Refractory witness and hostile witness
distraction in manner of handling such witnesses.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 240 OF 2008

LESIIT J.

REPUBLIC……PROSECUTOR
VERSUS

MUSYOKA MIRITI ……...…RESPONDENT

(From the original conviction and sentence of Chuka Resident Magistrate Hon. Mr. P NGARE)

JUDGMENT

The appellant MUSYOKA MIRITI was charged with acts causing penetration or indecent act committed within the view of a family member, child or person with mental disability contrary to section 7 of the Sexual Offences Act (here in after SOA). He faced an alternative count of indecent acts with a child contrary to section 11(1) of the SOA. The appellant faced a second count of Assault contrary to section 251 of the Penal Code. The learned trial magistrate found him guilty "**on both counts**" and convicted him. He was sentenced to 20 years imprisonment in count 1 and 2 years imprisonment in count 2. The appellant was aggrieved by the conviction and sentence and therefore filed this appeal. The appellant has cited five grounds of appeal as follows:

1. **That, the learned trial magistrate erred in law and fact in making presumptions and taking into consideration extraneous matters which had no basis on evidence before him, which presumption led him to misdirect himself and make a wrongful conviction**.

2.**That the pundit trial magistrate misdirected himself on the effect of contradiction and inconsistency upon the probative value of evidence tendered before him**.

3.**That the pundit trial magistrate erred in law and fact in relying upon the evidence of the clinical officer without his qualifications preferred therein**.

4.**That the sentence meted was harsh, excessive in the circumstances and bad in law.**

5.**That the pundit trial magistrate further erred in law and fact in failing to consider and indeed in dismissing the defence put forth by the appellant which defences were credible and not disapproved by the prosecution**.

When the appeal came up for hearing the appellant urged the court to reconsider the sentence meted out stating that he was 65 years old and the sentence of 22 years was too long.

Mr. Kimathi learned counsel for the State left the matter of sentence for the court to decide. However counsel urged that the offence was aggravated as the appellant had first released his dogs on the complainant which bit her. That he then dragged the complainant to his house and defiled her. Counsel urged further that the complainant was mentally challenged.

The facts of the prosecution case were that the complainant, a mentally challenged girl went to her grandmother PW1, at 1pm on 25th September, 2007. She informed her that the appellant had released his dog to bite her after which he forcefully took her to his home and had carnal knowledge of her the whole night. The complainant herself testified to that effect and said that the offence was committed inside the appellant's house which he shares with sheep. The doctor's findings confirmed that the complainant had been sexually assaulted leading to bruises on her virginal lips and wall. The complainant's blood stained clothing were recovered inside the appellant's house the after day after the alleged rape.

The appellant chose to keep quiet in exercise of his right under S.211 of the Criminal Procedure Code.

I have carefully considered this appeal, and have analysed and evaluated afresh the entire evidence adduced before the lower court, guided by the court of Appeal case of **OKENO V. REPUBLIC [1972] EA 32**. In the cited case 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 scrutinize the 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.)"

The appellant has now appealed against the conviction. However due to serious omission in the case, I have decided to look at the entire proceedings of the lower court. Before I consider it I must mention that I have considered the evidence of the complainant and her grandmother PW1. PW'1s evidence was merely what the complainant told her. The complainant's evidence was strong to sustain a conviction. That evidence was corroborated by medical evidence in all particulars.

The first mistake is the charge preferred against the appellant. He was charged under S.7 of the SOA which stipulates as follows:

"7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

The facts of the case do not support the main charge. The complainant's testimony was that the appellant raped her in the house he shares with sheep S.7 of SOA is meant to be preferred in addition to other offences under the SOA, as an aggravation of the offence committed. It is an offence under S.7 of the SOA if the rape or indecent act is committed in the view of a family member, a child or a person with mental disabilities.The victim under the section is, in terms relevant to this case the family member, not the person with mental disability. The offence would fall under the section, (in addition to other sections under the Act) if the rape complained of was done in the view of a family member, a child or mentally disabled person.

The facts of this case reveal that the complainant was mentally "disabled" girl and that the offence was committed in the presence of sheep. Surely the law did not intend that committing the offence of rape or

indecent act is aggravated if it is committed in the presence of animals.

The learned trial magistrate did not realize that the prosecution had preferred an offence not supported by their case.The learned trial magistrate ought to have exercised his power under section 214 of CPC and directed an amendment of the offence to the correct one.

The second error committed is the manner in which PW1 was declared a refractory witness.

Section 152 of the Criminal Procedure Code sets out who a refractory witness is and also gives guidance on how to handle such a witness. It provides as follows:-

"152. (1) **Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence**

(a) refuses to be sworn;
(b) Having been sworn, refuses to answer any question put to him; or
(c) Refuses or neglects to produce any document or thing which he is required to produce; or
(d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it."

It is clear from the above section (152 of CPC) that PW1 was not a refractory witness for the basic reason that the prosecutions complaint was not that she refused to answer questions put to her. She was accused of retracting her statement to the police. She was a hostile witness. The procedure adopted by the learned trial magistrate was wrong especially the decision to remand the witness in custody. Where the prosecution wishes to show that its witness has retracted previous statements made by him to the police, the prosecutor musty apply to cross examine his witness as to such previous statements made by him to the police, the prsecutor must apply to cross examine his witness as to such previous statement. In such circumstances the court must ensure that the provisions of S.153 and S.154 of the Evidence Act are observed. The witness will then be cross examined by the defence.

The purpose of such cross examination by the prosecution may extend, not only to establishing that the witness retracted his previous statement. The prosecution will be at liberty to cross examine their witness as to his credibility accuracy and veracity among other things. If the prosecution succeeds in shaking the credibility and injuring the character of its witness The witness will be treated as a hostile witness.

The Court of Appeal in **Maghanda vs Republic [1986] KLR 255 at page 257**discussed the manner in which the evidence of a hostile witness should be treated by a trial court. That court held:

"Halima was called to testify for the prosecution. She was declared a hostile witness. The magistrate said that therefore her evidence could be safely disregarded for, being the appellant's girlfriend, it was but natural that she would testify as a defence witness. **The first part of the magistrate's statement strictly was a misdirection. The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the court."**

The third mistake made is when the learned trial magistrate after ably evaluating and analyzing the evidence reached a conclusion to convict in respect of count 1. The learned trial magistrate failed to indicate whether the conviction was entered in the main count or the alternative count.The trial court must always make an election of the count of offence in respect of which a conviction is entered. Where there is a main count and an alternative count, the trial court is required to show a conviction in either count. In which case the count in respect of which no conviction is entered, the court must indicate that it enters no finding on it.

The learned trial magistrate entered a conviction generally.

I have concluded that the main count of offence facing the appellant could not be sustained by the evidence adduced. The alternative count charge is a minor offence to the defective first count. The evidence adduct more than supports the charge.

I will alter the conviction entered by the learned trial magistrate by setting aside the same and entering a conviction in the alternative charge of indecent acts with a child contrary to section 11(1) of SOA.

I set aside the sentence of 30 years imprisonment and substitute same with a sentence of 15 years imprisonment. The sentence on count 2 is upheld. The same should run concurrently with the sentence in count 1 from the date of sentence in the lower court.

Dated signed and delivered this 28th day of July 2011.

LESIIT, J
JUDGE