NYAMAI MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court

Criminal Case No. 641/2009 by Hon. S.K. Mutai, RM on 29.11.2009)

JUDGMENT

1. When the Appellant appeared before the Resident Magistrate's Court at Kitui, he pleaded not guilty to the main charge of defilement as well as the alternate charge of committing an indecent act with a child. The court proceeded to try him, after which he was found guilty both of the main charge of defilement and the alternative charge of committing an indecent act with a child. The Learned Magistrate then sentenced him to serve 20 years in jail.

2. The case against the Appellant is that at around 11:00am on 26/01/2009 she defiled the Complainant who had gone to fetch water at a river. The Complainant gave sworn testimony after a *voir dire* as PW1. She had gone to the river to fetch water when on her way back home she noticed a donkey was missing. She went looking and found it near the river. The Appellant was also nearby in a farm. She knew the Appellant since he was a neighbor. The Appellant gave her KShs 100 then defiled her, threatening to kill her if she reported the matter to anyone. Nevertheless she went home and reported it to her mother.

3. The Complainant's mother was PW2. She testified that around 1:00pm on 26/01/2009 when her daughter returned from the river where she had sent her, she noticed blood on her legs. She also had torn clothes. She later accompanied the Complainant to the Police and to the hospital. The Complainant told her grandmother that the Appellant had defiled her.

4. PW3 was the Complainant's grandmother. Her testimony was that the Complainant and her mother went to her home with the news that the complainant had been defiled. She saw the Complainant had torn clothes and blood on her legs. They met the Appellant but he became violent when they asked him who had defiled the Complainant. Later on the Complainant told her that she had been defiled by the Appellant.

5. PW4 was the Police Officer who received the Complainant and her mother at Mutomo Police Station. When he heard that the child had been defiled, he escorted the child to Mutomo Mission Hospital for treatment. He issued her with a P3 form the following day. He also received blood stained clothes from the Complainant and presented them in evidence. He stated that the accused was arrested and he preferred the charges against him.

6. The final witness for the prosecution was the Clinical Officer at Mutomo Mission Hospital. He testified that on examining the complainant he noticed that she had a broken hymen and a perennial tear. The Complainant also had blood stains, though there were no spermatozoa.

7. The trial Court ruled, on the strength of this evidence, that the Appellant had a case to answer.

8. In his defence, he stated that on the material day he was working his shamba with his neighbours until 5:00pm when he saw a group of people approach him. One of the people in the crowd was the Complainant's father. They asked him if he had been in the same place earlier at 11:00am. He felt threatened and the following day he reported to the Assistant Chief that he had been threatened by those people. Later he was arrested and taken to Mutomo Police Station. He testified that he did not know the Complainant, and she did not know him either. He denied committing the offence, and asserted that he had been framed.

9. The Court weighed his defence against the Prosecution case and found that the Prosecution had established beyond reasonable doubt that he had committed both the defilement and the indecent act with a child. He was therefore sentenced to serve 20 years in prison.

10. He has appealed against the conviction and the sentence, relying on 7 grounds of appeal i.e.

a. That the learned pundit trial magistrate fell in point of law and fact by failing to observe that some of the vital and crucial witnesses were not summoned by the court to come and testify and be cross-examined by I the Appellant, contrary to Section 150 of the Criminal Procedure Code.

b. That the learned trial magistrate further fell in point of law and fact by failing to consider that the prosecution case was contradicted thus violated section 163 (c) of the Evidential Act.

c. That the learned trial magistrate also erred in matters point of law and fact while upholding the conviction against me in reliance to the P3 form produced in court as evidence failing to observe that the same remained the least most unsatisfactory to sustain a conviction.

d. That the learned trial magistrate made an error both in law and fact by failing to note that Section 211 of the Criminal procedure Code was not complied with as required in law, thus I was prejudiced.

e. That the learned trial magistrate also erred in matters of law and fact by failing to observe that nothing was produced in court as evidence linking me the Appellant to the crime commission so as to implicate me as a perpetrator in this case in question.

f. That the learned trial magistrate failed both in law and fact by concluding that the prosecution case was proved beyond reasonable doubt failing to note that this instant case could base that of identification of a stranger but not refofnirion as stated by PW3.

g. That the learned trial magistrate erred while upholding the conviction in reliance to the weakness of my defence failing to observe that I was not read and explained of the charge before I gave my sworn defence evidence also there was no indication which law was I convicted with contrary to section 212 of the CPC.

11. I have analyzed and evaluated the evidence adduced before the lower court and I have drawn my own conclusions. I am guided by the court of Appeal case of in the case of ***Okeno v. Republic [1972] EA 32*** where the role of a first appellate Court is given as follows:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinitize the evidence to see if there was some evidence to see if there was some evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)

12. One of the seven grounds of appeal is that there was no indication of which law the Appellant was convicted of contravening. I have read a copy of the charge sheet and the judgment. The Charge Sheet states the main count as:

Defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.

The alternative count is stated as

Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

13. I have also read the judgment of the Magistrate which states that:

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 case of defilement and indecent act with a child contrary to section 8(1)(3) and section 11(1) respectively of the Penal Code beyond reasonable doubt against the accused. I therefore convict the accused on both charges, accordingly.

…

I have considered the fact that the accused is a first offender and his mitigation. However, the offence committed is a serious one and very rampant. I hereby sentenced the accused to serve 20 years imprisonment.

14. It is important to begin by pointing out that there is no such section as Section 8(1)(3) in the Sexual Offences Act as was claimed in the charge sheet, nor Sections 8(1)(3) and 11(1) of the Penal Code as has been claimed in the Judgment. The question the Court must answer is whether these errors in the charge sheet and the judgment entitle the Appellant to an acquittal? Differently put, are these errors merely technical and capable of being cured or did they occasion a miscarriage of justice?

15. The answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

16. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

17. The starting point for this analysis is our case law. Two cases are pertinent: the case of ***Yosefa v. Uganda*** *[1969] E.A. 236* – a decision of the Court of Appeals – and ***Sigilani v. Republic*** [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. ***Sigilani*** held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

18. Hence, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? In this case, the Appellant was charged under section

8(1)(3) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant? To answer that question one needs to ask if it can be reasonably said that the accused person understood the charges facing them including the specific ingredients of the offence charged so that he can properly direct his defences.

19. One approach to determining whether an otherwise defective charge should be immunized under section 382 of the Criminal Procedure Code is to use a cumulative sliding scale. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal.

20. Applying this approach to the facts of the present case, we note two defects in the trial process as pointed out above. First, the charge is predicated upon a non-existing section of the Sexual Offences Act. Second, the Learned Magistrate, in his judgment, compounded the problem by purporting to convict the Appellant under the non-existing section exported into the Penal Code! The question, then, is whether this contributed to a miscarriage of justice. I think it did not. The error apparent in the Learned Magistrate's judgment came at the end of the trial and did not affect the trial process strictly speaking. In any event, this Court will get an opportunity to look at the record afresh and determine if, absent the error, a Court of law properly seized of the law and facts could have concluded that the Appellant was guilty as the Learned Magistrate did. As a first appellate Court, we are duty-bound to do just that: examine all the evidence afresh and to arrive at the Court's own determination. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190*.**

21. After looking through the record, the Court concludes that there is sufficient evidence to confirm the finding of the Magistrate's Court that the Complainant was defiled. Such evidence starts with her own testimony that she was defiled, the testimony of her mother and grandmother both of whom saw blood between her legs and her torn clothes, and the evidence of the Clinical Officer whose examination led to findings that were consistent with defilement. The only issue, therefore, was whether the Appellant had been properly identified as the Complainant's assailant.

22. The Complainant herself testified that she had been defiled by the Appellant who she knew as a neighbor. None of the other witnesses could testify as to who exactly defiled the Complainant – she was alone. All the other witnesses can state as to the identity of the defiler is what the Complainant told them. As has rightly been pointed by the Appellant in his written submissions, there was no DNA test to link the Appellant to the defilement. This means that the only testimony that links the Appellant directly to the case is the identification evidence of the Complainant.

23. The Trial Magistrate conducted a *voir dire* examination of the child and found that she was competent to give sworn testimony. The Learned Magistrate found her credible enough and I also see no reason to doubt her. It must be noted that this is a case of defilement and like in most other sexual offence cases, the victim is almost always alone with the perpetrator. The rules of evidence which strictly demand corroboration have therefore been relaxed by Parliament and the courts when it comes to sexual offences. Where the victim is a child, the rule that testimony from children should be treated with caution if not corroborated is also not so strictly applied. There now exists a proviso to Section 124 of the Evidence Act which reads as hereunder:-

provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to

convict the accused person if, for reasons to be recorded in the proceedings, the alleged victim is telling the truth.

24. The Appellant has gone to considerable length in attempting to discredit the evidence of the Complainant's mother and grandmother who each testified that they saw the Complainant at around 1:00pm yet the Complainant indicated that she went home at 2:00pm. The time difference of one hour is an immaterial discrepancy in my view. The disparity between the timings offered by the child, her mother and grandmother are understandable in a village setting where people work with relative time. If anything, time is not so central to the offence in question. Besides, the difference between *around 1pm* and *around 2pm* is not appear to be so huge and inconsistent as to capture the attention of the court away from the main evidence.

25. The Appellant has also attacked the testimony of the Complainant's mother who spoke of the child being *injured* rather than defiled. He insists that the word *injured* does not mean the same thing as *defiled.* Of course this is true – whereas defilement can result in an injury, an injury can result from many other incidences. Again such an attack is akin to splitting hairs. There is not such a huge difference in the meaning of the two words so as to lead the court to disregard the testimony of the Complainant's mother. His claims that the fact that the medical examination of the Complainant did not reveal any spermatozoa also fails – it is perfectly possible for penetration to occur without the deposit of spermatozoa. Lack of spermatozoa is not dispositive that no sexual contact occurred. In any event, it was the professional opinion of the expert witness that defilement had occurred. That opinion was not meaningfully challenged at trial.

26.The Appellant's complaint that he was not taken for medical examination and that this means the offence against him could not have been proved equally fails. There is no requirement for there to be medical evidence linking a person accused of a sexual offence with the offence. Other evidence might suffice to establish that link. In this case, that other evidence is one of identification. The offence was committed at 11:00 am – in broad daylight. The Complainant testified that he knew the Appellant before the incident for he was a neighbor. She had plenty of time to see his face during her ordeal. In short, the possibility of mistaken identity is virtually nil. It is true that our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in ***Roria v R [1967] EA 583***, that *"a conviction resting entirely on identity invariably causes a degree of uneasiness."* And, the Court of Appeal reminded us in ***Kiarie v Republic*** that "*it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken."* Finally, the famous ***Charles Maitanyi v R*** **[1986] 1 KLR 198** admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.

27.To aid in the exercise of this "c*ircumspection*" our courts have adopted the guidelines for receiving and considering identification evidence set out in the famous English case of ***Regina v Turnbull [1976] 3WLR 445*** are considered very comprehensive. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:

a. How long did the witnesses have the accused under their observation?

b. What was the distance between the witnesses and the accused person?

c. What was the lighting situation?

d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?

e. Had the witnesses ever seen the accused person?

f. If the witnesses knew the accused prior to the current transaction, how often?

g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness

have any specific reason for remembering the accused?

h. How long elapsed between the original observation and the subsequent identification to the police?

i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?

28. As aforesaid, if one considers all these factors, there is no question at all that the Learned Magistrate was entitled to conclude that there was positive identification of the Appellant: This was in broad daylight; the ordeal must have lasted for more than a few minutes; for sexual intercourse to occur, the Complainant and the Appellant were literally intimate – without any obstruction; the Complainant knew the Appellant prior to the incident; and she described him to the adults around her and was able to name him only a few hours after the incident. In my view, there can be no reasonable doubts about the identity of the Appellant.

29. The Appellant's case is that he was framed in the case, even though this bit of his testimony is missing from the Court record. I find it difficult to accept the defence that he was framed in the case. There is sufficient evidence on the record that points to the fact that the complainant was defiled. Whatever grudges he had with the complainant's family, I do not think they engineered their daughter's defilement so that they could fix the Appellant. I also do not think that they knew the person who actually defiled the Complainant but went for the Appellant instead so they could fix him while the true assailant walked free. But this is what the Appellant would have this court believe. The evidence on record indicates otherwise. The Complainant was defiled, and she identified the Appellant as her assailant.

30. The Appellant has also appealed on the ground that some material witnesses were not called to the stand. He singles out the following: the complainant's neighbor (Nzuki Kilonzo) who was with the complainant as she went to the river, A Mr. Joseph who took her to the hospital, and a Janet who told PW3 that she had seen the Appellant by the river. This argument is unavailing to the Appellant also. All the Prosecution is expected to do is to marshal evidence to prove the essential ingredients of the case. There is no requirement that it calls a multiplicity of witnesses just because they are available if the fact in question can be established by another witness. I find no evidence that the Prosecution willfully refused to call the people the Appellant mentions with the conscious intention of keeping information away from the Court.

31. Finally, the Appellant contends that the provisions of Section 211 of the Criminal Procedure Act were not complied with before he was put in his defence. Section 211 of the Criminal Procedure Code provides that

211. (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

32. The Appellant was put on his defence on 11/11/2009. The Court record indicates that the accused opted to give a sworn statement and that he had no witnesses. It is clear that he knew his options and he exercised them effectively. The purpose of the section is to concretize the right to fair trial by ensuring that an accused person understands his rights – including the right to call witnesses and or give an unsworn statement. The purpose of the right is not merely formalistic. If one takes this functional view of the section, it seems plain that even if it were true that the section was not explained to the Appellant, he suffered no prejudice at all because he was clearly aware of his options and he exercised them. If there was an error here, it was evidently a harmless one.

33. There is one other matter the Court must deal with before laying the matter to rest. The Learned Magistrate convicted the Appellant of both the main charge and the alternative charge. This was obviously in error. The same set of facts cannot lead to a conviction on two different charges. Since, as I have found above, there was sufficient evidence to convict on the main charge of defilement, I hereby quash and set aside the conviction for the alternate charge of committing an indecent act. The conviction for the main charge shall remain intact.

34. As for sentence, it is clear that the Appellant received the minimum sentence which could be imposed for the offence for which he was convicted. I would, therefore, uphold the sentence of 20 years imprisonment as well. Orders accordingly.

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

J.M. NGUGI
JUDGE