REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 195 of 2011

MUTUKU MWATHA……..……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal against conviction and sentence in Cr. Case 377 of 2010 by the Hon. J.W. Gichimu, Resident Magistrate in Tawa delivered on 5th July 2011)

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JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to section 8 (1) as read with subsection 2 of the Sexual Offences Act and an alternative charge of indecent act with a child contrary to section 11 (1) of the same Act in Criminal Case No. 377 of 2010. The matter was heard and determined by the Resident Magistrates Court at Tawa, where the appellant was convicted and sentenced to life imprisonment.

According to the proceedings of the Subordinate Court, there were seven (7) prosecution witnesses who testified.

It was the evidence of Pw1**, D.N.M**, that, on the 15th October 2010 at around 12 noon, she left the complainant (Pw2), her daughter of 6 years of age, at home to watch over her younger child while she went to farm her shamba which was 20 meters away. When she came back she found Pw2 seated outside and requested her to accompany her to the river to wash, which she did. It was at this moment when they were headed to the river that she released that Pw2 was walking with difficulties and her pant was falling down. When she asked Pw2 what the problem was, she informed her that the appellant herein had visited her home, asked Pw2 where Pw1 was and asked Pw2 to accompany him to give her a sweet. When she declined, he held her by the hand and forcefully took her behind the house where he defiled her and left. Pw2 took Pw1 to the scene. When the father, **M.M,** Pw7, came, Pw1 informed him what had transpired and he took PW2 to Mukuyuni Health Center and later Mbooni District hospital and reported the appellant to the police. Pw1 further identified the pair of pants and the dress the complainant was wearing.

PW2**, M.M**, in her evidence, said that on the material day she was playing with the younger child when the appellant came to the homestead and asked her where her mother was and she told him that she was at the shamba. The appellant then asked her to accompany him so that he could show her something and she declined. He then held her by the hand and took her behind the house and defiled her. She saw some white substance that looked like mucus on her private parts. She felt pain on penetration but did not scream. She later informed her mother what had happened. Her father took her to hospital. In court she identified the pant and the dress she was wearing and also identified the appellant as the person who

defiled her.

The evidence of PW3, **Peter Kioko Mbilu** was to the effect that, he was painting **P.K's** house, who is PW1's neighbor, when he saw the appellant pushing a wheelbarrow at around noon. He was carrying fences. He saw him leave the wheelbarrow and head to Pw1's house and after a while he came back took his wheelbarrow and left. He also identified the appellant.

PW6, **Doctor Mulwa Andrew Mutere,** a clinical officer, on 21st October 2010, filled a P3 form for Pw2. He received treatment notes from Mukuyuni Health Center, which he relied on and examined Pw2. He further said that Pw2 had changed her clothes when he examined her. On examination, he established that there was a cut on the external genetalia which was also swollen, the hymen was broken and there was evidence of penetration. There was however no evidence of a discharge.

PW7, **M.M**, the father of the complainant, on that material day, arrived home at 5 p.m. he was informed by his wife, Pw1 that Pw2, his daughter, had been defiled by the appellant. He called Pw4 so that they could take Pw2 to the police station where they were referred to the hospital at Mikuyuni. They were referred to Mbooni District Hospital where Pw2 was treated. He identified the appellant. The appellant was later put on his defence after that Magistrate found that a prima facie case had been established against him. He stated that, he did not know anything about the offence.

The learned Magistrate having evaluated her evidence on record found that a case against the appellant had been proved. The appellant was accordingly convicted and sentenced to life imprisonment. The appellant thereafter sought to appeal against conviction and sentence. He filed a petition of appeal and premised it on the following grounds:-

a) That the learned trial magistrate made an error in both law and fact by convicting him when the case had not been proved beyond doubts.

b) That the learned trial magistrate did not consider the fact that he was not taken for any medical check- up.

c) That there was no independent witness.

d) No tangible evidences were produced before court in the form of exhibits.

At the hearing of the appeal on 9th July 2012 the appellant opted to canvass it by way of written submissions. However he attached amended supplementary grounds of appeal, in which he now claimed: -

a) That the entire trial was a nullity as the same proceeded while the appellant was sick and unable to participate in the proceedings.

b) That the learned trial magistrate as per the circumstances of this case had no jurisdiction to impose a sentence of life imprisonment and acted contrary to the provisions of section 167 of the Criminal Procedure Code.

c) That the appellant was not accorded a fair and impartial trial as per the provisions of article 25 (c) of the constitution.

d) That the learned trial magistrate made a crucial error in both law and facts by failing to make a specific finding in relation to his inability to present a defence and the cause for the same.

Mr. Mukofu learned State Counsel on his part conceded the appeal on the grounds that the complainant was not subjected to *voire dire* examination before his evidence was taken. However, he sought a retrial on the ground that the offence was serious as it carried life imprisonment as sentence upon conviction. The appellant had been convicted and sentenced on 5th July 2011, he had not served a substantial portion

of the sentence, witnesses were readily available for the retrial and finally there was overwhelming evidence against the appellant and if a retrial was ordered, a conviction is likely to result. The appellant as well had no objection to a retrial.

On the first ground, I have gone through the proceedings and the judgement, it is quite evident that the appellant did not cross – examine any of the prosecution witnesses. This alarmed the Magistrate who ordered the appellant to be taken to Machakos General Hospital for Psychiatric examination for purposes of determining if he is of sound mind. A report in this regard was produced on 7th April 2011, which showed that the appellant was uncooperative. The case therefore proceeded to hearing. I have gone through the subordinate court file, the said report, declaring the appellant un cooperative, is not in the file. The only documentation in reference to the psychiatric assessment of the appellant is a letter dated 28th April 2011 from the Ministry of Medical Services which clearly shows that the appellant was assessed but the findings were that, the information he provided was unreliable and as such there was need for corroborated facts. The psychiatric was of the view that, he needed to consult the family members so as to adequately advice the court. Whether that was done or not I cannot tell as there is no documentation on record to show for it. It therefore remains a mystery whether the appellant was sick or not and whether he was fit throughout the trial or not. Those doubts must be resolved in favour of the appellant.

The second ground raises a question of whether Magistrate violated the provisions of section 167 of the Criminal Procedure Code. Section 167 (a), states that; If the accused, though not insane, cannot be made to understand the proceedings -

(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President\'s pleasure; but every such order shall be subject to confirmation by the High Court.

In the light of Sec 167 of the Criminal Procedure Act, the Magistrate did not err in proceeding with the trial to its conclusion though aware of the fact that the appellant was not following the proceedings. He was obligated to do so. The only omission he did was failure to order that the appellant be detained during the Presidents pleasure.

I have considered that the fact that the appellant did not pro actively participate in his own trial for reasons that he alleges that he was not mentally stable to do so. The offence was committed on 15th October 2010 and as such I believe the matter is still fresh in the minds of the prosecution witnesses. I further believe that failure to order a retrial in this matter will be prejudicial to the appellant. I have also taken into consideration that both the prosecuting counsel and the appellant have no objection to a retrial.

I therefore Order that this matter be referred back to the Resident Magistrate Court for a retrial. The retrial shall be conducted on the same charges before a magistrate of a competent jurisdiction in the said court but not the **Honourable J.W Gichimu** who conducted the previous trial. The case shall be mentioned before the said the said court of 5th October 2012 for the retrial to commence. Until then the appellant will remain in prison custody.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28th SEPTEMBER 2012.**

ASIKE- MAKHANDIA
JUDGE