REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: AKIWUMI, SHAH & OWUOR)
CRIMINAL APPEAL NO. 38 OF 2000
BETWEEN
MOSES SHIVAJI SHIKAH .....APPELLANT

AND
REPUBLIC .....RESPONDENT

(Appeal from a conviction and Judgment of the High Court of Kenya at Kakamega (Mr. Justice Tanui) dated 6th April, 1998
in
H.C.CRM. CASE NO. 267 OF 1997)
****
JUDGMENT OF THE COURT

The appellant, Moses Shivaji Shikah, was, on the 18th day of November, 1997, convicted of the offences of (1) Defilement of a girl under 14 years of age contrary to section 145(1) of the Penal Code and (2) of assault causing actual bodily harm contrary to section 251 of the Penal Code. He was sentenced to seven years imprisonment and ordered to receive five strokes of the cane in respect of the offence of defilement.He was ordered to serve one year imprisonment in respect of the offence of assault causing actual bodily harm. The sentences were to run concurrently.

The appellant appealed against both the convictions and sentences to the superior court. In his petition of appeal to that court which had six grounds of appeal endorsed at theback, he had not crossed out that portion thereof which says"I do not wish to be present at the hearing of the appeal".Similarly he had not crossed out the words

> "I do" in that sentence so that the sentence as it stood read uncertainly that:"I do/do not wish to be present at the hearing ofthe appeal".

The appellant was not present when his appeal to thesuperior court came up for hearing and the notes made by thelearned Judge in the pertinent fact read as follows:

> "1.4.98
> Coram Tanui J.
> N/A for the appellant
> Aluoch for the state
> Chesang. "

The appellant's first appeal, therefore, was heard in his absence. There is or could be some doubt as regards whether or not the appellant wished to be present at the hearing of his first appeal. In his very first ground of appeal before this Court he takes issue on the first appellate court's alleged failure to "summon" him to appear in person at thehearing of the first appeal "to adduce further evidence". Asthe memorandum of appeal is home drawn we would assume that the words "to adduce further evidence" mean "to argue the appeal orally". In all the circumstances before us we believe that the appellant actually wanted to be present at the hearing of the appeal. In any case when it is not clear as to whether or not an appellant wishes to be present at the hearing of the appeal the court's bounden duty is to see to it that the appellant is present at the hearing. Audi Alterman Partem is a cardinal principle of our system of law. No man should stand condemned unheard.

In the case of Gathega s/o Waweru vs. R (1954) 21 E.A.C.A. 349 it was held that the High Court should not hear an appeal in the absence of the appellant and without ascertaining that he has been duly served with the hearing notice. The importance lies in the fact of ascertainment as to whether the hearing notice had been served on the appellant. The record does not show that it was so ascertained.

It would therefore be prudent to remit the appeal before the superior court for a fresh hearing in the presence of the appellant so that his appeal could properly be heard by that court without depriving him of the right of appeal to this Court. This appeal is allowed to that extent and we direct that the appeal in the superior court be heard on a priority basis.

Dated and delivered at Kisumu this 14th day of June, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

E. OWUOR
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR