REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 199 of 2008

DANIEL MURIMI MAINA ..... APPELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(Appeals from original Conviction and Sentence of the Senior Resident Magistrate's Court at Mukurweini in Criminal Case No. 478 of 2007 dated 6h August 2008 by F. M. Kombo S.R.M.)

J U D G M E N T

The appellant, **Daniel Murimi Maina** was charged with two principal and two alternative counts all preferred under the sexual offences Act. In count 1, the appellant was charged with incest by a male contrary to section 20(1) of the sexual offences Act. Particulars of the charge were that on 1st July 2007 at Gumba village, Nyeri District, he committed an act of penetration on **M. W. M**, a girl under the age of 18 years, who to his knowledge was his daughter. In the alternative count, the appellant was charged with the offence of committing an indecent act on the said child by touching her private parts; contrary to Section 11(1) of he same Act.

In count 2, the appellant was also charged with the offence of incest contrary to the section aforesaid of the Sexual Offences Act. Particulars whereof were that he committed an act causing penetration on **M. W. M.**, a girl under the age of 18 years, who to his knowledge was his daughter. In the alternative count, the appellant was again charged with the offence of committing an indecent act with the said child contrary to Section 11(1) of the Sexual Offences Act, by touching the child's private parts.

The appellant denied the charges and his trial ensued. P.W.1 – **M. W. M.** told the court that she was aged 7 years old and was a pupil at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] . She recalled that sometimes in early July, 2007 on a Sunday, to be precise she had just come from church when she found her father, the appellant at home. The appellant then took her to the matrimonial bed and defiled her, having ordered her to undress. She also said that the appellant had told her not to report the incident to her mother, but she ended up doing so. According to her, this was the second time that the appellant had defiled her. Her teacher later found her doing the same thing with one **W.**, a classmate. Upon interrogation she told the teacher that the appellant had done the same thing to her. The teacher took her to hospital. The child **M. W.** (PW3), a sister to PW1 told the court that she was a class three pupil at the same school and aged 9 years. She stated that the appellant was her father. She went on to tell the court that one Sunday when she had arrived home from church, the appellant had defiled her; after ordering her to lie on his bed. According to her, it all happened during her mother's absence. She stated that the appellant had removed his trousers and inserted his organ into her vagina, however she did not see any fluids therefrom. She informed her mother about the incident who in turn

warned the appellant against such conduct. She further stated that she informed one **Ms M.**, her class teacher about it.

P.W.4 was **Dr. Murage Mbugua** of Mukurweini Sub-district hospital. He stated that a doctor Munyua who had since been transferred had conducted the examination, filled and signed the P3 form (MFI). He confirmed that he waqs familiar with the said Doctor's signature and handwriting. He identified the P3 form as belonging to P.W1.

According to **Dr. Munyua's** findings PW1's hymen had been torn but the tear had healed. There was no other observation. The doctor also identified MFII a P3 form for PW3 filed and signed by one **Dr. Njenga** who had also been transferred. According to **Dr. Murage** his findings were that the hymen had been found to be intact. There was no other observation.

P.W.2 – **G. N. M.** testified that the two complainants were pupils at [*particulars withheld pursuant to section 76 (5) of the Children Act, 2001*] and that they communicated often with her. She confirmed the testimony of P.W.1 that the matter came to her attention when she learnt from other pupils that PW1 had been seen "doing bad manners" with one **W.** – fellow pupil. According to her, PW1 had been inserting sticks into **W.'s** private parts. She confirmed that she had interrogated PW1 who had in turn narrated the incident involving the appellant and herself to her. She immediately informed the school headmaster who then contacted the area chief and ultimately the matter was reported a Kangurwe police post.

In his sworn testimony in defence, the appellant stated that he had not been at home on the date alleged as he had been at work until 8.00 p.m. when he came back home. Thereafter he described events leading to his arrest. He called his wife **B. W. M.** (DW2) as a witness. Her evidence seemed to cover the events of 7th September 2007, which is not the date of the charges. It was more of a description of the arrest than the events alleged in the charge. She stated that she was all along unaware of the charges against her husband and the involvement of her children until when she went to the police station upon the arrest of the appellant. At the police station she was read the statements by the complainants. She testified to the effect that one "Baba Ben" also called Kenguru had been involved in the matter and had influenced the children to implicate the appellant. She also stated that he said "Baba Ben" had been buying the children bread, soda and cakes in this regard and had even been at her home accompanied by the village Headmen and police, on false allegation that she had killed her newborn child.

The learned magistrate having fully considered and evaluated the evidence tendered by both the prosecution and defence ended up finding favour with the prosecution case in regard to count one. Accordingly he convicted the appellant and sentenced him to the 14 years imprisonment. The learned magistrate correctly made no finding on the alternative count. Otherwise the learned magistrate acquitted the appellant in respect of count II for want of evidence.

That conviction provoked this appeal. The appellant lamented in his petition of appeal that his constitutional rights were violated during the trial, sentence imposed was harsh and excessive, that the case was a fabrication and finally that the evidence tendered was at best tenious.

When the appeal came up for hearing, **Mr. Orinda**, learned Senior Principal State Counsel conceded to the same. He conceded on the technical ground that section 214 of the Criminal Procedure Code was not complied with by the trial magistrate. However he did not seek a retrial on the grounds that the evidence tendered was insufficient to find a conviction. The appellant shared in the views of he learned Senior Principal State Counsel.

I have considered albeit carefully the record of the proceedings before the trial court. It is apparent that after 3 prosecution witnesses had testified, the prosecution applied to amend the charge. That application was allowed on 29th August 2007. The court record on that was reflected as follows:-

29/08/07

Before V.W. Ndururu AG. SRM

Pros – I.P. Simiyu

C/C – Nuru

Accused – present

Inter – Eng/Kik

Pros – The commended (sic) charge sheet is now

ready.

C.R.O. & E in Kikuyu

Response: Count 1 – I am not guilty.

Laternative count – I am not guilty.

Count 2 – R.O. & E in Kikuyu

Response – I am not guilty

Alternative count – I am not guilty

P.O.N.G.E. against each count.

Bond terms to remain the same.

Hearing 12/09/07.

In amending the charge sheet the trial magistrate merely called upon the appellant to plead afresh. Under Section 214 (1) of the Criminal Procedure Code however, the trial magistrate was under a duty to read over the amended charge to the appellant and to ask the appellant whether he wanted to have the witnesses who had previously testified to be recalled to testify afresh or for further cross-examination. The proviso to Section 214 (1) of the Criminal Procedure Code is in terms:-

"**Provided that –**

(i) Where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge.

(ii) Where a charge is altered under this Sub-section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

These two provisions as I have had occasion to state in the past are obviously for the protection of persons facing criminal trials and in paragraph (ii) of the proviso, it is clear that a trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh or to be further cross-examined by him. This is not a procedural failure such as failing to ask him to plead afresh. The right to hear the witnesses give evidence afresh on the amended charge to cross-examine the witnesses further is a basic right going to the root of a fair trial and clearly it was the duty of the trial court to show in the record that it had informed the appellant of that right and to record further what the appellant said in answer to the information.

The learned magistrate did not at all bother to draw to the attention of the appellant those mandatory

provisions of the law. Failure to inform an accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the Code. Accordingly the appellant's trial was substantially flawed, defective and I must allow his appeal on that ground. Indeed **Mr. Orinda** was right in conceding to the appeal on that ground. Accordingly I allow the appeal against the appellant's conviction and set aside the sentence of 14 years imposed on him.

Where an appeal is allowed on the ground that the trial was either defective or a nullity, the usual order to make is one for retrial of the appellant on the self-same charge. Should I in the circumstances of the case, order a retrial?

Mr. Orinda did not ask for one and for good reasons. In concluding the judgment, the learned magistrate made these telling observations "**..... The notable issue in this case is that no investigating officer was called to testify. This is rather surprising in a case of this magnitude. This shortcoming notwithstanding however, I find that the evidence of PW1 is credible and believable ..... In conclusion, the general investigations in this case was very poor. Material witnesses such as the accused mother do not seem to have recorded statements, although the mother later became a defence witness......"** How could the learned magistrate have proceeded to convict the appellant despite his aforesaid reservations. In our criminal justice system, a conviction can only be entered where the trial court is satisfied beyond reasonable doubt that the accused committed the offence charged. If there is any lingering doubt in the mind of the trial court as to the culpability of the accused, then such doubt must always be resolved in favour of the accused. In making those observations the learned magistrate was clearly entertaining doubts as to whether the case against the appellant had been proved beyond reasonable in the light of the failure by the prosecution to call such crucial witnesses. In the circumstances if a retrial is ordered, the prosecution may be handed a chance to rectify that omission to the prejudice of the appellant. That aside and as correctly submitted by **Mr. Orinda**, the evidence tendered was insufficient to find a conviction having particular regard to the medical evidence tendered. Accordingly I decline to order a retrial and instead order that the appellant be released from prison custody forthwith unless he is held for some other lawful purposes.

Dated and delivered at Nyeri this 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE