**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO.56 OF 2010**

**KENNEDY NYUKURI MAFWETE……..APPELLANT**

**=VERSUS=**

**REPUBLIC OF KENYA……RESPONDENT**

***[From the conviction and sentence of R.O. OIGARA, S.R.M. In Kimilili SRM Cr. Case No.419 of 2008]***

**J U D G E M E N T**

The appellant, Kennedy Nyukuri Mafwete, was charged with the offence of defilement contrary to Section 8(3) of the Sexual Offences Act, Act No.3 of 2006. He was convicted of his own plea of guilty, as I understand it, and sentenced to life imprisonment. It is the method used to arrive at the conviction that became the basis of this appeal.

The prosecution called 5 witnesses who testified although the record would tend to show that only four witnesses were called.

PW1 was C. and was the mother of the complainant, PW2, B. N. She testified that PW2 was born in 1993. On 20.4.2008 PW1 got information that her daughter PW2, who was then about 15 years old, had gone to marry or be married by the appellant. PW2 was then learning at B[...] Primary School. On 16.5.2008 she reported the matter to Chwele Administrative Police Camp.

The Administrative Police then went to the appellant's home and arrested PW2 and handed her over to PW1. She took her to hospital at Chwele for medical tests, after which she reported at Kimilili Police Station with a complaint of defilement. She was given a letter for the arrest of the appellant.

In the meantime the girl escaped and went back to the appellant's home to stay once more, as his wife. Later the girl was returned to her parent's home for the second occasion, but she once more went back and joined the appellant at appellant's home, where she still was at the time the mother gave her evidence in court, for which reason the appellant's bond was cancelled and the appellant tried while in remand.

On 31.1.2009 the complainant was brought before the court and testified that she was 17 years old. She said that she had taken the appellant as her husband almost one year before, in July 2008 after her mother, PW1 chased her away from their house.

On 28.4.2009 B.N., who is taken to be the complainant, although she was not, testified as a witness. She said that she was 18 years old, having been born in 1991. She went to stay with her father in 2008 because her mother refused to pay school fees for her at B[...]. That she on 20.4.2008 decided to marry the appellant. She recalled that on 19.5.2008 her mother forcefully took her to hospital where tests revealed that she was pregnant. She said she was married to the appellant then and going to school was not available to her. She also testified that she never told the police that she was 15 years old. She also said that she never told the appellant that she was a pupil although she told him that she was 17 years old.

PW3, was A.W.W., the father of the complainant. He said his daughter was 17 ½ and not 18 years old, but he could not produce her birth certificate. He learnt from his wife that the complainant had gotten married to the appellant while she was a minor. They reported to the police at Kimilili and appellant was arrested. He also said that while the case proceeded in court, their daughter went back to join the appellant as a wife. He said that the complainant was pregnant. He wanted her to return home and later go on with education.

PW3 who is a Clinical Officer at Kimilili Hospital, carried out the medical examination on the appellant and established that he was 21 years old on 15.10.2008. He also read to court a P3 relating to one B.N., aged 15 years old who had been medically examined by one Wambani, a Clinical Officer at Chwele Hospital on 19.5.2008. The medical examination revealed that B.N., was found to be pregnant.

PW4 was PC. David Gekera of Mbubu police Station, previously at Kimilili Police Station. On 19.5.2008 he received a report from PW1, C.N. that her daughter aged 15 years had eloped with the appellant. The girl was taken to Chwele Hospital for medical tests and was confirmed to be pregnant with child. He arrested the appellant who was eventually charged with defilement. He produced P3 issued to PW2 and that one issued to appellant, as exhibits 1 and 2.

On being put on his defence, the appellant stated as follows:-

**"I am Kennedy Nyukuri. I stay at Chwele. I am a businessman. I had married the girl. Her and I live with her to date."**

It is not clear from the record whether those are the only words the appellants wanted to say because the words **"that is all"** are not on the record. Further more, the record shows that after the above cited words from the appellant, the trial Magistrate appears to have put on record the following words:-

**"Court: The accused has confessed to me that he committed the offence having married the**

**complainant then 15 years as per exhibit 2"**

**R.O. OIGARA, SRM**

**"I shall accordingly convict the accused on his own confession."**

**Prosecutor: "I do not have the previous records for the accused but offence is serious."**

**R.O. OIGARA, SRM**

**Accused: "My parents depend on me. I also have a sister who depends on me.**

**Court: "I have considered the mitigation by the accused and submission by the prosecutor. I shall sentence the accused to life sentence as a warning to others." R.O.A. 14 days.**

**R.O. OIGARA "**

In the court's view, the above record raises several issues. First, as already stated above it is not clear whether the appellant had completed stating his defence before the honourable trial Magistrate cut in and declared that the appellant had confessed before him that appellant had committed the offence of defilement. Secondly, the appellant's statement was clearly meant to be a defence not a confession. Thirdly, the appellant's statement properly examined is a purported defence to the effect that since he and the complainant had joined as husband and wife and lived so, he had committed no offence of defilement. Whether, such could be a defence for him matters little and could only be rejected in a written judgement which would take into account all the evidence on record. Fourthly, the court did not arrive at judgement as the law required him to do after listening to both sides.

For reasons which this court cannot imagine, and which were not recorded, the trial Magistrate jumped the gun apart from assuming the position of an investigating officer who would take up the accused's defence as a confession before his own eyes. He might have been entitled to come to such conclusion had he heard the appellant's statement to the end, and probably after giving him opportunity to call his witnesses, if appellant had any. However, as it is already noted, the trial Magistrate, for some reason, could not wait.

Be it what it may, it is the view of this court that for the various reasons stated above, there was such a serious mistrial against the accused that it can be rightly said there was no trial; there was only a kangaroo trial.

For the above reasons, the conviction herein cannot be left to stand. It is hereby quashed and the sentence set aside. I have carefully considered the necessity for ordering a retrial which the State Counsel did not in any case, seek. I have come to the conclusion that considering the facts and circumstances of this particular case, a retrial may not be a preference. In the circumstances the appellant is ordered released from prison, unless otherwise lawfully detained. Orders accordingly.

Dated and delivered at Bungoma this 21$^{ST}$day of JULY 2011

D.A. ONYANCHA

JUDGE.