REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 69 of 2011

MALUKI JULIUS ……..……..…APPELLANT

VERSUS

REPUBLIC…….…….....……RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 241/10 by Hon. S.K . Mutai, R.M. on 14/3/2011)

JUDGMENT

The appellant, **Maluki Julius** was charged before the Resident Magistrate's Court at Mutomo with defilement contrary to section 8(1) (2) of the Sexual Offences Act. Particulars of the offence were that on the 5th December, 2010 at unknown time at Mutomo District within the Eastern Province, the appellant defiled **JM,** a child aged 3 years. In the alternative charge, the appellant was charged with indecent act with a child contrary to section 11(1) of the same act, Particulars being that on the same date and place he committed an act of indecency with **JM,** a child aged 3 years by touching her private parts. The appellant entered a plea of not guilty to both counts and he was duly tried.

The prosecution called five witnesses in support of its case. They were **JMM, KM, Regina Kavengi, Herbert Ngunjiri Muraya** and **Philip Lenarpasipia.** They all testified as PW1, PW2, PW3 and PW5 respectively.

PW1 on 5th December, 2010 at around 7.00p.m., was at his workplace when his wife (PW2) and sister-in law came calling and told him that their child called **JM,** the complainant, had been defiled. He immediately left to see the complainant who she found lying down. He confirmed that indeed she had been defiled. He took her to the hospital and then to the police station. The complainant's clothes were soaked in blood. At the police station, he was issued with a P3. He gathered information that it was the appellant who had defiled her.

PW2 on the other hand on 5th December, 2010 at around 7.00 p.m. was at the church attending a crusade. She is the mother to the complainant. On her way back she passed by the appellants home where she was told that **Maluki,** *(the appellant*) had defiled a child called J**M.** She went back and told her husband (PW1) what had happened. She checked the child and found her bleeding in her private parts. Her husband took the complainant to the hospital for treatment. The complainant told her that the appellant took her to the bed and held her neck.

PW3 is the mother of the appellant. On 5th December, 2010, she went to the church at around 10.00 a.m. and later she went back home where she found children playing while the complainantlooked confused and dazed. She told her that she felt pain in the chest and she then saw a discharge on her thighs. Later the

complainant's parents came and checked her and thereafter took her to hospital.

PW4 attended the child at the hospital on 6th January, 2011 and filled her P3 form, on the allegations that she had been defiled. On examination the complainant had blood stained clothes without a pant and the hymen was perforated with tears around the vaginal opening and seminal fluids around the vulva. The complainant had dried blood stains on her hands. He concluded that there was evidence of defilement.

PW5 investigated the case. On 6th December, 2010 the appellant was taken to him by AP Officers from Kanziku AP camp. He recorded statements from witnesses and recovered clothes worn by the complainant on the material date. He later charged the appellant with the offences.

The appellant when put on his defence, elected to give an unsworn statement and had no witness to call. He stated that on 5th December, 2010 he went to church upto 3.00p.m when he went home and took a rest. He denied committing the offence.

The learned magistrate upon evaluating the evidence on record found that there was overwhelming evidence that linked the appellant to the offences charged. He accordingly, convicted the appellant on both counts and sentenced him to life imprisonment.

At this juncture I wish to point out that the learned magistrate was in error when he convicted the appellant on the main count as well as the alternative count. It is trite law that if an accused is convicted on the main count, he cannot again be convicted on the alternative count. That is why such count is called an alternative count. A magistrate can only revert to the alternative count if he dismisses the main count. Ordinarily, once there is a conviction on the main count, there should be no reference at all to the alternative count. It is also interesting that though the learned magistrate convicted the appellant on both counts, he imposed one sentence without stating to which count it applied. What sentence did he impose on the other count? These are obvious mistakes that magistrates of his rank should be knowledgeable about and avoid committing.

Be that as it may, it would appear that the sentence imposed was in respect of the main count. This is the offence which carries life imprisonment as a punishment if the victim is aged below 11 years. The victim in this case was a 3 years old girl and therefore fell within that age group hence, the sentence of life imprisonment for the appellant.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on the grounds that his conviction should not have rested on the evidence of the complainant's father and mother nor his own mother, no DNA was carried on the complainant and himself, the complainant never testified, her age was not proved and lastly the learned magistrate grossly misdirected himself in fact and erred in law when he convicted him for both offences.

When the appeal came before me on 25th June, 2012 for hearing, the appellant orally submitted that there was no complainant in the case since she did not testify and secondly, the age of the complainant was not proved in law as required.

Mr. Mukofu, learned State Counsel conceded the appeal on the ground that in the absence of the evidence of the complainant he could not see how the conviction could be sustained.

I think that the learned State Counsel was right in conceding the appeal on the above ground. Section 202 of the Criminal Procedure provides *interalia* that;-

"if in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case or is brought before the court under arrest, then if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the

hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit."

Whereas section 206 of the Act provides;

"(1) If, at the time and place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs."

All these provisions emphasize the presence and indeed the evidence of the complainant a in criminal trial. If such evidence is not forthcoming, the trial court may dismiss the charge. In this case, the complainant never testified. No reasons where advanced by the prosecution as to why they could not avail the complainant. Yes, at the age of 3 years, she may have been too young to testify. However, that is not the decision for the prosecution. It is for the trial court to conduct *voire dire* examination and determine whether the witness is possessed of sufficient intelligent, understands the need to speak the truth or the meaning of the oath so as to testify. No such exercise was undertaken in the circumstances of this case. It would appear that the prosecution unilaterally decided not to call the complainant as a witness. It cannot be said that such fatal omission did not prejudice or occasion a miscarriage of justice to the appellant. Again in the absence of such evidence, the rest of the evidence taken by the learned magistrate was hearsay which cannot be acted upon to find a conviction.

If the prosecution was uncertain as to whether the complainant could testify due to her young age, nothing stopped them moving under section 31 of the Sexual Offences Act to have her declared a vulnerable witness so that she could testify through an intermediary, say her mother. Nothing of the sought happened here. Accordingly, the case was concluded without the benefit of the evidence of the complainant either directly or through an intermediary. In the process the appellant was prejudiced in his defence.

For all the above reasons, the appeal is allowed, conviction quashed and the sentence imposed on the appellant set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and delivered at **MACHAKOS** this **15TH** day of **OCTOBER, 2012.**

ASIKE MAKHANDIA
JUDGE