**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**Criminal Appeal Case 15 of 2006**

**PATRICK MWANGI MUTHONI…..……..APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

***(Appeal against Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 3800 of 2005 dated 25th January 2006 by S. O. Mogute Resident Magistrate)***

**JUDGMENT**

**PATRICK MWANGI MUTHONI** hereinafter referred to as the Appellant was charged with the offence of indecent assault on a female contrary to *Section 144 (1)* of the Penal Code. Particulars being that on 19/8/2005 at Kiawara in Nyeri District he unlawfully and indecently assaulted CW L by rubbing his private parts against hers. The Appellant pleaded not guilty to the charge.

The prosecution called a total of five (5) witnesses in a bid to prove their case. The Complainant P.W. 1 in this case was a child of tender years. She was said to have been aged about 3 ½ years. She told the Court that she knew the Appellant as he was a shopkeeper in a shop which was next to her home. On the material day, the Complainant had been sent to the shop of the Appellant by her mother LN(P.W. 2) to buy groundnuts. She testified that whilst at the shop the Appellant touched her with his hands.

P.W. 2 LN the mother of the Complainant told Court that on 19/8/2005 at about 4.00 p.m. she left P.W. 1 in the plot playing with other children as she proceeded to hospital to see a patient. She returned at about 6.00 p.m. and found P.W. 1 still playing with other children within the plot. She took her into the house. After sometime she decided to bath her and it is at that time that P.W. 1 started complaining of itching in her private parts. P.W. 2 removed her pant and found sperms on her vagina and also on the pant. She asked her who had done that to her and she responded that it was Mwangi the shopkeeper, now the Appellant. P.W. 2 then called her colleagues Irene and Wanjiku to escort her to Nyeri Provincial General Hospital. They proceeded together with the step father of P.W. 1 to the shop where the Appellant was and asked him to accompany them to the hospital. They all went to Nyeri Provincial General Hospital and later to Nyeri Police Station where the Appellant was arrested by P.C. Grace Irungu P.W. 4 and kept in Police custody till he was charged with this offence. On 20/8/2005 P.W. 2 took P.W. 1 to Nyeri Provincial General Hospital where she was treated and examined. A P3 Form was filled by Dr. Karanja. However, it was tendered in evidence by P.W. 3 Patrick Mbuthia. The doctor had concluded that there was evidence of physical sexual assault with probable penetration.

P.W. 4 P.C. Grace Irungu testified on how P.W. 1 in the company of P.W. 2 and other members of the public came to Nyeri Police Station on 20th August 2005 at 2.00 a.m. She stated that she received a complaint from P.W. 2 who reported that her daughter (P.W. 1) had been defiled by the Appellant. P.W. 4 went on to tell the Court that the Appellant was among the members of the public who went to the Police Station at that time and she immediately arrested him and placed him in the cells until he was arraigned in Court on 30th August, 2005.

P.W. 5 P.C. Charles Kanyi told court that he took over the investigation file from P.C. Rama. He issued a P 3 to P.W. 2 which was duly filled by the doctor.

Put on his defence, the Appellant elected to give a sworn statement but called no witness. He denied committing the offence. His testimony was that on 19/8/2005 at 10.00 p.m. while at the shop where he is employed by Simon Warue he heard people calling him. He opened the door and found that it was the mother of the Complainant and 10 other people. The Appellant said that P.W. 2 told him that he had slept with her daughter. He said that the people asked him to accompany them to Nyeri Provincial General Hospital. The Appellant complied with the request and they all proceeded to Nyeri Provincial General Hospital and then to Nyeri Police Station where he was arrested and put in Police custody for seven days. The Appellant further testified that on 30th August, 2005 he was taken to hospital for medical examination. His trouser and underwear were not examined, however his blood was taken for examination. The Appellant admitted to knowing both P.W. 1 and P.W. 2.

The Court having duly considered the evidence adduced by all the prosecution witnesses and the sworn statement made by the Appellant in

his defence together with the final submissions made by his counsel found that the prosecution's evidence was consistent and at the same time cogent unlike the defence which was evasive. On that basis the Court proceeded to convict the Appellant whereupon it sentenced him to 2 years imprisonment.

Aggrieved by the said conviction and sentence, the Appellant preferred this appeal.

In a petition of appeal drawn by **MESSRS NJUGUNA KIMANI AND COMPANY ADVOCATES** on his behalf, the Appellant faults his conviction on eight (8) grounds. However, since the appeal was conceded to by Mr. Orinda, the Learned Senior Principal State Counsel on behalf of the State, it is not necessary to reproduce the grounds here.

In conceding to the appeal, Mr. Orinda pointed out that the judgment was not delivered in accordance with the law. It was not delivered in open Court as required by law. Mr. Orinda, however, proceeded to urge this Court to consider ordering a retrial on the ground that the evidence against the Appellant was overwhelming. That the parties were known to each other. That the Complainant was not cross-examined. Her evidence thus stood unchallenged.

**MR. KIMANI**, Learned Counsel for the Appellant would hear none of the above as regards retrial. He submitted that this case did not fit in the well known circumstances in which a retrial should be ordered. It was not the fault of the Appellant that the judgment was delivered in camera. In the circumstances a retrial will accord the prosecution and Court a chance to redeem themselves which will be prejudicial to the Appellant.

I have scrupulously and carefully considered the entire record of the trial Court. I have also considered the submissions made herein by respective Counsel. I am in agreement with the reasons advanced by the Learned Senior Principal State Counsel in conceding to the appeal. In fact I may say from the onset that there were a myriad of fundamental procedural defects in the proceedings committed by the trial Magistrate. First when the Doctor (P.W. 3) testified, he did so in camera. There was no legal basis for that decision by the Learned Magistrate. The record does not show why the Learned Magistrate felt the urge to have the evidence of a doctor heard in camera instead of open Court as required by law. Again when Counsel for the Appellant submitted on no case to answer, he did so in camera. Again there was no justification or legal basis for that decision. Finally when the Learned Magistrate delivered the judgment, he did so in camera. This was in total breach of the provisions of *Section 196(1)* of the Criminal Procedure Code. This provision is couched in mandatory terms. A judgment must be dated, signed and delivered by the presiding officer in open Court. Failure to comply with this provision of the law renders the entire judgment delivered a nullity. In the circumstances of this case, since the judgment was delivered in total disregard of the provisions of *Section 169 (1)* of the Criminal Procedure Code, it is a nullity. **MR. ORINDA** was therefore right in conceding the appeal on that ground.

However, that is not the end of the story. The charge preferred was indecent assault. However, from the evidence tendered, it comes out quite clearly that this was a case of defilement. The charge was thus at variance with the evidence tendered. The prosecution made no efforts at all to amend the charge. In any event even on the charge as preferred, it is still defective. No particulars of the private parts of the Complainant touched by the Appellant were given. Indeed even when the Complainant testified she merely stated "….***my Mum had sent me to Mwangi's shop to buy groundnuts. Mwangi touched me with his hands……"*** This evidence does not show that the Appellant touched the Complainant's private parts. Touching a person is not a criminal offence. The alleged particulars given in the Charge Sheet thus offends *Section 134* of the Criminal Procedure Code.

P 3 form of the Complainant was tendered in evidence by a Doctor who did not fill it allegedly pursuant to the provisions of *Section 33* of the evidence Act despite objection by Counsel for the Appellant. The prosecution did not, however, bring themselves comfortably within the aforesaid provisions of the law. It was not established that Dr. Karanja who filled the P3 form could not be traced or could not be found without occasioning any delay or expense. Indeed the Court was told that the said Doctor was within Nyeri Provincial General Hospital. I would have imagined that perhaps the prosecution should have invoked *Section 77* of the Evidence Act to lead such evidence. However they did not. That being the case, the evidence of the Doctor was hearsay and ought to have been rejected and not acted upon. If the evidence of the Doctor is disregarded and considering that the Charge Sheet does not disclose the part of the Complainant's body that was touched by the Appellant and considering the evidence of the Complainant that she was merely touched by the Appellant, could there have been any basis for the Appellant to be convicted for the offence preferred? I do not think so.

In the premises I would allow the appeal, quash the conviction and set aside the sentence of two (2) years imposed on the Appellant.

Should I order a retrial as pleaded for by Mr. Orinda? I do not think so. The circumstances pertaining as to when an order for retrial can be made are well settled. This case does not fit in any of those circumstances. A retrial no doubt will accord the prosecution and the Court a chance to redeem themselves by not hearing the case and submissions of Learned Counsel in camera. It will also accord the Court a chance to deliver the judgment in open Court. It will also accord the prosecution a chance to invoke perhaps *Section 77* of the Evidence Act. All these will be to the detriment and prejudice of the Appellant. It is for this reason that I decline to order a retrial.

**Accordingly, the Appellant should forthwith be set at liberty unless he is otherwise lawfully held.**

***Dated and delivered at Nyeri this 29th day of January 2009.***

**M. S. A. MAKHANDIA**

**JUDGE**