

KIMEU MWANGANGI LUVA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original convicting and sentence in Kitui Senior Resident Magistrate's Court Criminal Case No. 385 of 2007 by Hon. T.M. Mwangi RM on 31/7/2008)

JUDGMENT

Kimeu Mwangangi Luva, hereinafter "*the appellant*" was charged before the Senior Resident Magistrate's Court at Kitui with the offence of defilement of a girl under the age of the 16 years contrary to section 145(1) of the Penal Code. The particulars of the offence were that on 12th September 2005 at about 8.30p.m in Kitui District of the Eastern Province, the appellant had unlawful carnal knowledge of **N.M** a girl under the age of 12 years. In the alternative, he was charged with indecent act, on a female contrary to section 144(1) of the Penal Code, particulars being that on the same date, place and time the appellant unlawfully assaulted **N.M** a girl of 12 years by touching her private parts namely, vagina. The appellant pleaded not guilty to both counts and was soon thereafter tried.

Sabina Kaindi, Paulo Kithome Mwoki, P.C Benjamin Maindu, Ndinda Mwanduko and Pauline Maingi testified as PW1, PW2, PW3 PW4 and PW5 respectively. In essence, their testimony was that on 12th September, 2005 at 8.30pm, PW4, the complainant was in the company of the appellant. They had gathered to lock up in the cowshed, goats belonging to the complainant's mother, PW1. It was then that the appellant forced the complainant to the ground, removed her clothes and defiled her. The appellant warned her that if she cried or made any noise, he would beat her up. However it seems that despite the warning, the complainant nonetheless screamed attracting the attention of her uncle, **P.K.M**, PW2. He went to the scene and chanced upon the appellant and complainant. He found the complainant lying on the ground as the appellant stood over her. On seeing PW3, the appellant took off. On the material night, the complainant's mother (PW1) was absent from home. When she came back the following day, both the complainant and her uncle informed her what had transpired the previous night. PW1 then advised PW2 to report the incident to the local assistant chief. When the appellant saw the assistant chief approach, he ran away. He was later to be arrested in Mombasa. Nonetheless a report of the incident was made to P.C Benjamin **Maindu** (PW3) on 14th September, 2005 at 1pm. He booked the report and referred the complainant to Mutomo Mission Hospital for medical checkup. After treatment, he issued her with a P3 form which was filled by **Pauline Maingi** (PW5), a clinical officer. The clinical officer on examining the complainant noted that her hymen was broken; there was hyperemic vaginal mucosa and whitish discharge. She was convinced that the complainant had been defiled.

As already stated after the incident, the appellant ran away. However, sometimes later PW1 bumped into him in changamwe, Mombasa. She alerted the police who arrested him and escorted him to Mutomo Police Station and was subsequently charged with the offences.

Put on his defence the appellant alleged in a sworn statement that on 12th September, 2005 at about 8pm, he asked the complainant to assist him hold the calf belonging to PW1 who was his employer. After locking up the calf in the cowshed, they walked back to the house. On the way they bumped into PW2 who demanded to know what they had been doing behind the cowshed. He threatened to teach him a lesson for having turned down his offer to employ him in favour of PW1. The following morning PW2 reported to PW1, that he had defiled her daughter. Because of his sour relationship with PW2 he opted to relocate to Mombasa. He was later to be arrested thereat, brought to Mutomo Police Station and subsequently charged for the offences he did not commit. He called no other witness.

The learned magistrate having weighed the evidence tendered by the prosecution as well as by the defence concluded that the appellant had committed the main offence charged. She accordingly convicted

and sentenced him to 15 years imprisonment.

The conviction and sentences aforesaid triggered this appeal. In his petition of appeal, the appellant complains that the sentence imposed was harsh; he was not medically examined to determine whether he committed the offence, the magistrate did not weigh the case properly and that his fundamental rights spelt out in article 49(1) of the constitution were violated.

When the appeal came before me for hearing on 28th June, 2012, **Mr.Mukofu**, learned state counsel conceded to the same on the ground that though the appellant was initially charged under the Penal Code, he was nonetheless convicted and sentenced under the sexual Offences Act which was wrong and contrary to the transitional Clauses of the Sexual Offences Act. Counsel did not however seek a retrial.

On his part though welcoming, the concession nonetheless wished the court to consider his written submissions which he had tendered in court earlier on.

Having considered the record, the judgment of the learned magistrate, the grounds of appeal, rival written and oral submissions on record, I am satisfied that the state was right in conceding the appeal. The appellant having been charged under the Penal Code, it was expected that he would be prosecuted to the end under the said Act of Parliament. That is what Clause 3 of the Transitional Clauses in the Sexual Offences Act envisaged. It provides that-

“... any proceedings commenced under any written law or part thereof repealed by this Act shall, as far as practicable, be continued under this Act..”

The Sexual Offences Act came into force on 21st July, 2006. The offence herein was committed on 12th September, 2005 and the appellant was presented to on 25th April 2007. He was therefore being prosecuted for the offences under the Penal Code as opposed to the Sexual Offences Act. Pursuant to Clause 3 aforesaid, the appellant's trial should have proceeded under the Penal Code to its logical conclusion much as the Sexual Offence. Act had come into force whilst the trial was midstream. It was therefore wrong for the learned magistrate to have switched the proceedings from the Penal Code to Sexual Offences Act. That switch was irregular and rendered the entire proceedings a nullity.

In the premises, I allow the appeal, quash the conviction and set aside the sentence imposed. As the state did not seek a retrial, I order that the appellant be released from prison custody forthwith unless otherwise lawfully held.

DATED, SIGNED and delivered at MACHAKOS this 28TH day of SEPTEMBER, 2012.

ASIKE MAKHANDIA
JUDGE