MULEI MOKI……....…….……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 103/2010 by Hon. S.K. Mutai, RM on 12.08.2010)

JUDGMENT

1. The Appellant was tried before the Resident Magistrate's Court at Mutomo with the charge of defilement. The main charge as it appeared on the charge sheet is as follows:

DEFILEMENT CONTRARY TO SECTION 8(1)(3) OF THE SEXUAL OFFENCES ACT, NO. 3 OF 2006

MULEI MOKI: On the 14th day of June, 2010, at about 8:30 am, at [particulars withheld] in Mutomo District with in the Eastern Province defiled one S.N., a child aged 13.

2. The Appellant also faced an alternate charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 14th day of June, 2010, at about 8:30 am, at [particulars withheld] in Mutomo District with in the Eastern Province he "committed an act of indecency with S.N., a child aged 13, by touching her private parts namely thighs and vagina."

3. In a nutshell, the case against the Appellant is that around 8:00am on 14/06/2010 the Complainant was heading to school because she had earlier been sent home for failure to collect PTA fees. On reaching [particulars withheld], the Appellant called her to his shop, locked the door and had sex with her.

4. The Prosecution presented seven witnesses. PW1 was the complainant. Her testimony was that she was heading back to school around 8:00am with her father and on reaching [particulars withheld], the Appellant called her to his shop. She entered the shop and the Appellant closed the door, took her behind the counters, removed her clothes and had sex with her. As she was leaving the shop she met one Ng'ang'a outside. Ng'ang'a who had, apparently, seen the Complainant going into the shop and the accused locking it and had, therefore become suspicious, inquired from the Complainant what had happened. It would appear that through Ng'ang'a's intervention word got to the Headmistress of K Primary School where the Complainant is a pupil.

5. In what appears to be a carefully laid plot by the adults who had become involved in the matter by now, Ms. Florence Philip, the Headmistress, who testified as PW2, sent the Complainant to go buy her scones at the Shopping Centre. On getting to the Shopping Centre, the Complainant found a group of people gathered. After narrating her ordeal to them, she was escorted to the Assistant Chief's Office and then to [particulars withheld] Police Station, and finally to be examined at a hospital. The Complainant testified

further that this was not the first time the Appellant had had sex with her.

6. In her testimony, PW2 confirmed the narrative and testified that she was informed by two parents that one of her pupils had been locked in a shop in the trading centre. She sent the pupil, who had returned to school, back to the Shopping Centre to purchase scones, then followed her. On reaching the Centre she encountered the Appellant who informed her that he had innocently locked the shop unaware that the girl was inside. The pupil told her a different story – that she had been locked in the shop and defiled by the Appellant, and that this was not the first time she had had sex with the Appellant. The teacher then accompanied the Appellant to the Assistant Chief's Office to report the matter.

7. The complainant's father – Mr. N.M. – testified as PW3. His testimony was that on 14/06/2010 he accompanied his daughter back to school after she had been sent home for failure to pay PTA fees. It is not clear at what point they parted company. However, when he reached the Shopping Centre on his way back home, he was informed that his daughter had earlier been locked in the Appellant's shop. When he confronted the Appellant he (the Appellant) admitted that he had defiled the girl. The Appellant then proposed to settle the matter. They then went to the Assistant Chief, then to [particulars withheld] Police Station. He testified that his daughter was 13 years of age. He identified the Appellant in Court.

8. The Assistant Chief – Onesmus Kalabati Matingo - was PW4. He testified that on 14/06/2010 he was in his office when the Chairman of the complainant's primary school called him to report that the Appellant had been caught with a child. He sent for the Appellant then heard the entire story in his office. Again the accused told him that he innocently locked the shop without knowing that the child was inside, but the child insisted that she had been defiled by the Appellant in his shop. On cross-examination, the Assistant Chief testified that the Appellant had proposed to settle the matter without involving the police.

9. PW5 was Mr. Ng'ang'a Kaviu. He is a hawker in [particulars withheld]. His testimony was that on the morning of 14/06/2010 he saw the complainant enter the Appellant's shop. He approached the shop and found it locked. He called the complainant's father and told him what he had seen. A group of people gathered outside the shop, then the Appellant opened it. The complainant walked out of the shop and headed to school. She had been in the shop for about an hour. He testified that the Appellant admitted locking the shop with the Complainant inside. He then went to the Assistant Chief, then to [particulars withheld] Police Station to record statements.

10. PW6 – Peter Musuni Muli – is one of the people who were at the trading centre and who were called to the Appellant's shop by PW5. He was informed that a girl had been locked in the Appellant's shop, and he saw the girl walk out of the shop.

11. PW7 was Nelson Kimanthi, a Clinical Officer at [particulars withheld] Dispensary. He examined the Complainant on 15/06/2010 – a day after the incident -- and reported bruises on her left side, on her buttocks, elbow joints, left leg and through firm-er (sic) region. His lab tests revealed pus cells and epithelial cells. He concluded from his exam that the patient had been defiled due to the physical injuries, broken hymen and pus cells. He also examined the Appellant on the same day, noticed that his underpants were torn and that he had pus cells in his urine. He therefore concluded that the Appellant had committed the defilement. On cross-examination, the witness testified that both the Appellant and the Complainant had infections.

12. The last witness – PW8 – was PC James Githae from [particulars withheld] Police Station. He received the Appellant and the Complainant at the Station then escorted them to [particulars withheld] Mission Hospital for treatment. He recorded statements and charged the Appellant.

13. On the basis of this testimony, the learned trial Magistrate found that the Appellant had a case to answer and put him in his defence.

14. In his defence, the Appellant gave an unsworn statement. His theory of defence was that this was a frame-up. He testified that t the Complainant merely came to his shop to buy scones and left. According to his narrative, the Complainant's mother also went to the shop and asked the Appellant to keep a water

jerrycan for her. Around 10:00a.m. some people accompanied the Complainant to his shop, asked him to close it and accompany them to the Assistant Chief's office. He was then accused of defiling the child.

15. When he was put on his defence, the Appellant informed the Court that he would be calling one witness. However, it is evident from the record that there is no witness who testified on his behalf.

16. After considering the evidence and after due analysis, the Learned Magistrate concluded thus:

From the entire evidence on record and after having carefully considered the evidence adduced by both the Prosecution and the accused, I find that the Prosecution has proved its cases of defilement and indecent act with a child contrary to section 8(1)(3) and Section 11(1) respectively, of the Sexual Offences Act No. 3 of 2006 beyond reasonable doubt against the accused. I therefore, convict the accused on both charges, accordingly.

17. The Court then sentenced the Appellant to 20 years imprisonment.

18. The Appellant was aggrieved by the conviction and the sentence, thus this Appeal.

19. In his appeal, the Appellant raised five grounds of appeal.

1. That the learned trial magistrate erred in law and fact for failing to conclude that my right for a fair trial were infringed as provided by the country's new Constitution Article 50(2)M

2. That the learned trial magistrate erred in law and fact for failing to give a date of the judgment when delivering the same as the law provides in section 169(1) of the CPC.

3. That the learned trial magistrate erred in law and fact for failing to state the sentence passed upon the Appellant was in respect of which counts amongst the two charges.

4. That the learned trial magistrate erred in law and fact for failing to note that the case was not proved beyond reasonable doubt as law enjoins.

5. That the learned trial magistrate erred in law and fact for failing to note that my defence was plausible and worth to be believed.

20. The Appellant filed written submissions where he argued the above grounds with some detail.

21. The Republic responded to the Appeal by way of oral arguments by Mr. Mwenda, State Counsel. He urged the court to affirm both the conviction and the sentence imposed on the accused since the evidence adduced pointed to his guilt. He confirmed that the plea was taken in the *Kikamba* language which the Appellant understood. He also argued that the Appellant was rightly identified as the Complainant's assailant because he was known to the Complainant. The Complainant's testimony was corroborated by other witnesses who saw her enter the Appellant's shop before he locked it, only to emerge after a while saying she had been defiled by the Appellant. He urged the court to take heed of the report of the Clinical Officer who had found bruises on the Complainant's body, a torn pant, a broken hymen and secretions in her vagina – all of which confirmed that she had been defiled. He also reminded the Court of the Complainant's testimony regarding her age, the assessment by the Clinical Officer and the trial magistrate.

22. Mr. Mwenda, learned counsel for the state urged the court to dismiss the defence of the Appellant as mere denials and afterthoughts. He submitted that the Appellant was rightly convicted and ought to serve the sentence which was imposed by the trial court.

23. This is the first appeal in this case and this court is bound to re-consider all the evidence and form its own opinion on the innocence or otherwise of the Appellant. At the same time, the Court must take into account that it did not have an opportunity to hear or see the witnesses as they testified and accord due

deference to the lower Court's findings. See ***Okeno v R*** **[1972] EA 32** and ***Kariuki Karanja v R*** **[1986] KLR 190**.

24. I will now turn to the Appellant's grounds of appeal.

25. On the first point, the Appellant argued that he did not understand the entire proceedings since they were not translated to *Kikamba,* and this violated his constitutional right to a fair hearing which includes the right to have court proceedings interpreted to a language the accused person understands. Although the Appellant cites the New Constitution, 2010 which is inapplicable to his case since it was decided prior to its promulgation, the Old Constitution had similar provisions on fair trial. In the interests of justice, I have assumed that the Appellant predicated his arguments on the Old Constitution and dealt with them substantively as such.

26. I have had the benefit of looking at the court record of the trial proceedings. The Appellant took a plea on 16/06/2010 – on this appearance the Court record clearly indicates that the language of the Court was English/Kikamba. It is true that the language of the Court is not indicated in the other days the Appellant was in Court. The record seems clear that the Appellant understood and participated in all the proceedings. This is clear from the way he engaged the witnesses, asking various questions in cross-examination.

27. Such a ground has been raised in the Court of Appeal in ***David Njuguna Wairimu V Republic [2010] eKLR***where Justices of Appeal Bosire, Waki and Aganyanya stated the position of the law as follows:

The record clearly reflects that the appellant fully participated in the proceedings, asked questions in cross-examination, himself gave evidence in his defence, and in any case he did not raise the issue in his written submissions on first appeal. This ground is without merit.

28. The issue also arose in ***Muriithi****Mwai Mugo & 2 Others V Republic [2008] eKLR*where the Court of Appeal stated that

On the face of the record it cannot be said that the appellants did not follow the proceedings. Each of the appellants is shown to have cross-examined all witnesses and asked questions which were relevant to the charges.

29. On the other hand, however, we have Court of Appeal decisions on the issue which seem to arrive at a different outcome. For example, ***Albanus Mwasia Mutua v Republic (Court of Appeal Crim. App. No. 120 of 2004***) held:

Since the record of the magistrate did not show the language used by the two appellants, there was a violation of the appellants' constitutional rights under the foregoing section (Section 77(2)(b) of the [Old] Constitution) and the appeal is allowed. Once again, the nature and strength of the evidence brought by the Prosecution in support of the charge did not really count.

30. ***Francis Macharia Gichangi & 3 Others v Republic (CA Crim. App. No. 11 of 2004)*** is in accord.

31. The right of an accused to be provided with an interpreter is an important substantive right in both the Old and the New Constitutions. It is an important right to a fair trial. The **David Njuguna Wairimu** and **Muriithi Mwai Mugo** cases cited above take the view that Courts should not be too technical when determining if an accused person has been accorded that right. The test is a substantive one: can an appellate Court, looking at the totality of the record, conclude that the Appellant understood the charges he was facing, had fair notice of the charges, and defended them in a language he was well versed in? I agree that this is the better approach to the issue. At the same time, however, we must appreciate that we are Courts of record; written record. Without a written record documenting the language used by the Court as one an accused person understood, and in the absence of clear evidence that an Appellant actually understood the language which was used, it is better for Courts to err on the side of protecting the constitutional rights of accused persons rather than contracting them. I would readily agree that under

both the Old and New Constitutions where an accused person actively participates in the proceedings by, say, asking witnesses questions related to the testimony they gave, giving his defence and mitigation – in other words, one who evidently understood the proceedings cannot then claim that his right to fair trial was breached on account of a technical failure by the Court to record the language which was used in the proceedings.

32. However, applying this "substantive" test to the right to fair trial to the present case, I am not certain that we can be sure that it passes constitutional muster. There is not only the failure to indicate which language the Court used on any of the days beyond the day the plea was taken, but the record does not state in what language any of the seven witnesses testified in or the language the Appellant cross-examined them in. But what really gives me pause is the attenuated and short cross-examinations by the Appellant which might lead one to wonder whether he was fully aware of what had been testified. It is simply unsafe to confirm a conviction with such lingering doubts as to the fairness of the trial process.

33. Having reached this conclusion, I must quickly turn to the next logical question: does this entitle the Appellant to an acquittal or a retrial? This question must be answered with an eye to the rest of the record and grounds of appeal. This is because the rule of law is that a retrial will only be ordered where the interests of justice require it – and, especially where the rights of the accused person will not be prejudiced. The Court of Appeal for **Eastern Africa** in **Fatehali Manji v Republic [1966]E.A. 343** summarized the law thus:

In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial….each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.

34. In the instant case, I can only order a retrial if I can satisfy myself that other than the issue of language, the evidence presented to the lower Court is so strong that it is likely to result in a conviction if a retrial is ordered. I must also be satisfied that no rights of the accused person would be prejudiced by such a retrial. Finally, I must be satisfied that the order for retrial is not in vain: for example, I must be satisfied that the witnesses would be available to testify again.

35. On the first issue, after a thorough perusal of the record, I am satisfied that there is a likelihood that a re-trial would lead to a conviction. There is enough evidence on record to warrant a new trial. The less I say about this, the better so that I do not embarrass the lower Court which will hear the matter.

36. I am also satisfied that the Appellant will suffer no violation of his rights or prejudice if a retrial occurs. He is in prison for 15 years by virtue of this conviction and his ability to defend himself is not hampered in any way. Finally, I have noted that all the witnesses are Kenyans and are likely available again to testify. I regret that this will cause all of them – and especially the minor victim -- undue trauma. Yet, I believe this is the best course for justice.

37. In the end, therefore, I hereby quash the conviction and set aside the sentence. I order that the Appellant be presented to the Principal Magistrate's Court in Kitui to take a fresh plea.

DATED SIGNED and **DELIVERED at MACHAKOS** this **28TH** day of **SEPTEMBER 2012.**

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JOEL NGUGI
JUDGE