REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 92 OF 2012

KENNEDY MAVINDU KYENGO ……..……....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 354 of 2011 by Hon. J.K. Karanja, PM on 26/3/12)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl between the age of 12 and 15 years contrary to **Section 8(3)** of the **Sexual Offences Act No. 3** of **2006**

   Particulars of the offence being that on the **14th** day of **August, 2011** at **Kitonyoni Sub-location Murau Location,** in **Makueni District** within **Eastern Province** unlawfully caused penetration with his male genital organ to **F M** a girl between the age of 12 and 15 years.

2. In the alternative the appellant was charged with the offence of indecent assault with a girl contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.**

   Particulars of the offence being that on the **14th** day of **August, 2011** at **Kitonyoni Sub-location, Murau Location** in **Makueni District** within **Eastern Province** unlawfully indecently assaulted **F M** by touching her private parts.

3. He was tried, convicted on the main count and sentenced to **serve 20 years imprisonment**. Being aggrieved by the conviction and sentence he appeals on ground that;-

i. The learned trial magistrate grossly erred in law and fact when he entered a conviction and sentence in the instant case yet failed to find that the charge was defective.
ii. The trial learned magistrate erred both in law and fact by failing to make a finding that the case was not proved beyond reasonable doubt as provisions of Section **2(1) (d)** of the **Sexual Offences Act** was not complied with.
iii. The trial magistrate erred in law and fact when he relied on evidence that contravened the provisions of **Section 150** of the **Criminal Procedure Code**.
iv. The learned trial magistrate erred in law and fact when he rejected his defence on flimsy reasons.

4. The facts of the case are that on the **14th August, 2011** at about **6.00pm,** PW1, **F M** was grazing goats by the river with the appellant. The appellant called her. She went to him. He grabbed her, forced her onto the ground, removed her underpants and raped her. A young man called **Nziku**

saw them. She did not bleed but she felt pain. On finishing he gave her Kshs. 100/= and told her not to tell her parents. The following day she was in pain. She told her mother, **PW2, M K M** who took her to hospital for treatment. **PW4, Gilbert Kyalo Ngutu,** a clinical officer at Makueni District Hospital on examining her found her hymen having been broken. Investigations carried out in the laboratory revealed presence of spermatozoa and epithelial cells. The police on receiving the report directed **PW3, Andrew Musyoki Kisenge,** the Sub-chief of **Kitonyoni** to arrest him. He was charged.

5. In his defence the appellant stated that he went to fetch water using donkeys on the **22nd August.** He cleared cows then planted trees and sprayed plants.
6. In his written submissions the appellant emphasized averments in support of the grounds of appeal. In response thereto the learned State counsel, **Mr. Mwangi** conceded that the charge sheet was indeed defective. He however prayed for a retrial.
7. This being the first appeal, I am duty bound to subject evidence adduced in the Lower Court to a fresh review and scrutiny and come to my own conclusions bearing in mind that I neither saw nor heard witnesses who testified (see ***Pandya versus Republic 1957 E.A. 336; Okeno versus Republic [1972] E.A. 32).***
8. The charge as drafted is defilement contrary to **Section 8(3)** of the **Sexual offences Act.** That section of the Law provides thus:-

> "***Any person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction for a term not less than twenty years"***

That is the penalty Section. There was an omission of citing the section that creates the offence of defilement. The offence is created by **Section 8(1)** of the **Act** which stipulates thus;-

> "***a person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

The question to be answered is whether the omission in the circumstances renders the charge fatally defective?

9. **Section 134** of the **Criminal Procedure Code** provides as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

10. The issue to be addressed is whether the information given in the particulars of the offence was clear enough to make the appellant understand the kind of charge he faced that would have enabled him to prepare for his case/defence . The particulars of the offence notified the appellant of the fact of having caused his male genital organ to penetrate a child whose age was between 12 and 15 years an Act that was stated to have been unlawful and intentional. Following the information provided, the appellant having understood the substance of the charge denied the charge and participated in the trial fully till determination. He duly defended himself.
11. Whether or not the charge was defective would be established if he was prejudiced. No prejudice on his part has been established. In the premises it cannot be said that the charge was defective. The Court of Appeal considered the issue in the case of ***Amedi Omurunga versus Republic-Criminal Appeal No. 1789 of 2012 (Malindi)*** where the court had this to say:

> ***"A proper framing of the charge should have made reference to both sections. Clearly the appellant should have been charged with defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Can it however be said that a charge is fatally defective on account of the fact that it was predicated upon a penalty section as opposed to the section creating the offence?***

> ***We think not…….would the defect vitiate the proceedings and the conviction entered as submitted by the appellant? The answer lies as to whether the defect occasioned a failure of justice and thereby prejudiced the appellant"***

12. It is argued that **Section 2(1) paragraph 6** of the **Act** was not complied with. The alluded to paragraph interprets what "***DNA"*** is. In his submissions the appellant argues that DNA should have been done to exonerate him from the crime committed. His argument was that spermatozoa were found in the genitalia of PW1 which called for such proof.
13. DNA profiling test of the semen must be complicated especially in places where forensic laboratories are not many and hence cannot be easily accessed. The semen that was found in the complainant's vagina was of-course presumed to have come from the appellant. It could have been a good idea to establish if the semen was definitely for the appellant to enable the court reach an accurate finding. However, with the complication noted it is not an important issue. What the court had to do is to establish if there was some other evidence to prove the offence. That ground must in the premises be disregarded. (also see ***Andrew Cauri Ndungu versus Republic- Criminal Appeal No. 132/2008 eKLR 2013***).
14. **Section 150** of the **Criminal Procedure Code provides.**

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case"***

15. It was the evidence of the complainant that after the appellant knew her carnally and gave her Kshs. 100/=, one **Nzuki** went to get goats that had strayed onto somebody's farm. The appellant left going home. **Nzuki** was not called as a witness. **Section 143** of the **Evidence Act provides (Cap 80) Laws of Kenya** provides;-.

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

16. In the case of ***Amedi Omurunga versus Republic Criminal*** appeal No. 178 of 2012 the Court of appeal (*Malindi*) considered the issue of failure to call such a witness and it had this to say.

> "***Further to the case of Bukenya & Others versus Uganda [1972] E.A. 549… this court stated that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence maybe in consistent. In short, only witnesses necessary to establish a fact need*** to ***be made available and not a superfluity of witnesses."***

17. This is a case where **Nzuki** is said to have gone to the scene after the act, therefore his evidence cannot be said to have been vital. Failure to call him was not detrimental to the prosecution's case.
18. Finally, was the appellant's defence rejected for no apparent reason? The offence was committed on the **14th August, 2011.** The appellant's testimony was in respect of the events of the **22nd August, 2011,** the date of his arrest. The trial magistrate indeed took into consideration what the appellant stated in his defence and he stated so. Having observed the demeanor of the complainant in court he found her truthful and believed her. In reaching his finding he considered the medical evidence adduced that proved that there was penetration of the complainant a child.
19. The act was committed in broad daylight. The complainant positively identified the appellant. In the premises, the trial magistrate reached a proper conclusion in convicting the appellant. The sentence imposed was **20 years** which is within the law. I therefore dismiss the appeal and uphold the conviction and sentence meted out.
20. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **12TH** day of **JUNE, 2014**

L.N. MUTENDE

JUDGE