



PATRICK NZIVO KIIO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the convicting and sentence in Machakos Chief Magistrate's Court Criminal Case No. 626/2008 by Hon. S.A. Okato, Ag. P.M on 31/10/2008)

JUDGMENT

The Appellant, **Patrick Nzivo Kiio** was charged before the Chief Magistrate's Court at Machakos with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act, particulars being that on the 24th April, 2008 at [particulars withheld] area in Machakos District Within Eastern Province he unlawfully and intentionally attempted to penetrate the genital organ of **L** a girl aged 16 years. In the alternative count the appellant was charged with indecent assault contrary to section 11(1) of the Sexual Offences Act, whose particulars were that on the same day and place aforesaid he unlawfully and indecently assaulted **L** by touching her private parts, a girl aged 16 years. The appellant denied both counts and was soon thereafter put on trial.

The prosecution called three witnesses. PW1, **L** – the complainant on 24th April, 2008 at about 1.00 p.m. was walking towards [particulars withheld] to visit her uncle when she met the appellant who was in the company of another person called Mutuku. She knew both of them. They were walking behind her and when they caught up with her, they greeted her. Mutuku was the one who greeted her but the appellant warned him against talking to a “sister.” The appellant then held her by the blouse and a struggle ensued. She bit the appellant on his left middle finger and on his right palm. The appellant nonetheless pulled her into a sisal plantation and pushed to the ground, removed her pant, unzipped his long trouser and lay on her. She screamed and a certain lady (PW2) emerged armed with a panga. She aimed the panga at the appellant which scared him. He came off the complainant and ran away with unzipped trouser. The lady helped the complainant remove the blouse she had worn which was blood stained. She had another blouse she had carried in a paper bag which she put on. The complainant proceeded to Katuli market where she informed one, mama **Ngusie** what had happened to her. The said mama **Ngusie** called the local Chief who escorted her to his office and left. Shortly thereafter he returned with the appellant whom he had arrested IN the market. The chief arranged for a vehicle and she together with the appellant were escorted to Machakos Police Station where she lodged a complaint.

PW2, **Ngii Mbegu** confirmed what the complainant said adding that she was attracted to the scene by the complainant's screams and found the appellant a top the complainant's stomach, while the complainant was lying on her back.

PW3, **Martin Mumbu Kuvika** the Assistant Chief on 24th April, 2008 at about 1.20 p.m received a phone call from one **Mavua Wambua** who informed him that he had rescued a victim of defilement. He

rushed to [particulars withheld] shopping centre where he found the complainant surrounded by members of public. The complainant told him what had transpired and mentioned the appellant by his *alias* name **Sumba**. He managed to trace the home of **Ngii** (PW2) who directed him to the home of the appellant. He arrested the appellant who had bite marks on the left palm and left middle finger. The complainant had told him that while struggling with the appellant she had bitten him in self defence. He escorted the appellant to his office where he had left the complainant and the complainant confirmed he was her attacker.

Put on his defence, the appellant in a sworn statement said that he was at home when the Assistant Chief emerged accompanied by members of public. The Chief arrested him and escorted him to Machakos Police Station. Otherwise he had been framed up in the case by the complainant whom he had warned against grazing her livestock in his parcel of land.

The learned magistrate having carefully evaluated the evidence on record found the prosecution case proved. Accordingly he convicted the appellant and sentenced him to 15 years imprisonment. That conviction and sentence triggered this appeal. The appellant complained that-

- The sentence imposed was harsh and excessive,
- the evidence of identification/recognition was suspect,
- The burden of proof by the prosecution was not discharged, and finally,
- The appellant had been prejudiced when he was exposed to the complainant immediately upon arrest.

When the appeal came before me on 12th June, 2012 for hearing, the appellant chose to argue the same through written submissions. However, the State conceded the appeal on the ground that section 200 of the Criminal Procedure Code was not complied with.

Section 200(3) of the Criminal Procedure Code is in these terms-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”.

It can readily be seen that the section entitles an accused person to demand that any witness be re-summoned and enjoins the trial magistrate to inform the accused of that right. That requirement is couched in mandatory terms. The rationale being that it could not be said that if the succeeding magistrate had seen and heard the witnesses handled by the exiting magistrate, he would necessarily have convicted. It cannot therefore be said that the failure by the incoming magistrate to inform the appellant of that right did not cause prejudice him.

In this particular case, the prosecution case was heard entirely by **Hon. F.N. Muchemi**, Chief Magistrate (*as she then was*). At the defence stage, the case was taken over by **Hon. S.A. Okato**, Acting Principal Magistrate. In taking over the case, **Mr. Okato** made no reference at all to the mandatory provisions aforesaid nor did he comply. In the premises, the trial was thereby rendered a nullity.

That being the case, the appeal succeeds. The State did not seek a retrial. Accordingly, the issue does not fall for consideration or determination.

The end result is that the appeal is allowed, conviction quashed and the 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