



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**HIGH COURT CRIMINAL APPEAL NO. 41 OF 2017**

**ANTHONY MUNYAO MWANIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of R. KOECH Ag.PM in Criminal Case No. 77 of 2013 delivered on 24<sup>th</sup> September, 2014 at Makueni).*

**JUDGEMENT**

1. The appellant was charged and convicted of the offence of **defilement of a child contrary to Section 8 (1) as read with section 8 (4) of Sexual offence Act No. 3 of 2006.**
2. The particulars are that on diverse date between 3<sup>rd</sup> and 9<sup>th</sup> March, 2013 at [Particulars withheld]Makueni County the Appellant, did cause his penis to penetrate the vagina of C S a child of 16 years.
3. The alternative charge was indecent acts with a child contrary to **Section 11 (1) of Sexual Offence Act No. 3 of 2006.**
4. Particulars being that on diverse dates between 3<sup>rd</sup> and 9<sup>th</sup> March 2013 at [particulars withheld] Makueni County the Appellant, did intentionally and unlawfully caused his penis to come into contact with the vagina of C S a girl aged 16 years.
5. The trial court upon hearing prosecution case and defence convicted and sentenced the Appellant to 15 years imprisonment.
6. The Appellant being aggrieved by the decision of the trial court has filed appeal herein in which he raises and sets out 3 grounds of appeal.
7. The Appellant complains in the first ground of appeal that the charge sheet was defective in that it omitted the words ***“intentionally and unlawfully”***.
8. Secondly, he raises ground to the effect that the complainant PW1 was a consenting adult and finally in ground three the Appellant complains that the trial court breached Article 50 (2) (h) by failing to avail Appellant with legal representation and/ or counsel.
9. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction

of the Appellant.

10. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

11. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364.**

12. In view of the above, the court will relook at the evidence rendered. The prosecution called 7 witnesses to prove its case. PW1 was the victim who testified that she was 18 years old as she was born on 02/03/1995.

13. She disagreed with Birth Certificate which stated that she was born on 02/03/1996 saying that her age was postdated by one year by her parents who collected her Birth Certificate.

14. She had seen her Clinic Cards showing that she was born on 02/03/1995. She said that her friendship with Appellant commenced since 2012 when she was 17 years old. She visited the Appellant on 03/03/2013 and slept on his sofa set. She says that her mother met her while leaving Appellant house and she went to police to lodge complaint while in PW1's company.

15. She (PW1) however returned to the Appellant house where she slept for a night. She said she had sex with appellant on 03/03/2013.

16. On cross examination, she said that the Appellant was her friend and she could not understand why he was charged.

17. PW2 is PW1 mother who testified that her daughter was born on 02/03/1996. That on 03/03/2013 after church service PW 1 was left behind and PW 2 went home accompanied by her sister. PW2 arrived home at 6.00 p.m. and PW1 was nowhere to be seen. She PW1 spent a night away from home.

18. On 04/03/2013, PW2 started searching for PW1. She met a child who told her PW1 was seen with the accused and the child offered to lead her to Appellant place/home. They proceeded there and the house was closed. She learned later PW1 was inside the house.

19. She reported to the chief and they went and removed PW1 from the appellant house. On 05/03/2013, she reported the incident at Kalawa Police Station and PW1 was taken to hospital where she was examined.

20. On 08/03/2013, PW2 was travelling in a bus in which Appellant was the conductor and she saw both the appellant and PW1. PW1 and appellant alighted when motor vehicle slowed down alighted. On 10/03/2013 she was old appellant and PW1 were at Kalawa police station and both were taken to hospital for examination.

21. PW3 was father of the PW1 who testified that on 04/03/2013 they searched for PW1 and found her in Appellant's house. He testified that PW1 was born on 03/03/1996. On cross examination, he stated that PW1 had first completed Primary Education and was waiting to join form one at the time of the incident.

22. PW4 was assistant chief of Kinze sub-location who testified that on 04/03/2013 he found PW1 hiding under a bed in lodging. She was with Appellant. She told PW4 that she was Appellant girlfriend.

23. On cross-examination he said that PW1 was under age and could not be married. PW5 PC Kibet testified that he preferred charges of defilement after report was made. PW6 a clinical officer examined the PW1 and observed the hymen was missing. She also had pus cells. PW5 produced the P3 form.

24. PW7 was watchman of the lodging where Appellant spent with PW 1 on 03/03/2013. On 04/03/2013

he found PW 1 in the lodging room. She told him that she was Appellant wife.

25. On closing of the prosecution case, the court found Appellant had a case to answer and thus put him on his defence.

26. The Appellant gave unsworn statement. He stated that on 02/06/2012 he was ferrying primary school pupils when PW1 whom he did not know requested to use his phone to call her mother.

27. Shortly PW1 mother transferred Kshs.600/= to his phone for PW1. From that day onward, the PW1 kept on calling him requesting they be friends.

28. On the material day, PW1 went to his house and told him she had gone to see him. He slept with her until the next morning. He left at 4.30 a.m. and instructed her to leave at 6.00 a.m. for her home.

29. At 2.00 p.m., PW1 called him and informed him that her mother and PW4 found her in his house.

30. On 09/03/2013, he was arrested after presenting himself at the police station. He was charged with the offence. He says he did commit the offence due to the ignorance of the law. On close of the defence, the trial court found Appellant guilty and convicted him and thereafter sentenced him to 15 years imprisonment.

31. The parties agreed to canvass appeal via submissions and the appellant filed and served his written submissions together with his amended grounds of appeal.

32. The state counsel also filed and served the witness submissions which she highlighted during the hearing.

33. The appellant submits on ground 1, that the charge was defective for omitting words “**intentionally and unlawfully**” the provisions of Section 3(1) (a) Sexual Offence Act incorporates the said words as ingredients of the offence.

34. He relies on the case of ERRO OBA –VS – R CRA 11/08 NKU where omission of the said words in defilement charge was declared to render the charge defective. He also relied on SIGILANI –VS- R (2004) 2KLR.

35. On ground two which is in the effect that PW1 misled him that she was of age and thus consenting adult, he submitted, PW1 testified on oath that she was born on 02/03/1995 and at the time of the alleged offence she was 18 years.

36. She had gathered her date of birth from her clinic records. She testified that Appellant was her friend and she did not know why he was charged and he was a good person.

37. He thus relies on provisions of Section 8 (5) (a) Sexual Offence Act No.3/2006 which provides defence to defilement charge, if accused is deceived by child that she is 18 years, or over 18 years, he reasonably believed she was over 18 years.

38. He submits he was deceived by PW1 forceful and domineering character she used to have her way on him to believe that she was of age. (18 years and/or above).

39. On ground 3 that the trial court breached Article 50 (2) (h) in failing to avail him a legal representative and/or counsel, he submitted that it’s mandatory that where he was to suffer substantial injustice, he ought to be assigned an advocate as a component of right to a fair trial. Thus his right was violated.

40. On the Respondents side the state counsel submitted that on ground 1, the omission of words “**intentionally and unlawfully**” in the charge sheet did not prejudice the Appellant.

On ground 2, the state counsel submitted that the date of birth of PW1 was proved by birth Certificate produced. Further there was no evidence to prove that PW1 deceived Appellant about her age since he knew she was a minor.

41. On ground 3, the state counsel submitted that the provisions of Article 50 (2) (h) do not render right of being assigned an advocate absolute.

42. After going through the evidence on record and the submissions tendered, I find the following issues arising:-

**1) Whether the charge sheet was defective?**

**2) Whether the age of the PW 1 was proved beyond reasonable doubt?**

**3) Whether the Appellant was deceived by the PW1 that she was of age (18 years or above it?)**

**4) Whether Appellant rights to fair trial was breached and if so the import of same in the instant matter?**

43. On the first issue, the provisions of Section 3(1) of Sexual Offence Act No. 3/016 a person is deemed to commit offence of defilement if he/she INTENTIONALLY and UNLAWFULLY commits the act which causes penetration with his or her genital organ.

44. The words intentionally and unlawfully are set out as part of the ingredient of the offence. In the case of ERU OBA supra, the court held the charge of defilement was defective for omission of the above words which are components of the ingredients of the offence.

45. The court held that the conviction was vitiated due to prosecution failure to draw charge sheet according to the provision of the law. The court relied on **EKIMAT –VS- R. C.A CR APP 151/2004 ELDORET** which binding on high court.

46. On issue No. 2 the age of the child PW1 was sought to be proved by production of the PW1 Birth Certificate. However PW1 renounced the same and testified to the fact that she was privy to the content of her clinic records which put her birth date to be 02/03/1995 thus at the date of the incident on 03/03/2013 she was 18 years.

47. She stated that her birth date was postdated by her parents when they collected her birth certificate thus it never reflected her correct birth day.

48. The PW1 parents PW2 and PW3 never commented on the aforesaid testimony nor state the whereabouts of PW1, clinic records.

49. The PW2 and 3 (her parents) did not rebut her testimony. The trial court did not find it necessary to order the age assessment of PW1 to confirm or rebut her evidence on oath. Thus an element of doubt was raised by PW1 testimony as to the authenticity of the Birth certificate lessening the value of content thereof.

50. On the issue of the Appellant being deceived by the PW1 that she was of age (18 years and/or above) Section 8 (5) Sexual Offence Act (a) states that it is to be proved that the child deceived accused person into believing she was over the age of 18 years at the time of the alleged commission of the offence.

51. The PW1 is emphatic that at the time they had sex with the appellant she was 18 years. She was born on 02/03/1995. She did not even understand why the accused was charged and he was a good person. She took herself to the Appellant. Appellant also testified on the PW1 domineering and forceful character which she used to have her way on him.

52. The trial court ought to have considered the entire circumstances of the case as pertains to PW1 and Appellant conduct as disclosed by their testimonies to establish whether or not it was enough to render Appellant to entertain the believe that PW1 was 18 years or above at the time of the commission of the act.

53. On issue No. 4 the Appellant complaint is to the denial of the access to an advocate service during trial as provide by Article 50(2) (h). The article provide that;

***“50(2)”.....Every accused person has a right to a fair trial which include the right: (h) to have an advocate assigned to the accused person by the state and at the state expense, if substantial injustice would otherwise result and to be informed of his right promptly.”***

54. Clearly nowhere does the record show that the appellant was informed of the above right. He was unrepresented by an advocate nor was he explained of that right of representation. The possibility of a long sentence after conviction was real and in fact same was imposed. It is not enough to say that the right is not absolute. The state counsel submission is that the same right is not absolute.

55. The cumulative effect of the failings as noted above in the analysis in issues No. 1 to 4 renders this court to hold that the proceedings in trial court did not accord appellant fair trial. Article 25(c) of the constitution of Kenya state that RIGHT to FAIR trial shall not be limited.

56. In the conclusion the court has found that the instant appeal has merit and same is allowed. The conviction is quashed and the Appellant shall be set at liberty unless he is otherwise held.

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 20<sup>TH</sup> DAY OF APRIL, 2017.**

**C. KARIUKI**

**JUDGE**

.....