KILYUNGI MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Resident Magistrate's Court

Criminal Case No. 684/2007 by Hon. D. Ochenja Nyakundi, Ag P.M on 28/11/2008)

JUDGMENT

The appellant, **Kilyungi Mutua** was charged before the Senior Resident Magistrate's Court at Mwingi with indecent act with a girl contrary to section 11(1) of the Sexual Offences Act. The particulars were that on the 15th June, 2007 at Kyuso District within Eastern Province the appellant intentionally caused a contact between his male genital organs with the buttocks and the breasts of one **N N.** The appellant pleaded not guilty to the charge and his trial ensued.

The prosecution case was that on 15th June, 2007 the complainant (PW1) who was then aged about 13 years was in church when at around 9.00 p.m the appellant went there and duped her that there was some maize flour in his house which he wanted her to collect. The two then left for the house. Once in the house the appellant locked the door from the inside. He then forcefully grabbed the complainant, put her on his bed and removed her biker (pant). Thereafter, he forcefully had sex with her. In the meantime, the complainant's mother, **A N** (PW2) was looking for her. She had given her permission to attend a church crusade. She was supposed to come back home at 8.00 p.m. By 9.00 p.m she had not returned and her mother became anxious and went looking for her. She received information that she had been called out of church by the appellant to go and take some maize flour. She proceeded to the appellant's house and knocked at the door. The appellant refused to open the door but he was compelled to do so. The complainant was found inside the house. The appellant attempted to flee but he was arrested by members of the public who took him to Machungwa Police Post. At the Police Post he was received by **P.C. Julius Sunguri** (PW3) who booked the report and commenced investigations. In the course of the investigations he learnt that the appellant had duped the complainant into going into his house under the pretext that he would give her maize flour. Instead he ended up having sex with her. The witness did not refer the complainant for medical examination as she came to the police station after a long time. The complainant disappeared from her home after she got embarrassed. He thereafter charged the appellant with the offence.

When put on defence, the appellant chose to give unsworn statement. In his defence, he stated that on 15th June at around 8.00 p.m he was in his house when he heard somebody knocking the door. After 5 minutes he heard people talking and complaining. The door to his hosue was forced open and one lady by the name **N** (PW2) entered. He was grabbed and pulled out of the house. He struggled with the lady but she was joined with another man who started beating him. They demanded to know who was in his house but he told them that he was alone. They also demanded money from him but he told them that he did not have any money. He was then arrested and escorted to the police post where he was placed in the cells. The following day he was set free by the complainant's father. He later alerted his father and told him what had happened. His father talked to the complainant's relatives but they failed to reach a

consensus. He was duly arrested and escorted to Kyuso Police Station where he was placed in the cells. He was later charged with the present offence.

The learned magistrate having evaluated the evidence on record reached the verdict thus:-

"***The accused was found in the act. He was found committing sexual act with the complainant. One wonders what the two were doing in the house. The only logical conclusion to be drawn from this scenario is that the two were found having locked themselves in the house because the accused was having sex with the complainant. In fact the accused person ought to have been charged with defilement of a child contrary to section 8(3) of the Sexual Offences Act".***

Having reached such verdict, he then sentenced the appellant to 10 years imprisonment.

The appellant was not happy with the conviction and sentence. Hence he filed the instant appeal on the grounds that;

§ his defence was not given due consideration,

§ the complainant had not been subjected to medical examination,

§ the evidence tendered was insufficient to find a conviction,

§ there was a grudge between the appellant and the complainant's mother; and finally,

§ the sentence imposed was manifestly harsh and excessive.

When the appeal came before me for hearing on 12th June, 2012, the appellant submitted that he had been detained illegally in the police cells for 21 days, crucial witnesses were not called and that the only evidence on record tending to connect him with the offence was that of the complainant and her mother.

When it came to the State to respond, **Mr. Mukofu,** learned State Counsel conceded the appeal on the grounds that crucial witnesses had not been summoned to testify and that there was no medical evidence.

In my view, much as the State conceded this appeal on those grounds, however, there were equally other grounds upon which the State could have conceded this appeal. The appellant was charged with the offence of Indecent Act. The indecent act complained of was that he intentionally caused contact between his male genital organ and the buttocks and or breasts of the complaint. There is no evidence at all to support the above allegation. The complainant did not testify as to the appellant's genital organ ever coming into contact with either her buttocks or breasts. All that she testified to was that the appellant forcefully had sexual intercourse with her. The mere fact that there was sexual contact between the two does not mean that the appellant's penis must have come in contact with the complainant's buttocks or breasts. This was a criminal offence and charge was specific as to the particulars. There is no room for assumptions, speculations or theories in criminal proceedings. It was upto the prosecution to prove with credible evidence that indeed the appellant's penis came into contact with the complainant's buttocks and or breasts. This they failed to do. In any event, indecent act under the sexual offences act is defined as any unlawful intentional act which causes contact between the genital organs of a person, his or her breasts and buttocks with that of another person or exposure or display of any pornographic material to any person against his or her will but does not include an act which causes penetration. The magistrate was convinced, and wrongly so in my view that what the appellant did to the complainant on the fateful night fell under the above definition. That was a gross misdirection on the part of the magistrate. There was no evidence that there was any contact between the genital organs of the appellant with the breasts and buttocks of the complainant.

What actually happened here was a case of defilement. Indeed the learned magistrate acknowledged this fact when he stated that the appellant was lucky that he had not been charge with defilement of a child contrary to section 8(3) of the Sexual offences Act.

From the evidence on record and the observations of the learned magistrate, it is clear that the evidence led was at variance with the charge preferred. This yet another ground upon which State should have conceded the appeal. The evidence led proved the offence of defilement as opposed to indecent act. There was penetration according to the complainant. However, the trial court could not have convicted the appellant for that offence under section 179 of the Criminal Procedure Code since it was not minor to the offence initially preferred. In any event, in the absence of medical evidence, I do not see how a conviction on defilement could have been sustained.

Finally, the case was presided over by 2 magistrates, **Richard Odenyo,** SRM and **D. Ochenja,** Ag Principal Magistrate. Indeed **Odenyo** presided over the entire prosecution case before he was replaced by **Ochenja** who heard the defence, crafted and delivered the judgment. In taking over the case from **Odenyo, Ochenja** did not comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code. He did not inform the appellant as he was mandatorily required that he had a right to have the witness (ses) who had previously testified re-summoned. Such failure of course occasions failure of justice and indeed renders the proceedings a nullity.

For all these reasons, the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** dayof **JULY 2012.**

ASIKE-MAKHANDIA
JUDGE