the document. In this case the appellant objected to the P3 form being produced by PW.3. He wanted the maker to be called as a witness. But the learned magistrate overruled the objection and wrongly so in my view. In any case, no basis had been laid by the prosecution for the invocation of section 77 of the Evidence Act. Again it is instructive, that the maker of the document, was to subsequently to testify as PW.4 but did not produce the P3 form as an exhibit.

For all the foregoing reasons, I find the trial of the appellant in the subordinate court to have been a nullity. The appeal is allowed, conviction quashed and the sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Ruling dated, signed and delivered in **Machakos** this **15th** day of **March, 2012**.

ASIKE-MAKHANDIA

JUDGE