REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 25 OF 2010

ANTHONY MUSEE MATINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant **Antony Musee Matinge** was charged in the subordinate court with defilement of a girl under the age of 16 years contrary to **section 145(1)** of the **Penal Code**. The particulars were that on 7th March 2006 in **Mwingi** District within the Eastern Province had carnal knowledge of **MM** a girl under the age of 16 years. He pleaded not guilty to the charge. After a full trial he was convicted under **section 8 (2)** of the Sexual Offences Act. In convicting the appellant, the learned magistrate stated:-

> **"Thus pursuant to the transitional provisions contained under section 48 of the Sexual Offences Act, I hereby substitute the charge of defilement under section 145(1) of the Penal Code with the charge of defilement under section 8(2) of the Sexual Offences Act and subsequently convict the accused accordingly under section 215 of the Criminal Procedure Code."**

The learned trial magistrate then proceeded to sentence the appellant to serve twenty (20) years imprisonment, after considering a Probation Report.

The appellant, having been dissatisfied with the decision of the learned magistrate has appealed to this court against both conviction and sentence. His grounds of appeal according to his amended petition are as follows:-

> **1. That the learned trial magistrate erred in law and fact by convicting him without proper consideration that he was delayed in police custody contrary to section 49(1) of the Constitution.**
>
> **2. That the learned trial magistrate erred in law and fact by convicting him for the offence of defilement in reliance on the evidence of the complainant alone in the presence of sufficient evidence which contradicts the same.**
>
> **3. That the learned trial magistrate erred in law and fact by failing to adhere to the provisions of section 200 of the Criminal Procedure Code, when succeeding another magistrate who had ceased to exercise jurisdiction.**
>
> **4. That the learned trial magistrate erred in law and fact by failing to adhere to the provisions of section 211 of the Criminal Procedure Code before inviting him to give his defence.**
>
> **5. That the learned magistrate erred in law and fact by failing to consider his defence.**

With the leave of the court, the appellant filed written submissions, which I have perused.

The learned State Counsel **Mr Mwenda** opposed the appeal. Counsel submitted that the learned trial magistrate considered two issues. First, whether the complainant PW3 was defiled. Secondly, whether the appellant was identified as the defiler.

On the first issue, the magistrate relied on the complainant's evidence that the appellant removed her pants and inserted his penis inside her. The complainant reported the incident immediately she reached home to PW5, her grandmother who found a white discharge and swelling in the complainant's vagina. There was also the evidence of PW1 the Clinical Officer, who examined the complainant and noted bruises, though the hymen was intact.

On identification, Counsel submitted that the appellant was a neighbour and was known to the complainant and the grandmother. The incident occurred during broad daylight.

Counsel also stated that under the **Sexual Offences Act**, the sentence of 20 years imprisonment imposed by the learned trial magistrate was not legal, as the sentence provided by law was life imprisonment.

This being the first appellate court, I have to start by reminding myself that I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

I have re-evaluated the evidence on record. The trial was conducted by two succeeding magistrates who were **J.K. Ngarngar SRM** and **S Ongeri RM**. The latter magistrate took over the conduct of the case on 26/6/2007 when only one witness PW1 **Eunice Kieme** had testified. The record with regard to the taking over of the case between the two magistrates states as follows:-

> **"Mbaluka – let the matter proceed from where it had reached. Let proceedings be typed.**
>
> **Court – Matter to proceed from where it had reached. Proceedings to be typed."**

The legal requirements to be complied with in the taking over of proceedings from a previous trial magistrate by a succeeding magistrate are contained in **section 200** of the **Criminal Procedure Code (Cap 75),** the relevant part of which provides:-

> **200 (3). Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.**

The above provisions of the law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality.

The appellant has raised the issue of the long period he was kept in custody before being charged in court. Indeed, under **section 72 (3)** of the **repealed Constitution** which was operational when the trial took place, an arrested person in a non-capital offence was required to be brought to court within 24 hours. Even assuming that the allegation is true, the jurisprudence now is that the remedy for such violation of Constitutional rights is a claim for damages. It does not result in an acquittal in a criminal case.

Having considered the evidence on record, I am of the view that if the same evidence is tendered at a fresh trial, a conviction may result. I am therefore, of the view that this is a proper case to order a retrial, as the offence is a serious offence on the person.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I however order that a retrial be conducted. In this regard, the appellant will remain in custody, and appear before a magistrate with jurisdiction (except the two magistrates who conducted the trial), at **Machakos** on 18th December 2012 to be recharged and tried afresh on the same offence.

It is so ordered.

Dated and delivered at Machakos this **13th** day of **December** 2012.

George Dulu
Judge

In presence of:-

Appellant present in person
N/A for State
Mutinda – Court clerk