



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO 56 OF 2016**

**(Appeal against conviction and sentence in Kandara SPM Criminal Case No 558 of 2012 – C Kithinji, RM)**

**GEORGE MWANGI MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**1.** After several amendments to the charge sheet, the Appellant was tried of two counts (each with an alternative charge) as follows –

Count 1: ***Defilement of a girl with mental disability*** contrary to **section 7** of the ***Sexual Offences Act, No 3 of 2006***.

Particulars: In the night of 28<sup>th</sup> & 29<sup>th</sup> July (no year!) in Kandara District within Murang'a County, he intentionally and unlawfully caused his penis to penetrate the vagina of one C W G, a child aged 14 years.

Alternative Charge: ***Committing an indecent act with a child*** contrary to **section 11(1)** of the ***Sexual Offences Act***.

Particulars: (In the same night and place he intentionally touched the breasts of (the same girl child).

Count 2: ***Attempted defilement*** contrary to **section 9(1) & (2)** of the ***Sexual Offences Act***.

Particulars: (In the same night and place) he intentionally attempted to cause his penis to penetrate the vagina of M W N, a child aged 17 years.

Alternative Charge: ***Committing an indecent act with a child*** contrary to **section 11(1)** of the ***Sexual Offences Act***.

Particulars: (In the same night and place) he intentionally touched the breasts of (the same girl child).

**2.** After a full trial the Appellant was acquitted of Count 2 and its alternative charge. As for Count 1, the Appellant was convicted, not of the offence charged of **defilement of a girl with mental disability**

**contrary to section 7 of the Act**, but of **defilement of a child contrary to section 8(1) & (3) of the Act**. He was sentenced to serve twenty-five (25) years imprisonment. He was also, inexplicably, convicted of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act and sentenced to ten (10) years imprisonment. The sentences were to run concurrently. The Appellant has appealed against both conviction and sentence. Learned prosecution counsel does not support the convictions.

3. I have read through the record of the trial court. I have also considered the submissions of the learned counsels appearing. The first thing to note is that Count 1 was fatally defective in the following aspects –

(a) The offence provided for under section 7 of the Sexual Offences Act is **not defilement of a girl with a mental disability**. That section reads –

**“7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.”**

The offence under section 7 therefore is **the commission of rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities**. Defilement of a girl is provided for under section 8 of the Act.

4. The offence as charged in Count 1 was thus mis-stated and did not exist under section 7. The particulars given did not disclose an offence under 7 but under section 8(1) & (3).

5. An accused person is entitled to understand fully the offence or offences he is facing. The charge in Count 1 was never amended and was fatally defective.

6. In convicting the Appellant under section 8(1) & (3) (which was not the offence the Appellant was charged with) the trial court relied upon **sections 184 and 186** of the *Criminal Procedure Code*. Section 184 provides –

**“Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”**

With respect of the trial court, the Appellant was not charged with rape!

7. **Section 186** of the Criminal Procedure Code provides –

**“Where a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”**

Again with the greatest respect to the trial court, the Appellant was **not** charged with defilement of a girl under the age of 14 years contrary to section 8(1) as read with subsection (2) or (3) of the Sexual Offences Act. Although the particulars of the offence disclosed an offence under section 8(1) & (3), the offence charged was mis-stated as **defilement of a girl with mental disability** contrary to section 7 of the Sexual Offences Act. I have already stated elsewhere above in this judgment what offence is provided for under that section. I have also already held that the main charge in count 1 was fatally defective.

8. The conviction of the Appellant in the main charge in Count 1 is thus bad and must be quashed.

9. Having convicted the Appellant in the main charge, the trial court could not in law convict him also in the alternative count. This was clearly wrong. That charge was alternative to the main charge, not in

addition to it! The trial court should not have made a finding on it. That conviction was thus a nullity in law and must be set aside.

**10.** In the result therefore, I will allow this appeal in its entirety. The Appellant's conviction in the main charge in Count 1 is hereby quashed and the sentence of 25 years imprisonment imposed upon him set aside. His conviction in the alternative charge being a nullity in law, the same is hereby set aside. The sentence for that alternative count is also set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF MAY 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 31<sup>ST</sup> DAY OF MAY 2017**