**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 444 of 2006**

**STEPHEN NDUVA MWANZII……..……. APPELLANT**

**V E R S U S**

**REPUBLIC ……..……..RESPONDENT**

**(Appeal from Original Conviction and Sentence in Criminal Case 351 of 2006 of the**

**Principal magistrate's Court at Kiambu C. Kabucho (Mrs) R.M.**

**J U D G M E N T**

Stephen Nduva Mwanzii ***(the appellant***) was charged for the offence of attempted defilement contrary to section 145 (2) of the Penal Code that on the 19th day of February, 2006 at Sasini Estate in Kiambu District within Central Province attempted to have carnal knowledge of Beatrice Inganje Khavasku , a girl under the age of 16 years.

He was sentenced to a prison term of five years with hard labour and he has appealed against both conviction and sentence. It was the evidence of Beatrice Inganje (P.W.1) aged 15 years, that on 19/2/06 at about 6.30 pm, she was with her cousin Susan Atieno who was in nursery school then. P.W. 1 was plaiting Susan's hair. P.W.1 then left the house to go and check on her father and on the way, she met Stephen whom she knew as he lived in the neighbourhood – he was the farm manager's cook. P.W.1 met him in a place where there was coffee and she told him that she was going to look for her father so that he could buy her supper. When P.W.1 started walking away Stephen (the appellant) held her on the back, by her clothes. He held her mouth and took her to the coffee where he lifted her dress and petticoat. He held her mouth with one had while using the other hand to remove her clothes. He opened his belt and removed his trouser to his knees, he then removed his underwear. P.W.1 resisted – appellant had not managed to remove her panty then she says "He used his thing for urinating and put it on my thing of urinating, on top of my panty. He did not penetrate.

When appellant finished, she told him she would tell her father but appellant told her he would give Kshs.500/= for abortion. She says at the time of encounter, she was struggling, but he was stronger than her. P.W.1 was crying and went home but there was no one – she then went to her brother's house and reported the incident to him and together they went and made a report first to the Gitamaiyu Chief and then to the Kiambu Police Station. She was then taken to hospital, she did not have any injury. She further explains that "***He was touching my breasts when he was doing me***." It was starting to get dark but not completely dark." P.W.1 said she had never had sex with the appellant but admits to having had sex with someone when she was in Std. 4. P.W.2 ***(Bruce Odhiambo***) is P.W.1's brother and lives in Kyuta Estate – he is a casual labourer. On 19/2/06 at 7.30 pm, he got home and found P.W.1 crying. He asked her what was wrong and for a while she could not talk, but finally after jointly talking to her, P.W.1 told him told him that "Stephen, the cook for the manager ….had attempted to defile her." P.W.2

confirms accompanying P.W.1 to make a report to the Chief, the Police Station and finally to Kiambu hospital where she was examined. P.W.3 Francis Khabatsikha is P.W.1's father and lives in Kiguta Estate. On 19/2/06 in the evening, he went to see his wife at Kijabe and he spent the night there. The following day, he went back to his house where he had left his two children, Ken and Beatrice. He got home at 7.00 am but before getting into the house, he met the elders who were discussing his children and when he got home, he met Beatrice and her brother Bruce together with police from Kigumo Police Post. He was informed about appellant's attempt to defile his daughter Beatrice. P.W.4 Sergeant Elizabeth Kiongo is attached to Kiambu Police Station and on 20.2.06 while going through the OB, she came across a case of attempted defilement of Beatrice Inganje who was accusing Stephen Nduva. She took over the investigations and after reading the statement of the complainant and other witnesses, she charged the appellant with the offence.

The appellant in sworn defence appellant confirms that he is the manager's chef and that on 19/2/06 he had come from home and went to work towards 7.00 pm. He was watching news until 9.00 pm and went to sleep. The following day at 6.00 am, he heard a knock on the door- he opened the door and found two police men at the door and they told her to dress and he was arrested.

At the gate, he found P.W.1 and P.W.3 and he was taken to Kigumo Police Post and charged. The learned trial magistrate then reviewed the evidence and stated that '***The question for determination is whether the accused attempted to defile the complainant."***

The learned trial magistrate noted that P.W.1 had stated she met Stephen, cook of the manager, and that is the same description that she gave to her brother when he found her crying. She had known appellant for a very long time and the learned trial magistrate said "***This is a pure case of recognition and not identification"*** and cited the Court of Appeal decision in ***Anjononi and Others –Vs- Republic (1980) KLR. 59*** on recognition more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some …… for or other.

The learned trial magistrate then stated that the appellant was well known to the complainant and hence the reason why she had even stopped to answer his questions as to where she was going to. She would not have stopped to talk to him if he was a stranger. The learned trial magistrate then examined the meaning of the word "attempt and stated that in Black's Law Dictionary it is described as –

"***The act or an instance of making an effort to accomplish something especially without success. An …….. act that is done with the intent to commit a crime but that falls short of completing the crime."***

and the learned trial magistrate that did not manger to penetrate. P.W.1 though he had removed his penis or placed it on P.W.1 parties without removing her parties and the attempt was in itself an offence. The learned trial magistrate also addressed her mind to the danger and relying on the evidence of a single witness and cited the case of ***Abdalla Ben Wendo –Vs- Republic [1953]*** **20 EACA 166,** saying that in the present case there was no issue of difficulty in the conditions under which the complainant identified the appellant and that the circumstances also placed the accused at the time of the offence was committed within the farm, his own evidence supports the fact that he was in the area just before 7.00 pm.

The appellant was thus convicted and sentenced. It is from the sentence and conviction of the learned magistrate that the appellant has appealed stating that his rights under Section 77 of the Constitution were not protected as he was not represented by an advocate during the trial although he had one on record. The appellant's counsel, Mr. Kurauka submits that appellant was not given a chance to have this advocate present and no efforts were made to confirm the advocate's whereabouts. He further points out that on 17/4/06 when the matter was set for hearing, it turned out to be a public holiday and fresh dates were given and the trial court did not inquire as to the whereabouts of the appellant's counsel, so no cross-examination took place.

To this limb, the learned State Counsel Miss Gateru indicated that she would concede to the appeal on a technicality, but seek a retrial. The reason for such concession is because she submits, the appellant's

constitutional right to be represented by an advocate was not upheld and when the matter came up on 29/5/06, the trial court didn't give appellant a chance for his advocate to be present. In any case 17/4/06 (a hearing date) fell on public holiday and subsequent dates were given and not communicated to the appellant's counsel.

Section 77 (2) of the Constitution of Kenya provides as follows-

77 (2) Every person who is charged with a criminal offence-

***(a) shall be presumed to be innocent until he is proved or had pleaded guilty;***

***(b) shall be informed as soon as reasonably practicable, the nature of the offence with which he is charged;***

***(c) Shall be given adequate time and facilities for the preparation of his defence;***

***(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;***

***e) shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and***

***(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court had ordered him to be removed and the trial to proceed in his absence.***

Indeed the record shows that the matter had been set for hearing on 17/4/06 and the Coram shows that the appellant's counsel was not present and the court remembered "***17/4/06 was a holiday. Hearing on 29/5/06"***

There is nothing to show that this new date was communicated to the appellant's counsel and which would explain why on 29/5/06 appellant's counsel was about when matter proceeded to hearing. In the absence of evidence to the contrary, then appellant's complaint is legitimate as regards violation of his constitutional rights under Section 77 (2) of the Constitution .

Another limb of the petition of appeal is that the learned trial magistrate erred in failing to uphold the appellant's constitutional right under Section 77 to a court interpreter and to ensure that the court proceedings were conducted in a language that appellant understood.

The learned State Counsel concedes to this limb too saying the language of the court and the witnesses was not recorded and it is not clear whether the appellant understood the proceedings before the court. On this point the learned State Counsel urged the court to take note of the fact that appellant asked very few questions on cross-examination. Again section 77 (2) Constitution provides the setting for this and in the absence of and indication as to the language of the court, it can only be understood that the proceedings were conducted in a language that the appellant did not understand hence the very limited cross-examination. First apart from Section 77 of Constitution there is the provision under Section 198 91) of the Criminal Procedure Code.

**198. (1)** ***whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***

Consequently, the appellant was prejudiced and the trial was therefore a nullity.

I think the other limbs in the petition, such as appellant not being availed an opportunity to cross-examine prosecution witness, being availed adequate time and facilities to prepare his defence not being availed an opportunity for mitigation fall within the bracket of being denied proper representation and proceeding in a language not indicated, so I need not address them afresh.

The learned State Counsel however applies that the court do order for a retrial as there is strong evidence on record to return a conviction. She also points out that the witnesses who testified can easily be availed to testify and appellant's will not suffer any prejudice as he ahs not suffered a great portion of his sentence.

Mr. Kurauka's response to this is that since the respondent has conceded to the constitutional breaches then the court has no option but to acquit the appellant. Secondly that the appellant has been in prison since 2006. For a five (5) years prison term so he has already served 2/3 of the sentence and there will be injustice if he is subjected to further trial, so he should first be set free.

The legal principles relating to retrial were addressed in the decision of Pascal ***Clement Brangaza – Vs- Republic (1957***) E.A. 152 which stated this:-

"***We accept the principle that re-trial should not be ordered unless the court is of the opinion that on a proper consideration of the admissible or potentially) admissible evidence, a conviction might result."***

I bear in mind the gravity of the offence, the weight and character of the evidence available. Of course I do recognize that appellant was not a blame for the technical flaws noted. Three of the limb of petition of appeal actual address merit, but in my mind, I cannot at this stage address these merits because from what is on record, I don't think a retrial in this matter would be prejudicial and there is very specific evidence ready to be adduced. A retrial in this instance would be merited.

The period spent in prison so far is taken into account – it will not be prejudicial to the appellant as he was out on bond in the lower court proceedings and this can easily be mitigated for by seeking release on bond.

(2) In the event of a conviction, his counsel can always point out to the trial court the period already served and request that the same be taken into account when passing sentence.

The orders made are as follows:

***(1) The proceedings leading to the judgment of 2/8/06 together with the judgment itself, are hereby nullified and vacated.***

***(2) A retrial is hereby ordered to take place at the Kiambu Law Court, before a Magistrate (****having jurisdiction****) other than the Magistrate who presided in the trial of the case.***

***(3) This matter shall be mentioned at the Magistrate's Court, Kiambu, for trial directions and for orders as the said court may see fit, on 18th March, 2008.***

Dated and delivered at Nairobi this 10th day of March, 2008.

H.A. OMONDI

JUDGE