



**MBITHI KIIO MUTINDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original Conviction and Sentence in Makueni Principal Magistrate's Court*

*Criminal Case No. 526 /2009 by Hon. F.M. Nyakundi –PM 8/4/2010)*

### **JUDGMENT**

The Appellant, **Mbithi Kii Mutinda** was charged before the Principal Magistrate's Court at Makueni with the offence of defilement of a child under the age of eleven years contrary to section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 23<sup>rd</sup> May, 2009 at around 18.00 hours, at Makueni District within Eastern Province, the appellant unlawfully caused penetration of his male genital organ to **MM**, a girl under the age of 11 years.

In the alternative charge, the appellant was charged with the offence of indecent assault of a girl under the age of eleven years contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence given were that on the same day, time and place the appellant unlawfully and indecently assaulted **MM** a girl under the age of 11 years by touching her private parts. The appellant denied both charges and he was tried.

The complainant, PW1 **MM** was at the time of the alleged offence aged 11 years and was attending Ni Primary School. On 23<sup>rd</sup> May, 2009 she went to fetch water for her paternal grandmother on the instructions of her mother, PW2 **ANM**. She did as told, fetched the water using donkeys and off loaded the same. She then left the donkey at her grandmother's home and started walking back home at about 5.00p.m. On the way she passed through the home of the appellant; whose mother is a cousin to her father. The appellant was at home and he called her. On going where the appellant was, he got hold of her and locked her inside the house. They proceeded to the bedroom where he threw her on a bed, removed her pant, and proceeded to defile her. The experience was painful but she could not scream as the appellant threatened to strangle her if she did. Though it was her first time, she did not bleed, and when the appellant was done, he opened the door for her. She carried her pant with her and went home. Immediately she arrived home she informed her mother (PW2) who checked her private parts and saw spermatozoa in her private parts. The underpants too had spermatozoa. Since it was dark she decided to take her to hospital the next day. They spent the night and on 24<sup>th</sup> May, 2009, PW2 took the complainant to Makueni District Hospital but were referred to the police station where they reported the matter and were issued with a P3. Subsequently, PW1 was treated at Makueni District Hospital. Both PW1 and PW2 identified the treatment card issued at Makueni District Hospital and P3 Form issued to her from Makueni Police Station in Court. The P3 form was filled by the clinical officer attached to Makueni District Hospital. PW4, **Eugene Boge**. He examined her and concluded that there had been penetration.

**Corporal Agnes Ikaba**, of Makueni Police Station received the report from PW1 and PW2 on 24th May, 2009 and referred them to hospital for treatment. She also issued PW1 with a P3 form which was

later filled by the clinical officer who treated her. The appellant who was a form four student at Kyanzu Kyeni Secondary School, at the time had disappeared after the incident but was arrested upon sitting for his final KCSE Examination when he reported to his school and was charged with the present offences.

Upon being placed on his defence the appellant chose to give a sworn statement. He stated that he stayed with his parents at Kisau but was living at his grandmother's home in May, 2009 at I, as he was attending day school at I. He denied any knowledge of the offences and stated that on 23<sup>rd</sup> May 2009, he was at home at Kisau, and not at I as the Head teacher of the school he was attending had sent him home for school fees on 14<sup>th</sup> May 2009. That he had called his parents and informed them and they told him they were looking for the fees. After one week, when they had not responded, on the morning of 22<sup>nd</sup> May 2009 he left for Kisau to find out if the fees had been raised. On arrival he was told that there was no fees but his mother whom he called as a witness decided to go to his school and plead with the head teacher to allow him back without paying the fees as they did not have the money immediately. His mother did so in June, 2009 but the request to the head teacher was turned down.

This too was the evidence of DW2 **ZMK**, the mother to the appellant. She confirmed that in June 2009 she went to the appellant's school to request if the head teacher could allow him back to school as they were unable to raise the school fees then but the request was not granted. She then decided to pass through her birth place at I where the appellant was residing and met with the mother to the complainant (PW2) who demanded Kshs. 20,000/= from her allegedly because the appellant had defiled her daughter. It was the first time she was hearing of this and said she would not pay for something she did not know. It was then that PW2 threatened her that the appellant could not continue with his education. DW2 alleged that since she and her family are learned, the complainant's family who are her relatives, as father to complainant and herself are first cousins were jealous and they also had a land dispute. DW2 then returned to Kisau and informed the appellant that he could stay at home and she would get him teachers to assist him study as their request had been denied. The appellant stayed home until 9<sup>th</sup> October, 2009 when he went back to school to sit for his final examinations. He sat his examinations from 21<sup>st</sup> October, 2009 upto 11<sup>th</sup> November, 2009 and upon finishing his last paper, he was arrested and taken to Makueni Police Station where he was charged with the present offences and brought to court and next day.

That was the extent of both the prosecution and defence cases. The learned magistrate having evaluated the evidence on record both by the prosecution and defence was satisfied that the prosecution had proved beyond reasonable doubt that the appellant had been defiled by the complainant. She accordingly convicted the appellant and sentenced him to serve 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that the prosecution did not prove the case against him as required, the evidence by the prosecution witnesses was suspect as it was full of discrepancies, his age was not considered and finally, his defence was not given due consideration.

When the appeal came up for plenary hearing before me on 3<sup>rd</sup> May, 2012, **Mr. Mukofu**, learned State Counsel conceded the same on the ground that the appellant was charged and convicted under the penalty section of the Sexual Offences. This was irregular. Nonetheless, he sought a retrial of the appellant on the ground that the offence was serious, the evidence against the appellant was overwhelming, the appellant had not served a substantial portion of the sentence and finally, witnesses were readily available.

In response, the appellant welcomed the state's gesture in conceding to the appeal. He was also not opposed or averse to an order for retrial.

This is a first appeal and despite State conceding to the appeal, I am still duty bound to reconsider and re-evaluate the evidence adduced before the trial court in order to form my own opinion if that evidence could sustain the appellant's conviction, giving due allowance that I did not see and hear the witnesses testify in the trial court. This is for purposes of satisfying myself further whether a retrial or not

should be ordered.

There is no doubt that the appellant was charged, tried, convicted and sentenced under section (8) 2 of the Sexual Offences Act. That section is in these terms;

***“...Any person who commits an offence of defilement with a child aged eleven years or less shall be upon conviction be sentenced to imprisonment for life...”***

As can be seen the appellant was charged under the penalty section as opposed to the section creating the offence. The offence is created by section 8(1) of the Sexual Offences Act. It is in these terms;

***“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.***

Having been charged under the penalty section, the appellant was thus tried for a non-existent offence. The charge ought to have been framed thus-

***“Defilement of a child under the age of eleven years contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act”.***

As I have had occasion to state in the past, Sexual Offences Act created offences of strict liability. The discretion of the court was taken away in matters of sentence. Indeed the act came with horrendous sentences. Because of this it behoves those responsible for enforcing the act to be extremely careful in the manner they draft the charges. One single misstep or omission is a sure guarantee for the convict and in this case the appellant to walk on appeal. Again and as I have had occasion to state before, this misstep or omission, is not curable by the provisions of section 382 of the Criminal procedure Code. In my view therefore the above omission was a fatal flaw in the hearing of the appellant's case for which I find no cure. In view of this serious defect in the prosecution of the appellant's case in the trial court, the appellant's trial must be declared a nullity. Accordingly, the appeal is allowed, conviction quashed and sentence imposed set aside.

As the learned State Counsel told me and with which I agree, the offence is serious, the evidence against the appellant was simply overwhelming and should the self same evidence be tendered, most likely a conviction would result. Similarly witnesses are readily available. I am therefore persuaded that the State will be in a position to successfully mount a retrial. In any event, the appellant wholly embraced the State's plea and or request. This therefore is a proper case for a retrial. Consequently, I direct that a retrial be held. For this purposes, the appellant shall be presented before the Principal Magistrate's Court at Makueni on **27<sup>th</sup> June, 2012** for his retrial to begin before any other magistrate of competent jurisdiction other than **Hon. F.M. Nyakundi** who presided over the initial trial. Meanwhile the appellant will be held in custody until then.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 15<sup>TH</sup> day of JUNE, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**