



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CRIMINAL APPEAL NO. 68 OF 2014**

**KYALO MWALYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. M.A.O. Opanga Ag SRM in Sexual Offences Case No. 35 of 2012 delivered on 6<sup>th</sup> May 2013 at the Principal Magistrate's Court at Kithimani)**

**JUDGMENT**

Kyalo Mwalya, the Appellant herein, was charged in the trial Court with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act. The particulars were that on 14<sup>th</sup> October 2012 at [Particulars withheld] village in Masinga District within Machakos County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of N N, a child aged 15 years old. He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The Appellant was arraigned in the trial court on 19<sup>th</sup> October 2012 when he pleaded not guilty to the charge, and after trial he was convicted and sentenced to serve ten years imprisonment.

The Appellant has now appealed against the sentence in a Petition and Memorandum of Appeal he availed to the Court on 14<sup>th</sup> February 2017, seeking a reduction of the sentence and for the Court to consider the time he had served in prison. The Appellant stated that he was a first offender, remorseful and sole breadwinner for his two younger brothers. The learned Prosecution Counsel, Ms. Rono conceded the appeal in oral submissions made in Court on 14<sup>th</sup> February 2017, on the ground that from the record the Appellant had asked for his lawyer to be present in Court but the trial proceeded in the lawyer's absence. The learned prosecution counsel sought a retrial and left it to the Court to decide.

While this is an appeal against sentence only, the Court after perusing the proceedings in the trial Court notes that indeed there was an infringement of the Appellant's rights to a fair trial, and his conviction which was the basis of the sentence meted out against him cannot stand. The trial record shows that the proceedings on 28<sup>th</sup> November 2012 were as follows:

**“Coram**

**Before M. A. O. Opanga Ag. S.R.M.**

**Prosecutor: Pc Wachira**

**Court Clerk: Faith Mutave**

**Accused present**

**Interpretation: English/Kiswahili**

**Prosecutor**

**I have four witnesses in court. I am ready to proceed.**

**Accused**

**I am not ready to proceed.**

**Court**

**Accused is represented.**

**Prosecutor**

**This is the third time accused is seeking for adjournment on the same reason.**

**Accused**

**I haven't seen my advocate.**

**Court**

**I will not allow the adjournment. I read it as a ploy by accused to delay matter. Hearing to proceed.**

**M. A. O. OPANGA RESIDENT MAGISTRATE**

**28.11.2012.”**

The hearing then proceeded and five prosecution witnesses gave evidence on that day including the complainant. The Appellant did not cross-examine any of the witnesses, including the three additional prosecution witnesses who testified later on. The record also showed that the Appellant had earlier on been represented by a Mr. Nzioki, who had appeared in Court for the Appellant on 24<sup>th</sup> and 26<sup>th</sup> October 2012. Further, the Appellant had previously sought an adjournment only once on 16<sup>th</sup> November 2012, on the grounds that he was unwell and wanted to be taken to hospital, which the trial Court ordered be done .

Article 50(2) of the Constitution in this regard provides as follows;

**“Every accused person has the right to a fair trial, which includes the right to:-**

**(c) “to have adequate time and facilities to prepare the defence.**

While it is important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of an accused person as guaranteed by the Constitution. In particular an accused person must be given additional time to prepare his or her case adequately. This includes the opportunity to consult his or her advocate and get adequate legal advice and preparation for the trial from the advocate.

Therefore the trial magistrate by asking the Appellant to proceed with the hearing in the absence of his Advocate violated his right to procure legal representation, and to have adequate time and facilities to prepare his case. I am therefore constrained to quash the Appellant's conviction and sentence on the

ground that he was not accorded a fair trial by the trial Court.

I am of the view that this ground is sufficient to dispose of the appeal. I also am of the view that a retrial may not be prudent in the circumstances, as the Appellant has already served four years in prison, which in the circumstances is enough punishment. The Appellant's conviction for attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act is therefore quashed, and the sentence of ten years imprisonment for this conviction set aside. The Appellant be and he is hereby set at liberty unless otherwise lawfully held.

It is so ordered.

**DATED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF APRIL 2017.**

**P. NYAMWEYA**

**JUDGE**