REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, O'KUBASU & WAKI, JJ.A)

CRIMINAL APPEAL NO. 149 OF 2003

BETWEEN

REUBEN NYAMAI BICHANGE …… APPELLANT

AND

REPUBLIC ……RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nairobi (Tuiyot, J) dated 3rd July, 2002

in

H.C. Cr. C. No. 19 of 2002
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JUDGMENT OF THE COURT

Reuben Nyamai Bichange, the appellant herein, was originally charged on one count of defilement of a girl contrary to ***section 145*** of the Penal Code, with an alternative count of indecent assault on a female contrary to ***section 144*** (1) of the Penal Code. Both charges named a four-year girl DKN as the complainant and in the main charge of defilement under section 145 of the Penal Code, it was alleged that on **27th day of December, 2000** at [*particulars witheld*] Estate in Nairobi, the appellant had unlawful carnal knowledge of DKN while in the alternative charge it was alleged that on the same day at the same place, the appellant unlawfully and indecently assaulted DKN by touching her private parts.

The appellant was tried at Makadara Chief Magistrate's Court by a Principal Magistrate, Mrs. Kimingi. The witnesses who testified before the Magistrate were AK (***PW1***), who was the mother of DKN, DKN's father JM ***(PW4)***, a neighbour HM ***(PW2)***, Dr. Charles Okwemba Anangwa ***(PW5)*** and Police Constable Veronica Odari ***(PW6)***. At the end of the prosecution evidence, the appellant made an unsworn statement and by her judgment dated and delivered on 21st March, 2002, the trial Magistrate acquitted the appellant on the main charge of defilement under section 145 of the Penal Code but found him guilty and convicted him on the alternative charge of indecent assault under section 144 (1) of the Penal Code. In the final portion of her judgment the learned Magistrate found as follows:-

> **"The court find (sic) the prosecution evidence consistent and find (sic) that complainant's evidence is corroborated by the rest of the prosecution witnesses on her complaint against the accused. The court accept (sic) the prosecution evidence that the accused indecently assaulted the complainant but find (sic) that in the absence of the report from the police doctor who examined the complainant and the accused soon after the complaint the court find (sic) that**

the prosecution has not established its case in the main charge of defilement beyond reasonable doubt and the court discharges the accused on the main charge. The court find (sic) the prosecution has proved its case in the alternative charge and find (sic) no merit in the defence case by the accused which the court rejects. The court find (sic) the accused guilty as charged in the alternative charge and convict (sic) him accordingly."

The person referred to as the complainant in this passage and whose evidence was corroborated by the other prosecution witnesses was obviously DKN who made an unsworn statement as PW3. As to the use of the phrase **"discharges the accused on the main charge,"** it is clear what the learned trial Magistrate meant was that as the prosecution had not proved its main charge beyond a reasonable doubt, the Magistrate was acquitting the appellant on that charge. In the circumstances, no other meaning can be reasonably put on the term "**discharge"** except that the appellant was acquitted on that charge.

What followed the conviction of the appellant on the alternative charge was simply farcical . It appears from the record that the appellant was a first offender. In mitigation the appellant told the Magistrate that he was **"educating"** his brothers up country and that he asked for forgiveness. This, despite the fact that the girl he was found to have indecently assaulted was only four years old. The Magistrate, upon hearing the appellant in mitigation called for a probation report. Such a report was subsequently made available to her on **30th April, 2002**, and the report being favourable to the appellant, he was placed on probation for three years. The appellant did not appeal to the High Court against his conviction on the charge of indecent assault. The Republic did not also appeal against the order of acquittal on the main charge of defilement. But it appears that someone asked the High Court to exercise its power of revision under section 362 of the Criminal Procedure Code. So it came to pass that on **19th June, 2002**, the appellant, represented by Mr. Kanyi Advocate and the Republic, represented by Miss Nyamosi as the State Counsel, argued, not the rightness or wrongness of the appellant's conviction, but the propriety of the sentence which had been imposed upon the appellant by the trial Magistrate. By his order made on **3rd July, 2002**, the late Mr. Justice Tuiyot set aside the conviction on the alternative charge of indecent assault under section 144 (1) of the Penal Code, and substituted it with a conviction on the main charge of defilement under section 145 of the Penal Code. As we have already seen, the trial Magistrate had acquitted the appellant on that charge. The learned Judge then sentenced the appellant to twelve (12) years imprisonment with six strokes of the cane. The appellant now appeals to this Court on a total of twelve grounds, but the main ones are: -

" 1. THAT: I pleaded NOT guilty to the charge of defilement of a girl contrary to section 145 of the Penal Code.

3. THAT: The trial Judge erred in law in convicting me without Police Doctor report which could have convinced the court beyond reasonable doubt.

4. THAT: The trial learned Judge based his judgment on the eye witnesses and outcry of the public which denied me my justice.

5. THAT: Trial learned Judge erred in law in convicting me with the Doctor's report which was examined (sic) after three months.

6. THAT: I'm requesting this Hon. court of appeal to reverse orders made by Hon. Justice Tuiyot with orders that deem fit (sic).

7. THAT: I'm also requesting this Hon. court to rely on the evidence which was adduced in the court of law."

The other grounds contained in what the appellant calls **"NOTICE OF APPEAL"** deal with the severity of the sentence imposed on him and other mitigating factors. In his submissions before us the appellant also told us that part of the prosecution's case was conducted by a police constable thus violating the principles laid down by this Court in **ELIRAMA & ANOTHER V. REPRUBLIC [2003] 1 EA 50.**

We are aware that the appellant is not represented by counsel and argued his appeal as a layman. But the truth is that after his conviction by the Magistrate, he did not appeal to the High Court. The matters which he is now raising in his grounds of appeal ought to have been raised before the High Court on an appeal to that court. As we have said, Tuiyot J whose decision is now challenged before us was exercising his powers of revision, not even at the instance of the appellant who was perfectly satisfied with the decision of the Magistrate, and during the hearing before the learned Judge where he was represented by counsel, the question of the correctness of his conviction was never raised. This Court can only declare a trial a nullity as it did in **ELIREMA'S** case where there is a valid appeal to it. The issue of the correctness of the appellant's conviction was not even remotely touched on in the High Court; the appellant did not appeal against his conviction to that court and he cannot be allowed to raise that issue for the first time in this Court merely because he got a heavy sentence in the High Court. We accordingly reject his grounds of appeal purporting to challenge the correctness of his conviction by the trial Magistrate.

But there is still the question of section 364(4) of the Criminal Procedure Code. That section provides:-

"364 (4). Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction."

The meaning of this section is plain. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. The trial Magistrate had acquitted the appellant on the main charge of defilement under ***section 145*** of the Penal Code. In view of the provisions of section 364(4) of the Criminal Procedure Code, Tuiyot, J. had no power and was not entitled to convert that acquittal into a conviction. He was accordingly in error when he purported to set aside the conviction recorded by the Magistrate under section ***144(1)*** of the Penal Code and substituted that conviction with one under ***section 145*** of the Penal Code. To that extent this appeal must succeed. We accordingly allow the appeal to the extent that we set aside the conviction under section 145 of the Penal Code recorded by Tuiyot, J. and restore the conviction under ***section 144(1)*** recorded by the trial Magistrate. It follows from this that the sentence of 12 years with six strokes of the cane imposed by Tuiyot, J. is set aside. The maximum sentence allowed at the time the appellant was sentenced by Tuiyot, J. was one of five years imprisonment with hard labour and with or without corporal punishment. There is no doubt that the appellant committed a grave crime against a girl of four years and though he was a first offender, the gravity of his crime must be reflected in the nature of the sentence allowed by law. Accordingly, we now sentence the appellant to five (5) years imprisonment with hard labour to run from ***3rd July, 2002*** when he was sentenced by Tuiyot, J. We also order that he shall receive two strokes of the cane which penalty was lawful at the time he committed the offence and even at the time he was sentenced in the High Court. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 1st day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.