

ELIUD NJAGI NDEGWAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.2407 of 2006 by T.W. MURIGI – SRM)

J U D G M E N T

The appellant, **Eliud Njagi Ndegwa** was arraigned before the Senior Principal Magistrate's Court, Murang'a to answer to the charge of defilement of a girl contrary to *section 145 (1)* of the Penal Code. Particulars of the offence were that on the 20th day of August, 2006 at K[...]trading centre in Murang'a District within the Central province he had carnal knowledge of **MWW** a girl under the age of 16 years. He also faced a second count of indecent assault of a female contrary to *section 144 (1)* of the Penal Code whose particulars were that on the 20th day of August, 2006 at K[...]trading centre in Murang'a District within Central Province unlawfully and indecently assaulted **MWW** a girl under the age of fourteen years by touching her private parts. He entered a plea of not guilty to both counts and he was tried.

The complainant, **MWW(PW1)**, a girl aged about 9 years at the time testified that on 20th August, 2006, the appellant's wife who is her aunt sent her to the shops for potatoes and Kales. She was to get the same from the appellant who is her paternal uncle and a cobbler at the said shops. At the shops the appellant handed over to her the tomatoes and potatoes, but just as she was about to leave, the appellant pulled her hand and promised to give her a Ngumu cake but she declined the offer. He then pulled her into his kiosk, closed the door, removed her pant and defiled her. That she cried out loud and one, **Kibe**, came to her rescue, opened the door and she ran away. She immediately reported the matter to her mother, **NWW (PW2)** and grandmother. Later her father took her to Gatura police base and she was attended to by P.C. **Jadel Ngari Njeru (PW4)** who referred them to Muriranja's sub district hospital. At the hospital she was examined by **Martin Mwangi Kariuki, (PW5)** a clinical officer, who later filled her P3 form. It was his opinion that the complainant had been sexually assaulted. The appellant was then arrested and charged as aforesaid.

Put on his defence, the appellant in his sworn evidence testified that he was a cobbler operating from K[.....] trading centre. On 20th August, 2006 at about 5.30 p.m. he was at his place of work closing business when the complainant in the company of three other children came and the complainant informed him that she had been sent by his wife to get potatoes and tomatoes from him. He instructed **Mama Nyambura** a green grocer who was his neighbour at the place of work to sell to the complainant tomatoes and potatoes for Ksh.50 and 10 respectively and she complied. As the complainant was leaving the potatoes fell on the ground and **Mama Nyambura** changed the paper bag. The three children requested him to buy them Ngumu cake but he told them that he did not have any money. Instead he sent the complainant's brother for a matchbox and sweets for each one of them. That the sisters then went home and left her brother behind and he later closed down his business at 8 p.m. and went home. On 23rd August, 2008, he heard his brother complaining that he had defiled his daughter and was later arrested. It was his evidence that there existed a grudge between them and the brother since his brother took him to the chief over a land boundary dispute and the chief ordered him to remove the nappier grass from the land. The appellant thereafter called 4 other witnesses to back his story.

Having carefully evaluated and re-appraised the evidence by the prosecution as well as the defence, the learned magistrate was convinced that the prosecution had proved their case beyond reasonable doubt. Accordingly, she convicted the appellant and sentenced him to life imprisonment.

That conviction and sentence provoked this appeal. However since the appeal was conceded to, there is no need to consider the grounds of appeal put forth by the appellant.

Mr. Makura, learned senior state counsel conceded to the appeal on the grounds that the charge sheet was defective and that accordingly the appellant was tried and convicted for a non-existent offence. Similarly the sentence imposed was illegal. The appellant on his part had nothing to say in response.

Having carefully re-appraised the record of the trial court, I have no quarrel at all with the position taken by the learned senior state counsel in this appeal. It is quite clear that the charge sheet is defective. The appellant had been charged with defilement of a girl under *section 145* of the penal code. However as at the time that the appellant was being arraigned in court, that section of the law had been repealed and replaced with Sexual Offences Act. Sexual offences Act was assented to on 14th July, 2006 and came into force on 21st July, 2006. The appellant is alleged to have committed the offence on 20th August, 2006 when the Sexual Offences Act had already been operationalised. On the face of it therefore the appellant was tried and convicted on a non-existent offence.

The appellant's misery was not made any easier by the learned Magistrate when it came to sentencing. She now proceeded to impose the sentence under the sexual offences Act. The appellant was thus sentenced for an offence he had not been charged with and tried. Sentencing as aforesaid was thus unprocedural. The learned magistrate paid no regard to the transitional provisions of the sexual offense Act.

The totality of the foregoing is that the proceedings were a nullity and I so hold. The consequence of so holding is that the appeal is allowed, conviction quashed and the sentence imposed as aforesaid set aside. The appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE