JOHN MWANGI CHEGE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Senior Principal Magistrate's Court at Murang'a

in Criminal Case No.36 of 2005 by T.W. MURIGI – S.R.M. dated 13th November 2006)

J U D G M E N T

John Mwangi Chege, the Appellant herein was convicted for the offence of **Defilement of a Girl under the Age of 16 Years** contrary to **Section 8** of the **Sexual Offences Act**. He was sentenced to **Life Imprisonment**. Being aggrieved, he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Petition:

"1. That I pleaded not guilty to the charge.

2. That the Learned Trial Magistrate failed in the administration of justice particularly finding a life sentence where as I the appellant was incarnated more than six (6) days contravention of Section 71(3) B of the Constitution.

3. That the Trial Magistrate failed in finding the imposed sentence but equally failed in not putting the issue of intoxication as part of the facts in issue.

4. That the Learned Trial Magistrate misdirected herself in forming the opinion of guilt upon the adduced evidence but also failed in not analyzing the mental inability or incompetence in my life.

5. That Learned Trial Magistrate failed in analyzing the adduced evidence in respect of the charge but failed to observe that actual violence by way of exhibiting the clothes the victim were not exhibited.

6. That the Learned Trial Magistrate erred in points of law and fact in holding the scale partially on the Prosecution and thus became obliged to reject my defence that remains true and honest.

7. That the Learned Trial Magistrate erred in points of law and fact in holding an influence of guilt upon a family testimony in absence of an independent witness.

8. That the Learned Trial Magistrate erred in finding the imposed sentence without the need to observe that medical evidence on both parties was necessary."

When the Appeal came up for hearing, the Appellant was permitted to file and rely on written submission. Miss Ngalyuka, Learned Principal State Counsel opposed the appeal on the basis that the Prosecution's case was proved beyond reasonable doubt.

The case before the trial court was fairly short and straightforward. It is the evidence of CNN (P.W.1), that on 30th May, 2003, she was at her grandmother's (P.W.3's) house when at 11.00 P.M. she heard a knock. Her grandmother had gone for prayers, so P.W.1 thought her grandmother was the person knocking the door. She called out the name of her grandmother but there was no answer. P.W.1 heard the noise of some movements inside the house. P.W.1 screamed but since it was raining no one heard her screams. That person who appeared drunk entered P.W.1's bedroom. P.W.1 flashed a torch and recognized that person to be the Appellant. When P.W.1 called out his name, the Appellant slapped her, tore her pants and raped her in her bed. P.W.1 pushed him away and ran to Norman Thuo's (P.W.4's) house and informed him what happened. P.W.4 went to P.W.1's grandmother's house where he found the assailant having left leaving behind an umbrella which belonged to P.W.1's mother. P.W.4 and members of the public went to the Appellant's home and arrested him and brought him to P.W.1's grandmother's house where P.W.1 positively identified him as the person who raped her and by then he had not changed his clothes. P.W.1 reported the incident to the police who referred her to Kangema Health Centre where she was treated and issued with a P3 Form. NNN(P.W.2) stated that the Appellant was her friend and workmate whom she lived together as though they were husband and wife. P.W.1 was P.W.2's daughter. It is the evidence of P.W.2 that on 30th May 2003, the Appellant went out for shopping at 7.00 P.M. and took with him P.W.2's umbrella since it was raining. P.W.2 said, the Appellant delayed in returning. He came back smelling alcohol and then left after locking the door from outside. He returned at midnight without the umbrella. Later in the night, P.W.2 said P.W.4 and P.W.1's grandmother (P.W.3) came to inquire the whereabouts of the Appellant. They brought the umbrella which the Appellant had. Those people informed P.W.2 of what had happened to P.W.1. Mary Njeri Ngatia (P.W.3) averred that she was informed by P.W.1 that she had been raped by the Appellant. P.W.3 was able to identify the umbrella to be hers due to a special mark. John Maina Kabiru (P.W.6) a Clinical Officer based at Murang'a District Hospital examined and treated P.W.1. P.W.6 filled the P3 Form which he produced as an exhibit in evidence. P.W.6 noted in the P3 Form that P.W.1's hymen was broken with thick vaginal discharge. P.W.6 concluded that the complainant (P.W.1) was defiled. P.W.6 also examined the Appellant and produced the relevant P3 Form in respect of the Appellant. The P3 Form filled in respect of the Appellant appear to be of now no evidential value. P.W.6 further stated that the hymen was broken and that there were spermatozoa. When placed on his defence, the Appellant gave unsworn testimony denying the offence. It is P.W.6's evidence that P.W.1 and P.W.3 together with other witnesses had implicated the Appellant with the offence. In the end, the Trial Senior Resident Magistrate found that the Prosecution's case had been proved to the required standard of beyond reasonable doubt. The Trial Magistrate further opined that the Appellant's defence was a mere denial.

On appeal, the Appellant raised on cardinal point, which is to the effect that the Appellant was convicted under the **Sexual Offences Act** yet the charge was brought under the Penal Code. Miss Ngalyuka, did not address this Court over this issue. The record shows that the Appellant faced a charge of Defilement of a Child under the age of 16 years contrary to **Section 145(1)** of the **Penal Code.** He was convicted under **Section 8** of the **Sexual Offences Act**. The **Sexual Offences Act** came into effect as of 21st July 2006. By the time of indicting the Appellant i.e. on 10th January 2005, the Sexual Offences Act had not come into force. However, at the time of conviction, i.e. on 28th December 2006 the aforesaid Act was in force and **Section 145** of the **Penal Code** had been repealed. However, that did not entitle the Trial Magistrate to convict under the **Sexual Offences Act**. The law is very clear that under **Section 3** of the first schedule of the **Sexual Offences Act** that the trial should continue to its conclusion under the repealed law. The Learned Senior Resident Magistrate therefore fell into error when he convicted the Appellant under the new law. He in essence took away a right which the Appellant had already acquired thus prejudicing his rights. The appeal will be clowed for this reason.

The other serious issue which was ably argued by the Appellant is that the Trial Magistrate erred when he proceed to full trial when there was doubt as to the Appellant's sanity. Again, Miss Ngalyuka did not address me over this issue. I have looked at the record and it is clear that plea was taken on 10th January 2005, though the offence is alleged to have been committed on 30th May, 2003. The record further shows that on 28th February 2005, the Learned Senior Resident Magistrate noted that the Appellant exhibited some characteristics of a person with a mental illness and thus she made an order requiring the Court to be supplied with a Psychiatrist Report. It would appear the Appellant was taken for treatment at Mathari

Mental Hospital. The case proceeded for hearing on 27th February, 2006. There is no evidence that a Psychiatrist Report had been filed by that time. I am convinced, in the circumstances that the trial court erred when it proceeded for trial without the strict compliance of **Section 163(1)** and **163 (2)** of the **Criminal Procedure Code**. That omission is fatal hence the entire trial is vitiated.

I have carefully agonized on whether or not I should order for a retrial. At the back of my mind, I am convinced that if an order for a fresh trial is made, there are high chances that a conviction can be secured against the Appellant. However, there are certain factors which militate against the making of the order. First, it is clear that the offence took place about nine years ago. The possibility of getting witnesses is limited. The case may delay considerably thus prejudicing the chances of conducting a fair trial. Secondly, it is obvious that a fresh trial cannot start until the Appellant is subjected to another round of Psychiatric Examination. That process may take long and that it will also give the Prosecution another chance to seal the gapping loopholes to the detriment of the Appellant. In the end, I will not order for a fresh trial. Consequently, the appeal is allowed. The conviction is quashed and the sentence is set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE