MICHAEL THINWA MUGUKUMA ……..……APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(From original Conviction and Sentence of the Senior Resident Magistrate's Court at Karatina in Criminal Case No.33 of 2007 by P.C. TOROREY – SRM)

J U D G M E N T

The appellant was initially charged with the offence of "*unnatural offence"*, contrary to *section 162 (a)* of the Penal Code; particulars whereof being that on 5th January, 2007 in Nyeri District, he had carnal knowledge of one **E.N.K** aged 3 ½ years against the order of nature.

On 25th January, 2007, however the charge was substituted. The appellant now also faced a second count of defilement contrary to *section 8(2)* of the Sexual Offences Act. The particulars of this 2nd count were that on 5th January, 2007 in Nyeri District, he defiled **E.N.K,** a child below 11 years. The appellant further faced an alternative count to count 2 of compelled or induced indecent acts contrary to *section 6 (d) (ii)* of the Sexual Offences Act. From the record of the trial court the appellant pleaded not guilty to all the counts and was duly tried. It is apparent that the entire prosecution case was however presided over by **P.C Tororey Ag.PM.** Later at the defence stage, the case was taken over by **L. Mbugua Ag.PM.** The significance of this observation will become apparent later in this judgment.

PW1, the complainant, gave unsworn statement on account of her age, as she was only aged 3 ½ years old. She told the court that on the material day, she had gone to play with I at home of **Baba Mambo.** The appellant is the person she was referring to as **Baba Mambo.** Thereat she was then called by **Baba Mambo** into his house who proceeded to remove her trouser, and asked her whether he could "**put his thing for urinating in her thing of urinating"** He did so and she felt pain. He then gave her a sweet and she left. That evening as PW2, her mother, was cleaning her she noted that she had soiled her pants. PW2 was surprised as the complainant knew how to use the toilet. PW2 also found some jelly like substance around her anus. She then decided to take the girl to hospital on 8th January, 2007 where she was advised to report to the police as the child had apparently been sodomised.

Two medical reports were done on the complainant one by PW4 and the other by PW6. PW4 is also who filled the P3 form of PW1 on 9th January, 2007. His opinion was that the complainant's genitalia was normal with no bruises and hymen was intact. PW4 also found that upon rectal examination, there were bruises, on the anal verge with stool incontinence. His opinion was that the girl had been sodomised.

The other report was by PW6 **Dr. Ketra** of Nairobi Women's Hospital. Having examined the complainant under general anesthesia on 11th January, 2007, she found a torn hymen and small lacerations on the vagina between vagina and anal area. The anal region had small lacerations and he repaired the two lacerations to facilitate healing. Her impression was that there was partial penetration into the vagina and hence there was defilement and sodomy.

Put on his defence the appellant in unsworn statement stated that on 5th January, 2007 he went to his place of work where he remained until lunch time when his worker DW2 went for lunch and came back. The appellant then also went for lunch and came back. They continued working until evening when he went home. The appellant maintained that he was being implicated in the case because of having terminated the complainant's mother's services of picking tea on his farm for pay and to fetch water from his water tank.

At the conclusion of the trial, the appellant was found guilty on the first count of unnatural offence as well as the alternative count of compelled or induced indecent acts. Upon conviction the appellant was sentenced to 21 years imprisonment on the main count and 5 years on the alternative count respectively. The two sentences were correctly ordered to run concurrently.

Aggrieved by the conviction and sentence, the appellant through **Messrs Kinyua Kiama & Co. Advocates** lodged the instant appeal. Since the appeal was conceded to by the state but not on any of the grounds advanced by the appellant in his petition of appeal it shall not be necessary for me to set out the grounds of appeal or leave alone consider them. **Mr. Orinda** conceded to the appeal on the grounds that *section 200* of the Criminal Procedure Code had not been complied with by the incoming trial Magistrate. **Mr. Kahiga**, learned advocate for the appellant agreed with **Mr. Orinda**.

During the trial the prosecution called a total of 7 witnesses all of whom testified before **P.C. Tororey, Ag. PM**. For some reason, **Tororey** did not complete the trial. At the defence hearing another Magistrate, **L. Mbugua, Ag. PM** took over the case. This is how the proceedings went on before her:

"**28/3/08**

Before L. Mbugua SRM

Insp. Kasongo for Pros

CC Kariuki

Accused present

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…….

Order Mention on 31/3/08 to get a defence hearing date.

Case to continue under section 200 CPC".

It would appear therefore that in taking over the case **L. Mbugua** did not comply with the mandatory provisions of *section 200* of the criminal procedure code. That being the case, the proceedings of the trial court were a nullity as correctly submitted by **Mr. Orinda.**

The trial court did not give the appellant an opportunity to indicate whether or not the case should start de novo or some witnesses be recalled for purposes of cross-examination. It matters not that the appellant had a lawyer on record. It is instructive however that on the day that the learned Magistrate issued those directions, the appellant's lawyer, **Mr. Kiama** was absent. The record does not show that the appellant was explained to his rights under the said section of the law. The record also does not show what election the appellant made. He did not decide that it would be to his benefit if the trial proceeded from where the first magistrate reached. There is no note whether the succeeding magistrate informed the appellant of his right to resummon witnesses. There is no response of the appellant noted in the record implying that he wanted the succeeding magistrate to pick up from where her predecessor had left. As it

is that decision to proceed from where the previous magistrate had stopped was imposed on the appellant by the learned Magistrate. That is not the way it is done. In my view therefore the appellant was not made aware of his rights under *section 200* of the Criminal Procedure Code. Accordingly and as correctly submitted by both **Mr. Kahiga** and **Mr. Orinda,** the subsequent trial of the appellant was a nullity.

I think, I have said enough, to indicate that the trial before the subordinate court was a nullity. I declare it as such with the result that all the convictions recorded and sentences imposed upon the appellant must be and are hereby set aside.

As already stated, **Mr. Orinda** rightly conceded that the trial before the subordinate court was a nullity. He did not however ask for a retrial on the grounds that the evidence tendered in support of the charges was weak, insufficient and contradictory. In agreeing with these submissions**, Mr. Kahiga** also pointed out that the appellants constitutional rights enshrined in *section 72 (3) (b)* of the constitution had been violated.

I agree with both **Mr. Orinda** and **Mr. Kahiga** that this is not a case fit for a retrial. The appellant was arrested on 8th January, 2007 and it was not until 11th January, 2007 that he was arraigned in court. That detention was in excess of 24 hours permitted under our constitution for non-capital offences as were alleged to have been committed by the appellant. No explanation for the delay was given. The evidence of PW4 contradicted that of PW1 and PW2 with particular regard to the injuries suffered by the complainant and when they were allegedly inflicted. The complainant too was a minor. Yet before taking her evidence, the learned magistrate did not see it fit to conduct the mandatory voire dire examination.

The totality of the foregoing is that if a retrial is ordered and self same evidence is tendered, a conviction is unlikely to result. There is also the high likelihood of the prosecution correcting their mistakes in the event of a retrial. Accordingly, I decline to make an order for retrial. Instead I direct that the appellant be forthwith set at liberty unless otherwise lawfully held.

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

M.S.A. MAKHANDIA

JUDGE