REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 98 OF 2009

KENNEDY MUTIA MAINA.……………..……….……........…………..APPELLANT
VERSUS

REPUBLIC………………………..…………………………………...……RESPONDENT

(Appeal from the original conviction and sentence by L. Mbugua, Ag. Principal Magistrate, in the Senior Resident Magistrate's Criminal Case No.994 of 2005 delivered on 28th April 2009 at Karatina)

JUDGMENT

The appellant herein, **Kennedy Mutia Maina**, was tried on a charge of defilement contrary to *Section 145(1)* of the Penal Code. The particulars of the offence were that on the 16th day of October 2005, in Nyeri District within Central Province, had carnal knowledge of S.G.N, a girl under the age of 16 years. After undergoing a full trial the learned trial acting Principal Magistrate, convicted the Appellant for the offence of attempted defilement under *Section 145(2)* of the Penal Code. The Appellant was then sentenced to serve five (5) years imprisonment. Being aggrieved, the Appellant filed this appeal.

On appeal, the Appellant put forward the following grounds in his petition of appeal:

1. ***That the Learned trial Magistrate erred in law in not finding that the charge was fatally defective for the failure to include the word unlawful in the particulars of charge even though the same had been submitted both at the close of the prosecution case and at the close of the defence case.***

2. ***That the Learned trial Magistrate erred in law and fact in ignoring, refusing to acknowledge and follow the doctrine of stare decisis even after authorities in Nyeri HC. CRI A No. 373 of 2003-Jonathan Kinuthia –vs- republic Nyeri HC CRA NO. 329 of 2004-Edward Murage Githinji –vs- Republic, Ngeno –vs- Republic (2002) IKLR 457 among others had not only been cited but also provided to the court.***

3. ***The Learned trial magistrate erred in law and fact in invoking the provisions of Section 180 of the criminal procedure code and convicting the appellant of attempted defilement under Section 145(2) of the Penal Code when the original charge was fatally defective.***

4. ***That the Learned trial Magistrate erred in law and fact in concluding that the prosecution had proved its case against the appellant beyond any reasonable doubt despite the glaring discrepancies therein and thereby occasioned a miscarriage of justice prejudicial to the appellant.***

5. ***That the trial magistrate erred in law and fact in not making a finding in regard to the cogent***

defence of the appellant and thereby occasioned a miscarriage of justice prejudicial to the appellant.

6. That the Learned trial Magistrate erred in law and fact in coming to the conclusion that the prosecution evidence constituted a charge of attempted defilement and thereby occasioned a miscarriage of justice prejudicial to the appellant.

7. That the Learned trial Magistrate erred in law and fact in finding that the persuasion by way of tricks of P.W. 2 by P.W. 1 to implicate the appellant was proper and not prejudicial to the appellants case.

8. That the sentence meted out was harsh, oppressive and excessive.

When the appeal came up for hearing, Mr. Makura, learned Senior State Counsel, informed this Court that the State did not intend to contest the appeal. Before considering the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The prosecution tendered the evidence of four witnesses in support of its case before trial court. The first to take the witness box is **A.W** (P.W.1), the mother of S.G.N, the complainant therein. It is the evidence of P.W. 1 that on 15th October 2005 she left N Village to visit her husband in Kitengela leaving the complainant and two of her siblings under the care of her mother-in-law. The Appellant was also said to be staying in the same homestead. P.W. 1 said she came back home on 17th December 2005 whereupon she observed something abnormal about the Complainant. P.W.1 found her daughter to be sleepy and that she walked with some difficult. She later prodded her to say what was affecting her by enticing her with some sweets and snacks. That is when the Complainant (P.W.2) told her that the accused had inserted his fingers into her genitalia. P.W. 1 reported the matter to the Police who swung into action by arresting the Appellant. The Complainant was taken for medical examination and was found to have been defiled since her labia minora and majora were bruised. It is also said that her hymen was torn.

The Appellant on his part denied committing the offence. He stated that the children who included the Complainant spent the night in the bedroom while he slept on the coach at the sitting room.

On appeal Mr. Makura, learned Senior State Counsel, conceded this appeal on two main grounds: First, it is argued that the trial magistrate improperly received the evidence of the Complainant (P.W.2) without conducting a preliminary inquiry as required by law. I have examined the record and it is clear that the trial magistrate went straight to receive the evidence of the Complainant, a child aged six (6) years without conducting the *voire dire* inquiry which is a mandatory requirement under the Evidence Act. That is a serious lapse which will render the entire proceedings void. On this ground, I am convinced the appeal was rightly conceded. The second ground which the learned Senior State Counsel relied in conceding the appeal is that the trial magistrate took over the case from a colleague without complying with *Section 200* of the Criminal Procedure Code. I have examined the record and it is clear that L. Mbugua, learned Senior Resident Magistrate, took over the case from P.C. Tororey, the then learned acting Principal Magistrate, without complying with *Section 200* of the Criminal procedure Code. By the time L. Mbugua took over the case, three witnesses had testified before P.C. Tororey. It is a requirement under *Section 200* Criminal Procedure Code that the Magistrate taking over the case should explain to the accused his right to recall witnesses who had testified before her/his predecessor. This was not done. Again I agree that Mr. Makura rightly conceded the appeal. Mr. Karingithi, learned advocate for the appellant, was of the view that the charge was fatally defective in that it did not contain the word 'unlawful'. I do not think, that is the correct exposition of the law. The offence the Appellant faced was that of defilement. In such a case there is no need to include the word 'unlawful' because defilement denotes an offence of rape committed against a child. A child cannot give consent hence there is no need to include the word 'unlawful'. The Appellant's consent further argued that the trial magistrate did not take into account the Appellant's defence of alibi. I have looked at the record and it is apparent that the Appellant admitted he spent the night in the same house with the Complainant though in different rooms. The Appellant's defence of alibi could not have assisted him because he admitted being at the scene of crime. I see no merit on this ground.

In the final analysis I allow the appeal on the basis of the grounds argued by Mr. Makura, learned Senior State Counsel. Consequently, the conviction and sentence are quashed and set aside respectively. The Appellant is hereby ordered set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 4th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Mugo holding brief for Maina Karingithi for the Appellant and Mr. Makura for the State.