



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Appeal 94 of 2007

BENJAMIN MBUGUA GITAU:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGMENT

The Appellant BENJAMIN MBUGUA GITAU was on the 1st day of December 2006 charged before the Chief Magistrate's court at Eldoret with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No.3 of 2006. The particulars were that on the 26th day of November 2006 in Uasin Gishu District within the Rift Valley Province he defiled a named child aged thirteen years. He also faced an alternative charge that of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 and the particulars were that on the 26th day of November 2006 at Kambi Thomas Maili Nue in Uasin Gishu District within the Rift Valley Province he indecently touched the private parts of a named child aged thirteen years old. He pleaded not guilty to both charges. The prosecution called six witnesses at the close of whose evidence the accused was found to have a case to answer. The Appellant gave sworn evidence but called no witnesses. At the close of the defence case the accused was found guilty and sentenced to serve imprisonment for a term of twenty (20) years. Not being satisfied he has brought this appeal and raised the following grounds of appeal.

1. THAT the learned magistrate erred in law and fact in proceeding with the trial of the case when it had been transferred by a court without jurisdiction to a court that was equally not competent to hear the case in terms of section 79 of the Criminal Procedure Code cap.75 of the Laws of Kenya.
2. THAT the learned magistrate erred in law and fact in failing to find that a Resident Magistrate's court had no jurisdiction under section 7 of the Laws of Kenya to hear a charge of defilement and that of an indecent act on a child.
3. THAT the learned magistrate erred in law and fact in failing to find that the Sexual Offences Act No.3 of 2006 did not confer jurisdiction to a magistrate's court to hear offences under the Act hence it was only the High Court that could try and determine any criminal offences under the Act in terms of section 5 of the Criminal Procedure Code, cap.75 of the Laws of Kenya.
4. THAT the learned magistrate erred in law and fact in failing to find that the appellant's right to liberty under section 72(3) of the constitution of Kenya had been infringed which vitiated a fair trial of the Appellant.
5. THAT the learned magistrate erred in law and fact in failing to find that the provisions of section 36 of the Criminal Procedure Code cap.75 of the Laws of Kenya had not been complied with.
6. THAT the learned magistrate erred in law and fact in failing to find that the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No.3 of 2006 had not been proved beyond reasonable doubt.
7. THAT the learned magistrate erred in law and fact in failing to find that the evidence of the victim had not been corroborated as required by section 124 of the Evidence Act cap.80 of the Laws of Kenya.
8. THAT the learned magistrate erred in law and fact in failing to consider the alibi defence raised by the Appellant.

At the hearing of this appeal learned counsel for the Appellant Mr. Kigamwa submitted that a subordinate court has no jurisdiction to transfer a case to another subordinate court and he said that that offends section 79 of the Criminal Procedure Code. Counsel added that the jurisdiction of a Resident Magistrate is clearly stipulated under section 7 of the Criminal Procedure Code as being that of hearing cases under sections 278, 308 and 322 of the Penal Code and that the maximum sentence such magistrate can legally mete out is 2 years as per Section 7(3) of the Criminal Procedure Code and added that a Resident Magistrate has no jurisdiction to hear cases of defilement and indecent act under the Sexual Offences Act No.3 of 2006 as Parliament did not amend section 7(3) and section 7(5) of the Criminal Procedure Code and therefore submitted that the only court to hear such cases is the High Court being

the court with unlimited jurisdiction. His further submission was that the Appellant having been held in police custody for five days his constitutional rights were infringed and as the Appellant was not given police bail contrary to section 36 of the Criminal Procedure Code the whole process was flawed. There was submission that the offence of defilement was not proved as the P3 form was not filled in respect of the Appellant and there was no evidence whatsoever of indecent act proved. Counsel concluded that there was no corroboration which he said was a mandatory requirement in this case and that the alibi raised by the Appellant was not considered by the trial court. He prayed that the appeal be allowed. He placed reliance on the authorities of:-

1. Nyanamba Vs Republic (1983) KLR 5911
2. Michael Odhiambo Vs Republic, Nakuru HC.CR.APPL.NO.280/2004,
3. Paul Mwangi Muruga Vs Republic Nakuru Criminal Appeal No.35/2006.

Mr. Omutelema learned counsel opposed the appeal on behalf of the Republic. He submitted that under section 79 of the Criminal Procedure Code the transfer of the case was proper. He relied on section 7(1) and (b) of the said code which recognizes the Resident Magistrate's Court as that of the 1st class. He added that it was not true that Resident Magistrate Court's have no power to try Sexual Offences and referred the court to section 4 of the Criminal Procedure Code and stated that the jurisdiction part of the Penal Code was not repealed when the Penal Code sections on sexual offences were repealed and that section 23(2) of the Interpretation and General Provisions Act saved the jurisdiction clause giving Resident Magistrate's jurisdiction to hear cases under the sexual offences Act. Counsel submitted that a delay of five days was not inordinate and added that there was corroboration of the complainant's evidence by that of PW5 in very material particulars and concluded by stating that the Appellant had no business complaining of there being no evidence to support the offence of indecent act as the Appellant was in any event not convicted of the said offence. The reply by counsel for the Appellant was merely reiterating earlier submissions.

I have evaluated the evidence adduced at trial very carefully. Let me state on the onset that counsel for the Appellant was not right on his submission as to jurisdiction. There is no doubt that the magistrate who tried the Appellant was seized of competent jurisdiction. The offence committed is triable in the magistrate's courts and not by the High Court as submitted. As correctly pointed out by the learned state counsel section 23(2) of the Interpretation and General Provisions Act saved the jurisdiction clause and gave Resident Magistrate's jurisdiction to hear cases under the Sexual Offences Act.

The offence of defilement was proved and the evidence adduced at trial is clear on that. The complainant's evidence was steadfast on that. Contrary to what the Appellant says that PW2 exonerated him the said PW2 said that she was told by PW1 that she was raped by Mugo and another person and that other person was the Appellant herein. The complainant's evidence that she was raped by Mugo and the Appellant was not shaken. Her account of how the two dragged her away from PW5 was not disapproved. PW5 said that she did not witness the incident. That is not the same thing as saying that it did not happen. She clearly said that she ran away to call for help and when she came back PW1 told her that she had been raped. The P3 form was explicit that rape was committed and the complainant's labia majora had tears, the hymen was broken and there was fresh blood, spermatozoa and red blood cells in the complainant's genitalia. The complainant said she was raped by two people and the Appellant was one of the two the other one Mugo having escaped. Because of the age of the complainant what she calls rape is indeed defilement. Her evidence on that point was not contradicted. The Appellant's so called alibi cannot stand. He was arrested with his accomplice soon after the commission of the offence by the two boys who answered the distress call of the complainant and while Mugo managed to escape the Appellant was not as lucky. There is no missing link from the time of the commission of the offence and the arrest of the accused. No alibi is proved in the circumstances. If corroboration was needed it is in the evidence of PW2 and PW5 and in the P3 form in very material particulars. And the trial magistrate having believed the complainant and having recorded the reasons why she believed her no further corroboration was required here see s.124 – (the proviso thereto) of the Evidence Act cap.80 of the Laws of Kenya. As for requiring corroboration in sexual offences from women and girls see MUKUNGU VR Criminal Appl.No.277/2002 which held such requirement as unconstitutional for being discriminatory. I do not find that in the circumstances of this case where the complainant had to be examined and P3 form be procured that a delay of five days is inordinate. The Appellant was not convicted on the charge of indecent act and counsel's submissions on that issue are irrelevant.

For all the above reasons the appeal is without merit and the same is accordingly dismissed.

DATED AND DELIVERED AT ELDORET THIS 29th DAY OF OCTOBER, 2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Court Clerk - Paul

Mr. Kigamwa for the Appellant

Mr. Chirchir holding brief for Mr. Omutelema for the state

Appellant - Present.