KYALO MWENDWA …….....…….....APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 111/2008 by Hon. H.M Nyaberi, SRM on 3.9/2009)

JUDGEMENT

The appellant, **Kyalo Mwendwa** was charged before the Senior Resident Magistrate's Court at Mwingi with the offence of attempted defilement contrary to section 9(1) of the Sexual Offences Act. Particulars of the offence were that on 12th January, 2008 at, District within Eastern Province, he unlawfully and intentionally attempted to commit an act which would have caused penetration of his male genital organ to female genital organ of 12 year old child namely **MM.** The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Particulars of the charge being that on same day and place he intentionally caused contact between his genital organ and female genital organ of **MM** a child aged 12 years. The appellant denied both charges and was soon thereafter tried.

The complainant, **MM** (PW1) was on 12th January, 2008 looking after their goats on their farm when the appellant came and grabbed her, pulled her into a bush and defiled her. When done, the appellant left her and she went on grazing the goats until evening. She went home but she did not inform anybody on what had transpired. However the incident had been witnessed by her younger sister, **K who** told their mother who subsequently took PW1 to hospital.

BM, PW3 then aged 12 years on the fateful day was at home alone when the appellant came and enquired the whereabouts of her mother. She told him that she had gone to the market. The appellant then proceeded to the farm where the complainant was. She saw him speak to her. She heard him telling her to go to his house and collect food for one, **Tonny.** She then saw him pulling her towards his house. Later, she heard and saw her crying. Her clothes were blood stained. Immediately she came home, she went straight to bed.

Monica Muimi, PW2 in the meantime had on the material day left the complainant and her sister, PW3 at home as she went to Nguutani and thereafter to Musosya. She returned at about 8.00p.m and found the complainant sleeping. She was informed by PW3 that the appellant had pulled the complainant to the bush and defiled her. She woke her up and interrogated her but she did not say anything. She examined her genitalia and saw some spermatozoa on her thighs. It was then that the complainant opened up and told her that the appellant had raped her. She bathed her and thereafter went to sleep. The following day she took her to Kyuso Hospital where she was examined and treated. She went and reported the matter though at Kyuso Police Station where she was issued with a P3 form by **P.C Richard Sang,** PW5. Subsequently **Boniface Kimuyu,** PW6 attended the complainant and filed the P3 form. He came to the opinion that the complainant had been penetrated and the offence of defilement committed. The appellant was subsequently arrested initially by **APC Thomas Musasi** (PW4) of Kamongo Administration Camp,

on 15th January, 2008 who subsequently handed him over to PW6, who re-arrested him and charged him.

Put on his defence, the appellant in unsworn statement stated that on 8th January, 2008, he had travelled to Nairobi to get some money from his father. His father did not have money and stayed there until 13th January, 2008 when he travelled back. On the same day he was arrested by the Area Chief in the presence of the complainant's mother and interrogated over the incident. When he denied, he was escorted to Kyuso Police Station and was later charged.

The learned magistrate having carefully evaluated the evidence on record for both the prosecution and defence found for the prosecution holding thus-

"The evidence as alluded indicates that the prosecution witness 1 was penetrated. I have noticed that the prosecution witness 5 had booked the accused for an offence attempted defilement with an alternative charge of indent act. However, I do notice from the evidence of prosecution witness 4 that prosecution witness 1 and prosecution witness 2 had reported an offence of defilement. Be it as it may, am satisfied that an offence of defilement has been proved thus I substitute the charge of attempted defilement with one of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Office Act No. 3 of 2006. I therefore find the accused guilty for the offence of defilement and convict him under section 215 of the Criminal Procedure Code."

Upon such conviction, the learned magistrate sentenced the appellant to 20 years imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that:-

"1. ***That the pundit magistrate erred in both law and fact while convicting me on the purported visual identification by recognition that was alleged in my respect of which the same remained to be totally doubt*** *(sic)* ***and questionable.***

2. ***That the pundit magistrate erred in both law and fact while being impressed with my mode of arrest without considering that the same remained to be as*** *(sic)* ***matter of suspicious*** *(sic)* ***basis.***

3. ***That the pundit magistrate erred in both law and fact while convicting me on charges that were not all proved to point to*** *(sic)* ***my guilty both PW1 and PW6's evidence*** *(sic)* ***is put into consideration.***

4. ***That the pundit magistrate erred in both law and fact while rejecting my defence by not giving cogent reason in so doing which contravened section 169(1) of the Criminal Procedure Code.***

5. ***That the pundit magistrate erred in both law and fact while convicting me without considering that he*** *(sic)* ***matter at hand was unfairly conducted which contravened section 77(1) of the old Constitution which was in force by then".***

When the appeal came up for hearing before me on 12th June, 2012, the appellant elected to urge it by way of written submissions; which he had earlier filed with the permission of the court.

The appeal was however, conceded to by the State. In conceding to the appeal, the State through, **Mr. Mukofu,** learned State Counsel submitted that the learned magistrate grossly misdirected himself when he substituted the charge from attempted defilement to defilement. He had no jurisdiction to do so. He could only have substituted the charge if he was minded to do so by a lesser cognate offence.

It is true that the appellant was charged with attempted defilement contrary to section 9(1) of the Sexual Offices Act. This comes out quite clearly when one looks at the charge sheet preferred and which was filed in court on 28th January, 2008. Much as the evidence led by the prosecution proved the offence of defilement contrary to section 8(1) as read with section 8(3) of Sexual Offences the Act, the prosecution did not see the need to amend the charge. The task was left to the learned magistrate who in his judgment substituted the charge-sheet from attempted defilement to defilement. I would want to imagine that in

doing so he was acting pursuant to section 179 of the Criminal Procedure Code. That section is in these terms-

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged it.

As it can be readily seen, the trial court has jurisdiction to impose a substituted conviction for a minor cognate offence only. In other words, for the trial court to invoke this section, the substituted conviction must be for an offence which is both minor and cognate to the offence charge. Defilement is obviously not a minor or cognate offence to attempted defilement. In terms of sentence, the substituted offence for which the appellant was convicted carries a sentence of imprisonment for a term of not less than 20 years. However the offence for which he had been charged and prosecuted for initially carries a sentence of imprisonment of a term of not less than 10 years. From the sentence alone, the substituted charge cannot be termed minor and or cognate. Section 179 of the Criminal Procedure Code, as it appears operates downwards as opposed to upwards. One cannot substitute a lesser offence with a much more serious offence. So that a trial court cannot substitute a misdemeanour with a felony.

Further section 180 of the Criminal Procedure Code is quite clear that a person charged with an offence, may be convicted of having attempted to commit that offence although he was not charged with the attempt and not vice versa. The substituted offence of defilement not being a minor offence to defilement, the learned magistrate grossly erred in entertaining the substitution.

The appeal is allowed, conviction quashed and sentence imposed set aside. 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