(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 931 OF 2004SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI BEFORE C. OBULUTSA –SRM)

D.M.J.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G E M E N T

D.M.J (the appellant) was convicted on a charge of defilement of a girl contrary to section 145(1) Penal Code and sentenced to serve 20 years imprisonment. The particulars of the charge were that on 21st December 2004 at about 6.30pm in Kilifi District of the Coast Province, he had carnal knowledge of G.M.J, a girl under the age of 16 years. He denied the charge. Prosecution called a total of five witnesses.

On 21-12-04, M.J who resides in C, left her four children at home to go and fetch water. She returned to find one child missing and was told that G.M.J, aged 4 years had gone to collect the mangoes with their uncle (the appellant). She decided to follow them and stumbled upon them in the bush, the appellant had undressed and the girl was on the ground naked. M.J screamed and Albert came.

They checked on the girl and saw what looked like semen on her thigh. The appellant was apprehended and taken to Kilifi Police Station.

On cross-examination PW1 stated:

> "***It was evening, not dark yet. I found you kneeling over the girl…. I was suspicious that you were up to no good…I saw what I assumed was sperms."***

The child's underpants were recovered by someone else and taken to the police station.

M.M (PW2) testified that on 21-12-04 while herding his cows, PW1 approached him and requested him to assist her look for her child who had left with the appellant. They took different paths, then he heard her shout after some time. He went where she was and saw PW1 standing there with the child who had Ksh 5/-. The appellant was standing at a distance. He threw the girl's pant away and PW2 picked it and gave it to the girl. He noticed that it had semen stains.

On cross-examination PW2 stated:

> "***I did not see you with the child. I did not hear the child cry. I cannot confirm if the pant in court is the one I took. I did not see any substance on the pant. The girl had grass on her head. She had substance on her private parts, I thought it was semen."***

PW3 Albert M a farmer at C confirmed that on 21-12-04 while at home, he heard a commotion, so he followed the course and found M.J screaming. There were two boys there, D.M.J (i.e Appellant being of them) There was a

girl who had no pant and was wet on her thighs.
On cross examination PW3 stated:

> " ***I saw the girl rise, go to the mother …we have dispute over land … you are my brother. I saved you from the mob…. The child was wet with semen…the substance, I suspected was semen"***

Dr. Otuori (PW4) of Kilifi District Hospital examined the child and found that there were tears on the vulva and hymen, and she had a bloody white discharge with numerous spermatozoa. The P3 form filled by the doctor was produced as exhibit.

In his unsworn testimony, the appellant confirmed that the complainant is his niece and that he had met her on 21-12-04, on her way home. The complainant was with a strange lady, she went to appellant for a mango and appellant said he'd give her a mango. He then saw PW1 and PW2 coming and the girl went to PW1. They asked her what was wrong then he was beaten and taken to the police station and accused of defiling the girl.

In his judgment, the learned trial magistrate stated that:

> "***it is clear, as admitted by the accused, that he was with the girl at the time"***

He also noted that appellant admitted being found by the girl's mother. He observed that the child was found in a state of undress lying naked on the ground. She had what was suspected to be semen on her thighs. When the doctor examined her lab analysis confirmed the presence of numerous spermatozoa.
He then stated:

> "***The evidence against accused is circumstantial. The inculpatory facts are he being found naked with the girl and the presence of semen on her thigh. These facts are inconsistent with his innocence and incapable of explanation upon any hypothesis that of guilt. There are no co-existing circumstances that weaken the inference of guilt. The accused is an uncle to the girl, there is no reason why he should be framed for nothing. The P3 form and PW1 ….gave the age of the child as 4 years. The court did see the child who is indeed a minor. The P3 form corroborated that the child…. Had a sexual encounter based on tears of the vulva and presence of spermatozoa. The only conclusion is that it is the accused who had sexual intercourse with her, a minor incapable of giving consent."***

It is against this finding that the appellant appeals against both conviction and sentence. The amended grounds of appeal are that:

- The learned trial magistrate erred in law and in fact by failing to note that the charge is defective as the word "unlawful" was omitted in the particulars of the charge.
- The learned trial magistrate failed to sign the plea of "Not Guilty" as required under section 197 Criminal Procedure Code.
- The learned trial magistrate erred by failing to have PW1 sworn when she was recalled.
- The learned trial magistrate erred by basing his conviction on the evidence by PW1 and PW3 without properly considering that they were contradictory.
- The learned trial magistrate failed to consider that there existed bad blood between him, PW1 and PW3.

- That the learned trial magistrate failed to consider that the child was previously examined by someone else by PW4(the Doctor who gave evidence)

- That the learned trial magistrate misdirected himself in stating that the court saw the complainant and determined that she was a minor yet at no stage in the proceedings is this appearance of complainant in court recorded.

- That the learned trial magistrate erred by passing a harsh sentence under section 8(3) of the Sexual Offences Act yet he was charged under the Penal Code section 145(1).

- The learned trial magistrate did not consider his defence statement along with the prosecution case.

The learned State Counsel Mr. Ogoti opposed the appeal and supported both conviction and sentence. Appellant had filed written submission which he pointed out that because the charge did not mention the word unlawful, then it was defective and that whenever an act is not said to be unlawful then it remains to be lawful. He cited the decision in **David Odhiambo V R Cr. App. 5 of 2005 C.A (Msa)** which held that:

> "***Although issue of the word unlawful was not raised, there can be no reason for giving in these particulars of the change. The same applies to the provisions of section 143 (abduction of girls under the age of 16 years), section 144(indecent assault) and section 145(1) and (2) (defilement and attempted defilements of girls under 14 years."***

Mr. Ogoti's response is that it is a curable defect under section 382 Criminal procedure Code and should have been raised at the earliest opportunity and he has not suggested suffering any prejudice. section 382 Criminal Procedure Code provides as follows:

> "***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complaint, summons, warrant, charge… before or during the trial….or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice"***

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could have been raised at an earlier stage in the proceedings." I have read the Odhiambo (infra) decision – in fact there was no fatal finding made by the court due to the fact that the word "unlawful" was omitted in the particulars of the charge, instead the Court of Appeal exhorted the drafters of charges to be more careful in future when drafting charges of such nature and the Court of Appeal judges opted to say no more. I think the reason is pretty plain – the offence of defilement is in itself an unlawful act, and defiling a girl under the age of 16 years cannot by any stretch of any word be converted to become a lawful act and the omission of the word caused no prejudice to the appellant and it remained clear what kind of offence he was charged with and those particulars were sufficient to enable him conduct and prepare his defence adequately. This ground therefore has no leg upon which to stand.

The appellant also submitted that the entire trial was a nullity because the learned trial magistrate did not sign the plea he entered and he cited the provisions of section 197. The typed copy of the proceedings does not show that the learned trial magistrate signed the plea entered by appellant, the handwritten copy of the proceedings too shows that the same was not signed. Is this fatal as to render the entire proceedings and trial a nullity?

Section 197 Criminal Procedure Code is couched in mandatory terms that after the record of each "event" in the proceedings, the trial magistrate is required to sign – now that he failed to sign the plea is that the same to be regard as if it was never taken?

The learned State Counsel did not give an analysed approach it on the simply asking the court to look at the handwritten copy of proceedings. I think this is a fatal omission but as to whether it should render the trial a nullity and lead to an acquittal on a retrial, must be weighed against the evidence that was made available to the trial court.

Mr. Ogoti admits that when PW1 was recalled, she was not sworn again or reminded of being on oath but argues that even if the court were to expunge that bit of her evidence – which was simply the production of the girl's underpant in court, it would not affect the prosecution case – I concur – indeed the substantive portion of PW1's evidence was made under oath and the recall was simply with regard of production of a party. I agree that that portion of the evidence should not be given due weight as PW1 was not resworn but it does not affect the material particulars of PW1's evidence, and this situation is easily distinguished from that which prevailed in the case of **Samuel Ngumbao and Anor V R Cr. App. No. 60-61 of 2000** where the witness was not sworn in a trial within a trial.

On the question of existing grudge/bad blood between him and the witnesses, especially PW3 who admitted that they had a land dispute with the appellant and contradictions in prosecution case, Mr. Ogoti submitted that there were no contradictions and if at all there were, then they were so minor as not to affect the strength of the prosecution case.
Appellant pointed out that the contradiction concerning the recovery of the panty – I confirm that from the evidence, whereas PW2 claimed to have seen appellant throw away the girl's panty and he picked it immediately, PW1 said the panty was recovered the next day and taken to her mother – YET, the prosecution case does not rise and fall with the recovery of the panty – rather it is pegged or revolves around the fact that appellant took away the little girl from her siblings purportedly to go and pick mangoes with him, and he was shortly thereafter found in the bushes with the little girl lying naked on the ground and with wet substance on her thighs.

So that contradiction is important in determining fatal whether it is true that the child was found naked.

As for the existing grudge, it is true that the learned trial magistrate did not consider its weight in the appellant's case, yet having re-evaluated the evidence is there anything to suggest that the witnesses fabricated this incident due to the existing grudge.

The offence occurred before darkness set in, the appellant is said to have offered the young child with a mango, the child did not testify and the court did not record the reason why the child did not testify. The court only stated in its judgment that it had observed the child in court and she was a minor, but this appearance was never recorded in court. It is not clear how old the other children were or why it was found not necessary for them to testify to confirm that appellant did lure the little girl with a mango.

Is it likely that the little girl would have denied even going through any such ordeal were she to have testified?

Then there is the issue of blood seen in the child's private parts, yet none of the witnesses referred to seeing blood on the child when they appeared at the scene.
This is compounded by the fact that the doctor stated that when he examined the injuries, they were not fresh yet according to all the witnesses, the child was taken to hospital on the same day.

It is also not clear why appellant was not taken for medical examination yet he was arrested immediately.

Simply, an analysis of what the doctor termed as spermatozoa found on the child could only have been complete with an examination of the appellant and such failure was fatal. My finding is that the failure of the learned trial magistrate to consider the acknowledged existing grudge between appellant and PW3 and the failure to get the child to testify or at least record why the child though present in court did not testify, either rendered the conviction unsafe and I so hold. Subsequently, the conviction is quashed. The sentence meted out is set aside.

The appellant shall be set at liberty, forthwith unless otherwise lawfully held.

Delivered and dated this 2nd day of March 2008 at Malindi.

H. A. Omondi
JUDGE