JOHN MBULU KAVIU ……APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal from conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 140/2007 by Hon. F.M. Nyakundi,PM on 20/1/2010)

JUDGMENT

The Appellant, **John Mbulu Kaviu** was charged with the offence of defilement of a girl of 16 years contrary to section 145(1) of the Penal Code before the Principal Magistrate's Court at Makueni. The particulars of the offence were that on 9th March, 2007 at[particulars withheld] in Makueni District within Eastern Province, he unlawfully had canal knowledge of **F M M** a girl under the age of 16 years.

In the alternative charge, the Appellant was charged with the offence of indecent assault of a female contrary to section 144(1) of the Penal Code. The particulars of the offence being that on the same day and place he unlawfully and indecently assaulted **F M M** a girl under the age of 16 years old by touching her private parts namely vagina. He denied both counts and he was subsequently tried.

The Complainant, **F M** who testified as PW3 was aged 8 years. On 9th March, 2007 at about 7.00 a.m she was going to school with her younger brother, **M** when they met with the appellant who was known to them as he was a neighbour. The appellant called her and told her to go to his house for a mango; which she did, leaving her brother by the roadside. Inside the house, the appellant directed her to remove her pant and climb on the bed which she did, as he too undressed. He then lay on top of her and penetrated her vagina with his penis. Thereafter he gave her a mango and told her to leave. She bled from her private parts and also had a discharge or mucous like substance, but she went on to school. In the meantime, **M N N** (PW2) her aunt, who had been walking to a neighbour's home at about 7.00 a.m. saw the appellant call the complainant into his house, and became suspicious. He had in the past attempted to invite her daughter too, to his house and she had warned him. She decided to go and look for her husband so that they could go to the house of the appellant together but did not get him immediately. Neither did she get the complainant's mother. When she went back after finding her husband, they found the complainant's brother who had been left by the roadside having left and decided to ask the complainant about it later. She then however informed the complainant's mother **G M M** (PW1) about what she had seen.

The complainant's mother at about 4.00 p.m, questioned the complainant about it, and she confirmed that the appellant had indeed called her into his house for a mango and then proceeded to defile her. She checked her private parts which had blood discharge as a well as on her pant and then proceeded to report the matter to the area Assistant Chief who in turn gave her some people to assist her apprehend the appellant. Upon being apprehended the appellant was escorted to Makueni Police Station where **P.C. Aaron Mwangi** (PW4) received him and recorded the complainant made against him. He gave the complainant a note to seek medical treatment as well as P3 form. **Winfred Muendo Wambuka** (PW5) a clinical officer at Makueni District Hospital attended to the complainant. According to the treatment notes and her own personal examination, the complainant had lacerations on the right side of the vaginal wall and the hymen was ruptured. She experienced pain when a finger was pushed inside her vagina. She looked unkempt and was non-responsive, which PW5 attributed to the trauma she had undergone. Her

findings were that the complainant had been defiled. She tendered in evidence, the P3 form and then discharge notes, both of which she had prepared herself as exhibits 1 and 2 respectively. PW4 then took action against the appellant by charging him with the offences.

That was the extent of the prosecution case. Upon being put on his defence, the appellant gave an unsworn statement and did not call any witnesses. He denied committing the offences and stated that on 9th March, 2007, he was digging a toilet at about 7.00 a.m when 2 children going to school stopped by the roadside. One of them asked him for mangoes. He told them that it was too cold to eat mangoes and they should pass by the shamba after school and pick some. At about 2.00 p.m. while outside is house, he saw the same children pass by his shamba and pick mangoes, and as they left, they reported to him that there were other children picking mangoes too. Between 4.00 p.m. to 5.00 p.m, PW2 passed near where he was working and called him, demanding to know where he had been that morning and what he had done. He informed her that he had gone to change his election card before going to dig the toilet. He had walked along the road with the two children and a teacher in the morning, and he urged them to run to school to avoid being late. PW2 who had been holding a piece of wire suddenly then hit him with it on his back until he bled and both of them struggled upto her home, as he demanded to know what the problem was. She refused to disclose. He thereafter went back to his home, picked a jembe and worked in his shamba upto to 6.00 p.m. At about 7.00 p.m. he went back to his house and left for the shops to buy a match box. On the way he met the Assistant Chief who then arrested him, put him in a vehicle and was taken to the police station. He denied committing the offences alleged.

The learned magistrate having evaluated the evidence on record both by the prosecution and defence delivered herself thus –

"I am satisfied from the testimony of PW3 corroborated by that of PW2 and the medical evidence by PW5 that the accused person herein did defile the complainant on 9/3/2007. The evidence on record has proved the main charge of defilement of a girl under the age of 16 years contrary to section 145(1) of the Penal Code beyond any reasonable doubt. I dismiss the defence by the accused person in the circumstances, find him guilty as charged and convict him under section 215 of the Criminal Procedure Code".

Upon convicting the appellant, she sentenced him to 20 years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant mounted the instant appeal. He sought to impugn his conviction and sentence on the following grounds:-

1. That the learned trial magistrate erred both in law and facts in failing to observe that my basic rights were violated for I was kept in police cells for 14 days before I was taken in** (sic)**court.

2. That the leaned trial magistrate erred both in law and in facts by concluding that I was the appellant defiled child (sic) in absence of medical evidence to link me with the crime in question.

3. That the learned trial magistrate erred both in law had in facts in believing and accepting the evidence of PW1 and PW2 her mother, without considering that it was consistency** (sic) **as to where the crime was committed. PW1 said it was in the garden while her mother said it was in my house.

4. That the learned trial magistrate erred both in law and in facts to give** (sic) **inadequate consideration to my defence statement which I explained how I had** (sic) **bad grudge with the doctor who wanted my shamba".

When the appeal came up for hearing before me on 12th June, 2012, the State was represented by **Mr.Mukofu** whereas the appellant appeared in person. The appellant chose to argue the appeal by way of written submissions which he had earlier prepared and presented to court. On its part, the state conceded to the appeal on the ground that the appellant had been charged under a repealed section of the law. Considering his age, the state was not keen on a retrial.

I think that the State was right in conceding to the appeal on that account. The appellant was charged under section 145(1) of the Penal Code. As at 9th March, 2007 when the appellant is alleged to have committed the offence, that section of the Penal Code had been repealed and all sex related that offences transferred to the Sexual Offences Act. The Sexual Offences came into force on 21st July, 2006. Thus the offence having been committed on 9th March, 2007, when the Sexual Offences Act, had been operationalised, the appellant ought to have been charged under this Act as opposed to the Penal Code. As it were, the appellant was prosecuted, convicted and sentenced on account of unknown or non-existent offence in the Penal Code. The omission to cite the proper Statute of the law and the section thereof under which the appellant was charged, convicted and sentenced was fatal and is not curable by section 382 of the Criminal Procedure Code.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **JULY 2012.**

ASIKE–MAKHANDIA
JUDGE