(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 403 OF 2006 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI BEFORE C. OBULUTSA –SRM)

EDISON JAMBO KALEMBE ……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

J U D G E M E N T

Edison Jambo Kalembe (the appellant) was sentenced to serve ten (10) years imprisonment with hard labour. He had been charged with the offence of attempted defilement of a girl contrary to section 145(1) Penal Code that on the 18th day of April 2006 at 11.00pm in Kilifi District of the Coast Province, attempted to have carnal knowledge of J.C, 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 18th day of April 2006 at about 11.00pm in Kilifi District unlawfully and indecently assaulted J.C, a girl under the age of 16 years by touching her private parts, namely vagina.

The appellant denied the charges.

Prosecution called four witnesses in support of its case. PW1 J.C aged 13 years, testified that on 18-4-06 while at home with her parents, the appellant came to see his sister. Appellant said there was a person in Malindi who wanted a housemaid and so she left with him for Malindi from Mtwapa. They alighted at Kilifi and appellant took her round and round the beach saying he was waiting for Suleiman. He then took J.C to his house, ordered her to undress and have sex with him. She declined and a struggle ensued and she ran out and went to someone's house for help. She got a place to sleep and appellant went there at night and was apprehended.

On cross-examination PW1 states:

"you are the one who came to our home. I had not known you before. I was to go to see your sister before I took the job…there was no light in the room. We were alone then"

PW3 Mwenda Vinya, a resident of Kilifi testified that on 18-4-06 while asleep at home at about 3.00am, she was woken up by her brother-in-law and found a man and a girl at the veranda. The girl explained that she had been taken to go to work, but the appellant had attempted to defile her. The appellant denied the allegation – they stayed up to 6.00pm then PW3 took her to the chief.

On cross-examination PW3 said that he found the appellant and PW1 outside.

PW4 Patrick Samin Yaa, the Chief of hospital sub location testified that on 19th April 2006, the appellant and PW1 were taken to him and the girl explained what had happened. Appellant told him he was taking her to Malindi but now wanted to send her back to Mtwapa.

Chengo Nduma (PW5) informed the court that on 18-4-06, he was at home sleeping outside the house when a girl came running for help and saying that she had been with a man from Mtwapa but before she finished her sentence the appellant appeared and said he had been with her from Mtwapa.

Eventually Pc Serali recorded witness statements and charged the appellant.

In his sworn defence, appellant stated that PW1 is a neighbour to his sister, Machima Jambo. He had been sent by his sister to get a maid and since PW1 had been looking for work, he went to ask her. He confirms that they alighted in Kilifi to look for his sister, but when he called her, she said she was busy and so they waited for her. So he took the girl to his house, but the girl said she would not sleep there, preferring to return the next day. He escorted her to the stage and tried to get a taxi. They met strangers and had in a house which had no door. It rained and they took shelter. At about 4.30am, when they wanted to go to the stage, a man passed, asking them where they were going to so early. The man said they would have to go to the police, then he was arrested.

In his judgment, the learned trial magistrate considered it was not in dispute that appellant and PW1 were known to each other and were together on that day. On pretext of appellant taking her from home to get her a job. He also noted that they were in Kilifi at night and that they were in an undisclosed house.

He noted that although appellant claims that they were in that house so as to hide from strangers, PW1 said he had taken her there to have sex with her but she managed to ward him off. The learned trial magistrate was of the view that the testimony of PW5 corroborated that if PW1 in that he confirmed that PW1 reached him running and screaming for help.

The appellant's defence was considered and the learned trial magistrate stated:

"The defence of the accused has not cast any doubt in the prosecution evidence which is credible and consistent that appellant attempted to defile J.C aged 13 years"

In his appeal, appellant challenged the finding of the learned trial magistrate on the following grounds which are a summary, since some merely repeat others.

1. That the learned trial magistrate erred in law and fact when he convicted the appellant as there was no proof of the offence and on the evidence of a single witness which was uncorroborated.

2. That there was no medical evidence.

3. That his defence was not considered and the learned trial magistrate did not read the judgment contrary to section 169(1) Criminal Procedure Code.

4. That he was kept in police custody for six days without being taken to court.

In arguing the appeal, appellant submitted that there was no age assessment of the complainant nor was any document produced in court to prove her age.

He also complained that the plea of Not Guilty was not signed and the evidence of PW1 and PW2 were not signed and that it was not clear what time the offence took place.

Further that although he was taken to court on 24-4-06, plea was only taken on 24-5-06.

In his written submissions, appellant that there was no explanation as to why he was kept in custody for five days as a result of which his constitutional rights under section 72(3) (b) were violated, and he seeks to rely on the decision in ALBANUS MWASIA MUTUA V R CR. APPLICATION NO1 20 OF 2004.

Appellant also submits that there was no other evidence to support PW1's testimony that he ordered her to undress and have sex with him and wonders hwy her soiled clothes which she claims to have become dirty from the incident, were not produced as exhibit in court.

He also points out that there is contradiction in the prosecution case because whereas PW1 claimed appellant went to look for her in the house where she'd sought refuge after some hours, PW3 said appellant followed the girl as she was explaining her problem.

The appeal is opposed on both sentence and conviction. Mr. Ogoti for the state submitted that it did not take a month for plea to be taken, that in fact plea was taken on 24-4-06 and that the date complained of seems to be a typing error because the date that follows the orders is for a mention on 10-5-06 which was probably the hearing date and irregularly ought to be resolved in favour of the prosecution.

I have looked at the original record which shoes plea was taken on 24-4-06 and the date in the typed copy of proceedings reading 24-5-06 as date of plea is a typing error which can be resolved in favour of the prosecution without affecting the material substance of the case and I so resolve.

As regards the trial being conducted in his absence, Mr. Ogoti points out that the dates when appellant was absent were actually mention dates and that he was present during the hearing and fully participated in the proceedings and cross-examined witnesses, so that ground does not hold water.

Appellant also complained that the record was not signed – to which Mr. Ogoti's response is that even if the proceedings were not signed, it is not fatal as the same were taken on the trial magistrate's hand and failure to sign is not a key to acquittal. Now Section 197(1) Criminal Procedure Code provides as follows:

"in trials by or before a magistrate….

(a)the evidence of each witness shall be taken down in writing …..and SHALL be signed by the magistrate"

That is a mandatory requirement – in the original handwritten record, I confirm that after the evidence in chief and cross-examination of each witness, the learned trial magistrate appended his signature so that ground two cannot stand – it seems the typed copy has omission on some portion as to whether the learned trial magistrate signed but that original hand written record gives a true representation of the situation. Therefore that ground of the appeal must also fail.

What about the age assessment" It is correct that there is no evidence of the complainant's age having been assessed by a medical officer or a document to confirm her age, such as a birth certificate.

Mr. Ogoti argues that the question of age assessment is an afterthought as PW1's evidence in chief was not challenged regarding her age and voire dire was conducted and appellant never challenged her age.

With the greatest of respect to Mr. Ogoti, isn't that shifting the burden onto the appellant" Wasn't it

for the prosecution to prove PW1's age"

The rational for this provision is found precisely in that very section which recognizes that an individual may raise the defence of a belief that the victim was over sixteen years so did the appellant attempt to defile PW1 or to have carnal knowledge of her"

Form her evidence he had taken her round and around the beach eventually into a house ordered her to kindness and have sex with him, a struggle ensued and she managed to run out what is an attempt to defile – does telling to someone to remove their clothes so as to have sex with him/her amount to an attempt to defile" There is no evidence that she removed her clothes or he touched her sexual organs, breasts, buttocks or caressed her. An attempt is to make an effort to achieve or complete an act.

Appellant had announced his intention clearly to PW1. She resisted and according to her, put up a struggle in which her clothes got dirty and her limb aches therefrom.

What steps did appellant take towards achieving this intention" No description is given of what he did in an attempt to violate PW1's chastity. Did he lift her dress, did he start removing her clothes" Did he touch any part of her body like the genitals, buttocks, breasts. Did he pin her down, unzip or remove her dress" What evidence is there that a struggle actually took place" No evidence of injuries. I don't doubt that appellant made an announcement of his intention as facts but if the legal definition of defilement involves penetration – then an attempt to penetrate or to indecently assault has not been fully established. Appellant may have wanted to have sex but did he make practical steps towards achieving that" From the evidence I say NO.

Consequently this appeal succeeds on two limbs:

(a) PW1's age not having been established.

(b) Insufficient proof of an attempt to defile.

The appeal therefore succeeds and the conviction is quashed and sentence set aside. Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 26th day of November 2008 at Malindi.

H. A. Omondi

JUDGE