(From original conviction and in Criminal Case No. 97 of 2006 sentence of the Senior Resident's Magistrate's Court at Lamu before Mr. K. Bidali – SRM)

NICHOLAS KADENGE NDOTI ……..…………………..APPELLANT

VERSUS

REPUBLIC …………………………….…………… RESPONDENT

JUDGMENT

Nicholas Kadenge Ndoti (the appellant) had been charged with the offence of defilement of a girl contrary to section 145 (1) Penal Code that on the 12th day of March 2006 at about 12.45 am in Lamu District within Coast Province, unlawfully had carnal knowledge of A.M a girl under the age of 16 years. He faced an alternative charge of indecent assault on a female contrary to section 144 (1) Penal Code that on the 12th day of March 2006 at about 12.45 am in Lamu District within Coast Province, unlawfully and indecently assaulted A.M by touching her private part – being a girl under the age of sixteen years.

Appellant had denied both charges and upon the matter being heard to completion he was convicted under section 8(3) of the Sexual Offences Act of 2006 and sentenced to serve 20 years imprisonment. PW1(A.M) is a 14 year old girl at M Primary School.

According to her evidence on 11-3-06 at about 9.00pm her mother found her with about 40/- and upon learning that she had been given the same by one Ali, and her mother fearing that her daughter might be having an affair with Ali decided to go to the police station. At the station, they found four officers, among them being the appellant. They went to look for Ali, accompanied by the appellant and eventually appellant told her mother to go home, and her aunt R and uncle N. N were also asked to go to their house, leaving appellant with PW1 only. Appellant claimed he had forgotten something in the house and they walked towards the police lines and appellant pulled pW1 into a house, took a mattress and put it on the floor, removed his clothes and told her to remove hers too – she refused and started crying. Appellant told her that if she cried, he would kill her, he then removed all of PW1's clothes and slept on her. She says he was holding a dark object and switched off the lights. He slept on top of her and had sex with her, then took a cloth and wiped her and told her to dress up. PW1 obliged, then appellant locked the house and took her to the police station where uncle had returned to. Appellant claimed that PW1 had run away but PW1 told her uncle what had happened and she was rushed to hospital. After the incident PW1 experienced abdominal pains. It was her evidence that she had never met appellant before the incident.

On cross-examination she stated this:

"***You defiled me on a Friday. I could identify you even the next day. I went to hospital and was under treatment. When I finished treatment, I reported to police."***

On re-examination she explained that they made an official complaint after three days, but she had reported the incident to her mother the same day.

PW2 L.W confirmed that she took PW1 to the police station to look for Ali and that appellant offered to

take them where Ali was and upon failing to get Ali, appellant advised her to go home as N.N (who had accompanied her) would record the statement. Later at about midnight, N.N reported to her that PW1 had complained to him about appellant having defiled her. So she went to the police station and requested to have her daughter released to her and took her to hospital.

She explained on cross-examination:

"***N.N called me to the station. I could not report immediately because you were there and I was afraid you would detain her and I wanted the doctor to ascertain…"***

PW3 N.N who had accompanied L to the police station confirms the sequence of events and eventually appellant and PW1 were separated from him and he traced his way back to the police station and inquired about appellant, but those on duty had no information and after sitting there for about 45 minutes, appellant and PW1 appeared – the appellant was holding PW1's hand and he confirmed that PW1 told him the appellant had defiled her.

Pc Felix Munene (PW4) who was on duty on 11-3-06 confirmed that at about 11.30pm PW1 was brought to the police station by her mother and uncle on suspicion that she was having an affair with a certain young man. Appellant offered to accompany them to arrest the suspect and they left together. However PW4 reported off duty at 12.00am. Four days later, the girl came back with the mother on allegations of having been defiled in a house in the police lines and she led PW4 to the house which belonged to appellant.

Dr. Marabi (PW7) who produced P3 on behalf of Dr. Wasike who had examined the girl noted that the vagina was ruptured and there were minor bruises on the vaginal surface. No spermatozoa or pus cells were detected but his conclusion was that there was penetration. He filled the p3 form which was produced as exhibit.

On cross-examination PW7 explained:

"***No spermatozoa was detected, so we could not conduct a DNA examination to link the suspect"***

Upon being put on his defence, appellant elected to give a sworn testimony – he confirmed that he accompanied PW1's group to go and look for the man suspected to be having an affair with her and upon failing to find him, they all retuned to the police station – however along the way, PW2 was drunk and went to sleep. He also confirms parting company with Ruth and Nicholas on the way before reaching the police station and he took PW1 to the police station, later N.N came and spoke to PW1 in the their mother tongue. They then requested for the release of the girl and she was released to her mother.

On Monday at about 4pm, PW2 came and asked appellant for Miraa – he declined on 14th at about 10.30am while seated outside his house, he saw Pc Munene pointing at his house while accompanied by PW1, PW2 and one Lillian and he became anxious and went to find out from the OCS what was happening. Later a report was booked alleging that he had defiled PW1.

On cross-examination he maintained that the young girl did not show his house and that it is Pc Munene who showed her appellant's house.

In his judgment, the learned the trial magistrate had the following as the issues for consideration:

(a) when the incident took place

(b) whether the complainant was even taken to the accused's house at the police lines.

(c) Whether the accused had carnal knowledge of the complainant.

The learned trial magistrate noted that appellant's evidence was that the incident took place on Friday

10th March 2006 when the report was first made to the station and that the complainant stated that the report to the police was made on 11th March 2006 and the sexual assault took place at night. He found PW1's evidence as regards date corroborated by that of PW2 and PW3 who had accompanied PW1 to the police station on 11-3-06 and collected her after midnight i.e on 12-3-06. He also took into account Pc Munene's evidence that the complainants went to the police station on 11-3-06 and he (Munene) worked till 12.00am before checking out and by then, appellant had not returned. The learned trial magistrate stated:

"***I am therefore satisfied that the incident took place from the 11th when the report was made to 12th March when the accused returned to the station"***

The learned trial magistrate also considered the evidence of PW2, 3, and 4 in terms of sequence of events and opportunity for appellant to be alone with PW1 and stated that the appellant's evidence did not add up saying that;-

"***if at all he had gone straight to the police station, then definitely he would have arrived there before N.N who had escorted Ruth home and if he had arrived by 12.00am, then definitely he would have found Pc Munene still on duty."***

As to whether appellant had carnal knowledge of PW1, the learned trial magistrate was satisfied that he did because PW1's evidence was very consistent and even when tested on cross-examination, her demeanour was exemplary and she appeared truthful and had stated that appellant did not comply with his orders. This coupled with the medical officer's finding of penetration upon examination of PW1 was enough proof.

The learned trial magistrate relied on the provisions of section 124 Evidence Act in relying on the uncorroborated evidence of PW1 as regards the sexual offence saying

"***In this incident, as expected, there were no eye witnesses…I am satisfied that the complainant was truthful in her evidence. That notwithstanding, I find sufficient corroboration in the evidence of the doctor.***

He found the evidence direct and credible and rejected appellant's defence as weak and controverted in many instances by the prosecution witnesses.

At the hearing of the appeal, Mr. Mulongo appeared for the appellant.

The amended petition of appeal raised the following grounds of appeal.

- That the learned trial magistrate erred in law and in fact in arriving at a finding of guilty, in the face of insufficient evidence adduced by prosecution which fell short of the prescribed standard.

- That the learned trial magistrate relied on evidence which was untrustworthy and contradictory.

- That failure by the prosecution to summon the named Ali was fatal as it suggests that his evidence would have resolved the matter in favour of the appellant.

- That none of the testimonies tendered was corroborative of the other material particulars.

- The learned trial magistrate misdirected himself on the principles regarding sentencing and consequently arrived at an illegal and/or excessive sentence.

- The learned trial magistrate flouted procedure by allowing for the production of a document by a person other than the maker.

- The learned trial magistrate did not properly consider the appellant's defence.

- The period in which appellant was kept in custody infringed his constitutional rights.

In arguing the appeal, Mr. Mulongo submitted that the appellant was erroneously sentenced by the lower court which sentenced him under Section 8 of the Sexual Offences Act which was not applicable in this instance and that the appellant was charged with an offence alleged to have occurred in the course of duty and so it is section 24(2) of the Sexual Offences Act which has a minimum sentenced of 10 years imprisonment which would apply and so the sentence ought not to stand. He cited the decision in **Uganda V Opidi EALR (1965) pg 614** which held that there was a fundamental error in law where accused is charged with a non existent offence. However it must be noted that in the **Opidi case** the accused was charged with a non existent section of the Traffic Ordinance and the particulars set out as constituting an offence, could not create an offence. On this point, Mr. Ogoti, the Counsel for the State, urged the court to interfere with sentence pointing out that appellant was charged on 28-3-06 for the offence of defilement of a girl under section 145(1) Penal Code – which is the offence that existed then and then at the end of the trial, he was sentenced under section 8(3) of the Sexual Offences Act 2006 and that in the latter Act under the transitional provisions Schedule III, section 145 is among the sections that were amended. Under the Sexual Offences Act (which was an improvement of the Sexual Offences Act as litigated under the Penal Code). He argued that the charge in law did not create a lacuna in the criminal system and section 77(4) of the Constitution of the Opidi (infra) case did not apply. He urged the court to invoke section 354(4) (3) Criminal Procedure Code to remedy the situation and alter the sentence.

On the right to legal representation, Mr. Mulongo submits that although appellant was represented by an advocate and some witnesses testified yet on 16-8-06 when appellant informed the court that he was unable to proceed because his advocate was in the High Court, the court overruled him and proceeded without even seeking the view of the prosecution or appellant as to whether he was ready to proceed in person and he referred to the decision in **Okelllo V R 1986 KLR pg 220 at 224 –** where a trial magistrate ordered a case to proceed after the defence counsel had failed to attend court for hearing and Bosire J. as he then was, stated:

"***However, the step he took next was not constant with the provisions of section 77 of the Constitution of Kenya. He ordered that the appellant conducts his own defence without first asking him whether or not he could or was prepared to do so. The case therefore proceeded with the appellant conducting his own defence.***

This was clearly an error on the part of the trial magistrate. A court ought not and must not hurry to conclude a case without any due consideration as to what the ends of justice demand. In the circumstances of this case, it is now not possible to ascertain the extent of prejudice caused on the appellant by failure of the court to inform him of his rights or at least to comply with the requirements of natural justice. For that reason, I am not satisfied the appellant's convictions are safe."

Mr. Ogoti's response is that the court considered the appellant's application and did not find it sufficient, noting that it was the second time an adjournment was being sought. He also draws the attention of the court to the fact that when the appellant's counsel eventually came, he never raised any issue regarding the matter proceeding in his absence and says this is just an afterthought and the issue of the court seeking the views of the prosecution is neither here nor there as it was the court that was in control of the proceeding and made a decision.

I greatly respect of the view held by Bosire J, yet I think each situation must be considered on its own merit, otherwise the courts will be encountering a situation where the pace of proceedings and because of court will be dictated by the commitments of an advocate.

In any event the hearing was not concluded on that day and on 27-9-06 when Mr. Mwinyi Advocate appeared for the appellant, he did not pray for a recall of witnesses who had testified in his absence. He had a chance to remedy the situation if the defence felt prejudiced, but did not take it up and I agree with

Mr. Ogoti that to raise it now is simply an afterthought and cannot be a reason to allow the appeal.

Another issue raised by Mr. Mulongo is that the age of the complainant was not established – there being no birth certificate or age assessment and that there seems to have been an assumption that what the complainant and her mother said regarding her age was the truth, Mr. Mulongo submitted that the case here is defilement and age is a major issue to be determined. In the absence of which the conviction was not fair. He referred to the decision in **Musikiri V R (1987) KLR pg 69.**

Mr. Ogoti's response to this is that mother and daughter testified as to the age of the complainant and that there was a preliminary inquiry by the court as to whether she was competent to give evidence and that appellant was aware that there was evidence that appellant was 14 years at the time and he did not challenge that nor try to raise any contradiction as to her age and so, that argument should be dismissed.

The case of **Musikiri V R** (Supra) involved a complainant whose age had not been medically assessed but the learned trial magistrate was guided by the testimony of the complainant's mother and found that she was 12 years old. The charge in that case, like this one was defilement and at pg 70, Abdullahi J, commented:

"***It would seem that such a finding was made on the basis of evidence of the mother. It would have been desirable to seek better evidence as to the age of the complainant such as medical assessment of age or birth certificate before making a finding as to age on mere say of the complainant's mother"***

Certainly the complainant's age was not established and voire dire procedure does not prove age - that is only a procedure to test whether a child is intelligent enough and capable of giving sworn evidence or otherwise.

It is also submitted that the evidence of PW 4 and 5 was not sworn and that this contravened the provisions of section 151 Criminal Procedure Code and therefore that witness' evidence should not have been relied on.

Mr. Ogoti's response to this is that while this is true, it is not fatal to the prosecution case since there is other independent and sufficient evidence of PW2 and pW3 to prove the case against appellant beyond reasonable doubt and sustain a conviction.

I have checked the original record and confirmed that PW4 and PW5 were not sworn – whether this was an inadvertent omission to record, or whether the witnesses were not sworn – the fact is that Pc Munene and Pc Wafula on the face of the record, gave evidence which was not sworn and so the material or probative value of their evidence must be considered. Pc. Wafula's evidence simply related to receiving the report and accompanying the complainant and her mother to hospital for medical examination –

PW5's evidence is crucial as an independent witness to confirm that by 12.00am appellant had not returned to the police station as alleged by the other prosecution witnesses. How should his evidence be treated? Should it be entirely expunged from the record or should it be regarded as unsworn testimony and therefore its probative value be taken with caution? I think the latter option is the appropriate one as PW5's unsworn evidence even weighed against what the other prosecution witnesses especially PW1 and PW3, said still adds value to the prosecution case and there is nothing to suggest that there existed bad blood between him and appellant so as to visit malice in his testimony.

There is the question of prosecution failing to call one named Ali who appellant's counsel submits was a material witness. This Ali was said to have had an affair with the complainant and that the failure to call him was a deliberate attempt by prosecution to fix appellant as he could have given evidence adverse to the prosecution and exonerated the appellant. Mr. Ogoti's response to his is that the court ought to look at the sequence of events from the time appellant took over the custody of the complainant to the time he presented her at the police station – there was no break in the chain of events.

Indeed there was nothing in the defence case to suggest that complainant had been defiled prior to

reporting at the police station and it could not be sheer coincidence that she led police station to the very house belonging to the appellant at the police lines.

My finding is that failure to call Ali as a witness is not fatal to prosecution case.

Going hand in hand with this ground is an indication that the police officer who investigated this case actually took over from one IP Okumu the then OCS Lamu who was never called to testify and that the court was told from the bar that he had died. The one who took over did not seem to have all the facts regarding the offence and so the conviction couldn't be safe.

The learned state counsel submitted that the death of the investigating officer was not evidence from the bar but from a witness and that in any event a case can be proved without necessarily having the investigating officer testify.

I suppose what Mr. Mulongo wished to communicate is that there was no supporting document to confirm that CIP Okumu had died. But another officer took over the investigations and became the investigating officer. The only issue he could not establish was why the late OCS did not arrest appellant immediately, although the first part of his answer seems to give an explanation as to the reason – that after the offence, the suspect absconded and it was the OCS (deceased) who had the details. From that cross examination there is nothing else to suggest that PW6 was not a competent witness in terms of being an investigating officer and so that limb of argument as raised by Mr. Mulongo does not hold. Indeed the sequence of the events helps the prosecution case to remain intact.

Mr. Mulongo also submitted that there was no scientific evidence to establish the nexus between the appellant and complainant as the P3 form shows that the complainant was examined four days after the incident and that in any event the P3 form was produced by someone who was not the maker nor did he say he was familiar with the handwriting and that this contravened section 70 of the Evidence Act since no reason was even given as to why the maker wasn't called. It is true that from the record it was not established why Dr. Wasike who was shown as then being in Kilifi and who had filled the P3 form was not called to testify. It is also correct that nothing was done by the prosecution to establish that Dr. Marabu had worked with Dr. Wasike previously and was familiar with her handwriting and signature. This then clearly goes against the provisions of 70 Evidence Act and section 77 of the same Act could therefore not offer refuge, because a basis would first have to be laid as to why the court ought to accept the document without calling the maker. It would seem that this P3 form actually formed the basis of the appellant's conviction yet its admission as evidence was flawed and therefore prejudicial to the appellant's case. It is also correct that there is nothing to establish any nexus between appellant and complainant as regards the defilement, since he was not subjected to any medical examination.

Now then having found that the P3 form shouldn't have been relied on as evidence, then the conviction on the charge of defilement cannot stand. However, there is very clear evidence by PW1 as regards appellant's conduct, he removed her clothes and slept on her. (Placing his naked body against her naked body) and that in itself was an invasion of her decency and therefore constituted to an act of indecent assault. What about infringement of appellant's constitutional rights as provided under section 72(3) (b) of the Constitution of Kenya.

Mr. Mulongo submitted that appellant was arrested on 23-3-06 and taken to court on 29-3-06 and there is nothing to explain why he was not taken to court within 24 hours of his arrest- reference being made to the Court of Appeal decision in **Paul Mwangi Muranga V R**

Mr. Ogoti asked the court to consider the days in the 2006 calendar and make a reasonable finding.

I have looked through the March 2006 calendar which shows that 23rd March 2006 was a Thursday and 29th March 2006 was a Wednesday – then there are about five days delay in between. However there was an intervening weekend so that takes away two days and that reduces the period to three days. No explanation has been given regarding the delay whatsoever.

It has now become a common refrain that where there is a delay in presenting an individual to court within the stipulated period there he automatically gets an acquittal. My view is different – if that delay can be explained, then it would not ipsofacto lead to an acquittal, in fact such a situation was addressed in the celebrated case of **Albanus Mwasia Mutua V R Cr. Appeal No. 120 of 2006** when the Court of Appeal recognized that there may well be a reasonable explanation as to the delay. However in the present instance there has been no attempt whatsoever to explain the delay.

Then there was the claim of bias by defence counsel arguing that immediately upon prosecution closing its case, the appellant was placed on his defence and that there was no adequate time given to the appellant to prepare his defence. Mr. Ogoti's response is that the question of bias does not arise as there was nothing wrong in the procedure the trial court adopted and he has referred the court to section 160 of the Criminal Procedure Code, saying there was no hurry by the trial magistrate, who simply adopted the provisions provided in law and the word used is "IMMEDIATLEY" after close of prosecution case.

Indeed the provision under section 160 that

"***Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness <u>immediately after the close</u> of the evidence for prosecution***"

Really that bears out the learned trial magistrate – I think it is most paradoxical that when a matter proceeds so fast – then bad faith is alleged on the part of the presiding officer, yet when an adjournment is given, there are allegations of justice delayed being justice denied "and the wheels of justice moving at a snail's pace."

Anyway the upshot is that the limb on bias has no basis whatsoever. Was the defence considered by the trial magistrate? Mr. Ogoti says it was and it was found to be controverted by prosecution case. A look at the judgment however shows – the trial magistrate seemed to have had a summarized approach to the defence case BUT he took into consideration what was most vital – the time lapse when appellant was all alone with complainant.

Two issues emerge that were prejudicial to appellant.

(1) Reliance on a P3 form whose admission was flawed and for which evidence of defilement was not proved – but the offence of indecent assault was established.

(2) Infringement of the appellant's constitutional rights under section 72(3) (b) of the counstituion which up to this point has not been explained.

I therefore substitute the charge he was convicted on with the alternative charge of indecent assault on a female contrary to section 144 (1) Penal Code and convict appellant on the substituted charge. Would the fact that his rights were violated then be an overriding factor and earn him an acquittal? I think not – my reading of Section 72(6) of the Constitution is that in the event of a court established violation of rights, the remedy lies in compensation, not acquittal. I think courts cannot automatically take myopic view about this issue of violation of an accused's constitutional rights and completely trampling on the constitutional rights of the aggrieved party, which the self same court is expected to protect. I think a blanket remedy application to the question of violation of constitutional rights being an acquittal creates a very dangerous trend which is prone to abuse where for instance the accused can easily collude with police officers to have them delay taking him to court as an assured way of getting his way to freedom. The courts have a duty to protect, defend the rights of the victim as well, and justice cannot be seen to be done and be done by acquitting one who has already been pronounced as guilty. My view is that justice is done by punishing the offender for the wrong he/she has committed but also recognizing that the offender's rights too which have been violated and giving him/her remedy as provided by law, by way of compensation.

Appellant is at liberty to sue the State for compensation by way of damages as provided under section 72 (6) of the Constitution.

Having then found, the sentence herein must be interfered with – the maximum sentence under the Penal Code before repeal was 21 years by Act No. 5 of 2003. I therefore set aside the sentence meted out and substitute it with an imprisonment term of 10(ten) years as provided under the Penal Code. This sentence shall run from the date of conviction.

Delivered and dated this 17th day of November 2008 at Malindi.

H. A. Omondi

JUDGE