JOSEPH MUREITHI MURAGURI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Senior Resident Magistrate's Court at Othaya in Criminal Case No.90 of 2010

by F. W. Macharia – S.R.M. dated 7th April, 2011)

J U D G M E N T

Joseph Mureithi Muraguri, the Appellant was tried on a charge of the following counts:

In Count 1, the Appellant was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the charge are that: ***on the 5th day of March 2010 at {particulars withheld} in Nyeri South District within Central Province, intentionally and unlawfully caused his penis to penetrate to vagina of C.W. a girl aged 4 years.***

In Count II, the Appellant was charged with the offence of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2007 (2006). The particulars of the charge are that**: *on the 5th day of March 2010, at {particulars withheld} in Nyeri South within Central Province did commit and indecent act with C.W. a child aged 4 years by rubbing his penis against C.W.'s vagina.***

In Count III, the Appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particular of the offence are that: ***on the 5th March 2010, at {particulars withheld} in Nyeri South District within Central Province, intentionally, unlawfully caused his penis to penetrate to vagina of S.W. a girl aged 4 years.***

In Count IV, the Appellant was charged with the offence of Indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2007 (2006). The particulars of the offence are that: ***on the 5th March 2010, at {particulars withheld} in Nyeri District within Central Province did commit an indecent act with S.W. a child aged 4 years by rubbing his penis against S.W.'s vagina.***

In Count V, the Appellant was charged with the offence of Incest contrary to Section 22(1) of the Sexual Offences Act of 2006. The particulars of the charge are that: ***on diverse dates between 5th February, 2010 and 5th March 2010, at {particulars withheld} in Nyeri South District within Central Province intentionally and unlawfully caused his penis to penetrate to vagina of P.W. a girl aged 7 years knowing to be his daughter***.

At the end of the trial, the Appellant was acquitted in the other counts save for Count III where he was convicted and sentenced to serve 15 years imprisonment. The Appellant being aggrieved filed this appeal.

On appeal, the Appellant enumerated the following grounds in his Petition:

"1. The Learned Senior Resident Magistrate erred in law and in fact in convicting the Appellant on insufficient, contradictory and uncorroborated evidence. Prejudice and a miscarriage of justice was occasioned to the Appellant.

2. The Learned Senior Resident Magistrate erred in law and in fact in convicting the Appellant without first making a finding in her Judgment that the Complainant was telling the truth and/or failed to record any reasons for such a finding in total violation of Section 124 (Second Proviso) of Cap 80 Laws of Kenya. Prejudice and a miscarriage of justice was occasioned to the Appellant.

3. The Learned Senior Resident Magistrate erred in law and in fact in shifting the burden of proof to the Appellant when in Law he never has such a burden. Prejudice was occasioned to the Appellant.

4. The Learned Senior Resident Magistrate erred in law and in fact in continuing with the proceedings that were conducted in gross violation of the Law in that no "voredire" were conducted by her Predecessor while the minors who testified and the Appellant was not given a chance to cross-examine them. Prejudice and a miscarriage of justice was occasioned to the Appellant."

When the appeal came up for hearing, Mr. Njuguna Kimani, Learned Advocate for the Appellant abandoned ground 4 of the appeal. Mr. Njuguna argued together the remaining grounds of appeal. The appeal was opposed by Miss Ngalyuka Learned Principal State Counsel.

The case that was before the trial court appears to be short and straightforward. S. W. (P.W.2) told the trial court that the Appellant herein inserted a stick in her private parts and thereafter she was taken to a doctor for treatment. P. W. (P.W.3) told the trial magistrate that her father (the Appellant) took her to a nappier grass plantation where he removed her clothes and inserted a big stick into her vagina. P.W.3 further stated that the Appellant ordered C. W. (P.W.1) and S. W. (P.W.2) to lie down where he proceeded to cover them with a blanket. P.W.3 further stated that the Appellant bought sweets which he inserted in her vagina. The trio later proceeded to school where they were taken to hospital for treatment. R. W. (P.W.4), the mother of P.W.1 said that she was summoned to go to her daughter's school on 5th March 2010, where she heard her daughter (P.W.1) state in the presence of her teachers that the Appellant had defiled her and that is when she was taken to hospital. Dr. Gatwanja (P.W.9) examined P.W.1 and found her genitalia intact but was of the view that the defilement of P.W.1 was based on psychological aspect. P.W.9 examined P.W.2 and noted no injuries on her genitalia though her hymen was broken. P.W.9 formed the opinion that there was possible defilement with no forceful penetration. P.W.9 examined P.W.3 and formed the opinion that her hymen was broken with an old scar noted on the anal opening. P.W.3 is said to have had no visible injuries on her genitalia. P.W.9 also stated that there are various ways in which hymen could be broken i.e. sexual intercourse, insertion of instruments and doing vigorous exercises. When placed on his defence the Appellant gave sworn testimony denying the offences. He said he took himself to the police when he heard from his brother and friends that police were looking for him as a suspect for defilement and that is when he was arrested. The Appellant alleged that he was framed up due to the grudge existing between him and one Joseph the grandfather of P.W.1 and P.W.2 who had made a complaint against him for malicious damage to property (trees). After considering the evidence from both sides, the Learned Senior Resident Magistrate acquitted the Appellant in Counts II, III and in alternative Count II.

On appeal, Mr. Njuguna, urged this Court to find that there was no evidence connecting the accused with the offence of incest. Mr. Njuguna was of the view that the Learned Senior Resident Magistrate improperly applied the provisions of Section 186 of the Criminal Procedure Code. It is stated that the particulars of the offence under Section 5 of the Sexual Offences Act were not proved. The Learned Advocate further argued that the Trial Senior Resident Magistrate did not give reasons why she believed the evidence of complainant as required under Section 124 of the Evidence Act. Miss Ngalyuka, on her part was of the view that the application of Section 186 of the Criminal Procedure Code did not occasion any prejudice. She was of the opinion that there were strong evidence to sustain a conviction.

I have, on my part, considered the rival submissions and carefully re-evaluated the evidence. There is no doubt that the Appellant was convicted for the offence of sexual assault under Section 5 (1) (a) (ii) of the Sexual Offences Act. The Learned Senior Resident Magistrate invoked the provisions of Section 186 of the Criminal Procedure Code to convict the Appellant. In order for the offence to be proved under Section 5(1) (a) (ii), the following particulars must be established:

"(i) The Complainant's genital organ is unlawfully penetrated with an object manipulated by another.

(ii) That the purpose of penetration was not for proper and hygienic or medical purposes."

In the case before this Court, the Appellant was found guilty of committing sexual assault against his daughter, P. W. M. (P.W.3). It is the evidence of P.W.3 that her father (Appellant) inserted a stick into her private parts. In cross-examination by the Appellant, P.W.3 was emphatic that the Appellant inserted a stick into her vagina which stick he got from a fence. Dr. Gatwanja (P.W.9) examined P.W.3 and found her hymen broken. She had a foul smelling discharge. P.W.9 formed the opinion that there was a possibility of defilement. Let me start by stating that, the Learned Senior Resident Magistrate in convicting the Appellant under Section 5(1) (a) (ii) properly applied the provisions of Section 186 of the Criminal Procedure Code. This finding disposes of the Appellant's objection.

The second ground which was ably argued by Mr. Njuguna is that there was need to corroborate the evidence of P.W.3 under Section 124 of the Evidence Act. He has also complained that the Learned Senior Resident Magistrate should have given reasons for believing the uncorroborated evidence of the minor. I will start with the last bit of the objection. It is clear from the judgment of the Learned Senior Resident Magistrate that she gave reasons why she believed the evidence of the minor. She observed the minor and found her to be composed and consistent. Even assuming that there were no reasons given, I am convinced the evidence of P.W.3 was corroborated by the evidence of the doctor (P.W.9). In the end, I find that there was sufficient evidence tendered to establish the ingredients required to establish the offence the Appellant was convicted for.

In view of my findings hereinabove, I dismiss the appeal in its entirety.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE