



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 242 OF 2008

HENRY NYABUTO GUTO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGEMENT

**(From Original Conviction And Sentence By The Senior Resident Magistrate's Court At Oyugis
Criminal Case No.665 Of 2007 By R. Ngetich-Srm)**

The appellant, **Henry Nyabuto Guto** was charged before the Senior Resident magistrate's court at Oyugis on the main count of defilement of a girl under the age of 11 years contrary to section 8(2) of the **Sexual Offences Act, 2006**. The particulars of the offence were that on diverse dates between 12th to 19th July, 2007 in Rachuonyo district within Nyanza Province, the appellant had carnal knowledge of **V. K. N** a girl under the age of 11 years.

In the alternative, the appellant was charged with the offence of indecent assault contrary to section 6(a) of the **Sexual Offences Act**. Particulars given were that on diverse dates between 12th to 19th July, 2009 in Rachuonyo District of Nyanza Province, he intentionally and willfully indecently induced **V.K.N**, a girl under the age of 11 years by touching her private parts and removing her pants. The appellant denied both Counts.

The prosecution called five (5) witnesses in support of its case. In brief the evidence tendered was that the complainant, **V.K** was a girl of apparent age of 5 years. Whilst at home on 19th June, 2007 she started experiencing pain in her private parts. She reported the matter to her mother. She further told the mother that a person had been defiling her over time. That person was the appellant. The appellant who was their family employee used to remove her pants, remove his penis and insert it in her vagina and that he would ejaculate. She used to experience pain though. It was then that her mother **MK.M** (PW2) examined her private parts and saw evidence of penetration as there was whitish substance. She immediately reported the incident at O police post and was issued with a P3 form. The complainant was treated at O health centre before she was transferred to Nairobi Women's hospital. At O police post, the complainant was received by PW4, **Agwa Jairus**. After booking the report he issued the complainant with the P3 form. The P3 form was later filled by **Flaris Odhiambo**, a clinical officer at O health Centre. He noted hymenal tear and bruises on labia which confirmed defilement. The P3 form was tendered in evidence on his behalf by **Samwel Koech** (PW5).

The appellant apparently went underground after the incident and and it was not until 17th October, 2007 that PW4 managed to arrest him at Nyamira Law courts following a tip off.

When put on his defence, the appellant gave an unsworn statement and call no witnesses. He stated that he was employed by the complainant's father in February 2007. That subsequently from the month of April, 2007 they disagreed regarding the issue of him having to attend church. The complainant's father threatened him with termination of his employment with unspecified consequences. He had also threatened to beat him. He eventually left his employment and retreated to his home. Sometimes in August, 2007 whilst at Nyamira Law Courts, he was arrested and charged with the offence. In essence he denied having committed the offence.

The learned magistrate duly examined and evaluated the evidence tendered by both the prosecution and the defence exhaustively. She was nonetheless satisfied that the case for the prosecution had been proved to the required standard. She accordingly convicted and sentenced him to a mandatory life

sentence.

Aggrieved by the conviction and sentence aforesaid the appellant lodged the instant appeal through **Messrs C.O. Nyamwange & Co. Advocates**. He faulted the learned magistrate's decision on 8 grounds, to wit that:-

- 1. The learned trial magistrate erred in law and fact in failing to see the discrepancy on (sic) the evidence of PW2 M.K.M the mother of the complainant and that of the complainant herself on the issue that the accused used to wet his penis and the complainant's vagina with saliva then penetrate her something the complainant did not testify to.**
- 2. The learned trial magistrate erred in law and fact also in failing to take into account the discrepancy by the complainant on being cross examined that she reported the defilement to her mother while the accused was still at her home and PW2's version that he discovered about the defilement due to the complainant's scratch on her private parts on 19th June, 2007.**
- 3. The learned trial magistrate erred in law and fact in failing to take into account the fact that when the charges were substituted with section 8(2) of sexual offences Act 2006, the appellant applied for the recalling of the witnesses but the state failed to call them on ground that, the mother of the complainant had relocated and she was attending college, PW3 who was a jua kali artisan had also relocated, and that only remaining witness a police officer was attending the on going KCSE exams and the state proceeded to close its case hence denying the accused an opportunity to cross examine the prosecution's witnesses on the substituted charge.**
- 4. The learned trial magistrate erred in law and fact in upholding a (sic) false evidence of PW2 and that of the clinical officer that there was a (sic) presence of a whitish substance coming out of the complainant's private parts after a whole week from the time the appellant left to (sic) his home.**
- 5. The learned trial magistrate erred in law and fact in failing to realize that he was an (sic) impartial tribunal and went ahead to argue for the state that though the witnesses testified that the defilement was committed on 19th June, 2007, it was between 12th and 19th July, 2007 and went ahead to justify and bolster his argument for the state that accused did not challenge the prosecution witnesses on this issue of dates and years forgetting that the accused was unrepresented.**
- 6. The learned trial magistrate erred in law and fact by displaying and demonstrating a pre-conceived bias motion (sic) against the appellant in his repetitive lengthy judgment against the appellant.**
- 7. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant to serve an excessive sentence in the circumstances.**
- 8. The learned trial magistrate also erred in law and fact by totally disregarding the appellant's defence."**

When the appeal came up for hearing before me on 28th April, 2010, **Mr. Mutuku**, learned Senior Principal State counsel conceded to the same on the grounds alone that there was no compliance with the mandatory provisions of section 214(1) & (2) of the **Criminal Procedure Code**. On that ground alone the appeal ought to be allowed. In the event that the court agreed with him on the issue, he was seeking a retrial on the grounds that the evidence against the appellant was overwhelming, witnesses easily be available and finally, that the appellant would not suffer any prejudice. **Mr. Nyamwange**, learned counsel for the appellant associated himself fully with the submissions of the learned senior Principal State Counsel. He was also not averse to the order for retrial.

The record shows that after the prosecution had called its 5th witness, it applied to amend the charge sheet. Indeed a new charge sheet was introduced. The appellant was then called upon as required in law to plead a fresh to the new charge sheet. The appellant duly exercised his rights under section 214(I) and (II) of the **Criminal Procedure Code**. He demanded that "**all the prosecution witnesses be recalled for further cross-examination...**" His request was granted. However at the resumed hearing, the learned magistrate recanted the earlier order on the grounds that following the post election skirmishes the witnesses had relocated. The prosecution then closed its case. This was highly irregular and unprocedural. The right of an accused person cannot be compromised and or sacrificed at the altar of the convenience of the court, prosecution and or the witnesses. These provisions are among those referred to as fair trial provisions of the law. They are aimed at securing a fair trial for an accused person. If after the amendment of the charge sheet the accused requires the recall of the witnesses who had already testified, that request must be honoured and complied with strictly. It is not a matter for the discretion of the court or prosecution. The court and or the prosecution cannot infringe on that right which accrues to the accused. Yet by recalling the earlier order without as much as making any reference to the accused for his input,

the trial court did exactly that and in the process grossly erred. This was an error which was fatal. There was failure of justice in the circumstances with the resultant mistrial.

Should I order a retrial? That is what the state wants. The appellant is not averse to the idea either. I have considered the entire case as appears above. In the case of **Benard Lolimo Ekimat.v.Republic (2005) 1KLR 182** the court of appeal considering a matter similar to the one before me on principles for a retrial stated interalia:-

“.....there are many decisions on the question of what appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it...” In this case, what commends itself to me considering all the circumstances of the case and what **Mr. Mutuku** and **Mr. Nyamwange** have said is to order a retrial. Accordingly I allow the appeal, set aside both the conviction and sentence and order that the appellant shall be retried on the self-same charges before another magistrate of competent jurisdiction other than **C.L.Yalwala –RM** who presided over the initial trial. Towards this end the appellant shall be presented before the Senior Resident magistrate’s court at Oyugis on 7th June, 2010 for his retrial to commence. Until then he shall remain in custody.

Judgment dated, signed and delivered at Kisii this 31st May, 2010.

ASIKE-MAKHANDIA

JUDGE