MUEMA MULEI ……..……...……..….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate

T.M Mwangi RM delivered on 11/12/2009 in Kitui Criminal Case No. 18 of 2009)

J U D G M E N T

The appellant was charged in the subordinate court with defilement of a girl contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. In the alternative, he was charged with indecent act with a child contrary to section 11 (1) of the same Act. After a full trial, he was convicted of attempted defilement and sentenced to serve 24 years imprisonment.

He has now appealed to this court against both conviction and sentence. From his amended supplementary grounds of appeal, his grounds are:-

1. That the learned trial magistrate made a crucial error in law by convicting on a single uncorroborated evidence of PW1 and acting against the provisions of section 124 of the Evidence Act as no reasons were given for the decision.

2. That the sentence of 24 years imprisonment imposed on a charge of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act was unlawful.

3.That the learned magistrate erred in rejecting his sworn defence and terming it as a mere denial.

The appellant also filed written submissions.

At the hearing, the appellant relied on his written submissions. The learned State Counsel Mr Mukofu, opposed the appeal. Counsel submitted that there was sufficient evidence to sustain the conviction. Counsel emphasized that the evidence of PW3, the complainant, was truthful. In addition, the P3 form produced by PW4 showed that the hymen of the complainant was broken.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own conclusions and inferences. *See* **Okeno –vs- Republic (1972) EA 32**.

I have perused the evidence on record. I have also perused the judgment. This is a case where only the complainant, PW3 M M, claims to have been with the appellant for some days, and that the appellant defiled her. She is supported by her mother PW1 Josephine Muthui, who was so informed about the incident by the said PW1. Though PW4 Dorcas Munyao, the Clinical Officer, found that the hymen of the complainant was broken, there was no evidence that the breaking of the hymen was recent, or that such was connected with the appellant.

The appellant gave sworn testimony at the trial and he was cross-examined. He cross-examined

witnesses. It is obvious from the evidence, that he was working in the same homestead of the father of the complainant. However, he worked in the house of a younger wife to the mother of the complainant. It is also clear from the evidence that there was a family rift between the first wife (PW1), and her husband, PW1 thought that the husband had abandoned her for the younger wife.

The learned magistrate in his judgment merely referred superficially to the appellant's sworn defence. He dwelt on the prosecution evidence and came to the simple conclusion that:-

"….despite that the accused gave a sworn statement, I find his defence to have been a bare denial."

In my view, the above observation and finding by the trial magistrate was far from the true position. The appellant gave extensive sworn evidence which covered two typed pages. He was cross-examined. The cross-examination did not shake his evidence.

In criminal cases, the burden is always on the prosecution to prove its case against an accused person beyond reasonable doubt. That burden does not shift to the accused – **See Muiruri –vs- Republic (1983) EA 445.**

Secondly, and more importantly, section 169 (1) of the Criminal Procedure Code (Cap 75) requires that a judgment should contain the points for determination, the decision and reasons for the decision. It is also trite that a judgment should evaluate both the evidence for the prosecution and that of the defence before coming to conclusions.

In my view, had the learned trial magistrate evaluated both the prosecution and defence evidence herein, he would not have come to the conclusion that he came to. From the evidence on record, it was only the complainant who knew where she went to, for the days. She had disappeared from home on those days. She was reluctant to tell the story to her father. She also did not tell her mother immediately. There was a family rift. The appellant was involved in the family rift as a victim, because he happened to be a servant of the younger wife. The mother of the complainant was not happy that the husband favoured the younger wife. The place where the appellant lived was in the same homestead. It was quite close to the complainant's mother's house. One would wonder how the complainant would have disappeared and stayed there for some days.

The appellant denied the offence on oath which means he was ready to be interrogated, and was indeed subjected to cross-examination. He gave an account of himself and his side of the story which was believable. He denied the offence. The cross-examination by the prosecution did not shake his sworn defence. Infact, it did not challenge what he had stated on oath.

I find and hold that, had the learned magistrate considered all the above facts, he would have come to the conclusion that the appellant is innocent. It is not safe to uphold the conviction on the evidence on record. The prosecution did not prove its case beyond reasonable doubt.

For the above reasons, I allow the appeal. I quash the conviction and set aside the sentence. I order that the appellant be released, unless otherwise lawfully held.

Dated and delivered at Machakos this **13th** day of **June** 2012.

George Dulu
Judge

In presence of:-
Appellant in person
N/A for State
Nyalo – Court clerk.