



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL APPEAL NO. 23 OF 2016**

**BRIAN MUTINDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Mutomo Principal Magistrate's Court Criminal (S.O.) Case No. 43 of 2015 by Hon. S. K. Ngii R M on 06/04/16**)*

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

1. **Brian Mutinda**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 81(4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **21<sup>st</sup> day of October, 2015** at **[particulars withheld] Village, Ikanga Location in Mutomo Sub-County** within **Kitui County** willfully caused his penis to penetrate the vagina of **M K** a child aged **16 years**.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **21<sup>st</sup> day of October, 2015** at **[particulars withheld] Village, Ikanga Location in Mutomo Sub-County** within **Kitui County** willfully and unlawfully touched the private parts namely vagina of **M K** a child aged **16 years**.

3. Facts of the case were that PW1, **M K**, the Complainant was returning from school on the **21<sup>st</sup> October, 2015** at **6.00 p.m.** while in company of PW3 **K K** and PW4 **J K** when she encountered the Appellant a person she knew very well who hailed from the same village with her. He held her hand and told her colleagues to wait for her elsewhere. He pulled her into the thicket tore her school uniform that she was wearing from the hip downwards and defiled her. He left on completing the act. She went home. Her mother was away. The following day she went to school. When her mother returned she informed her. They reported the matter to the police. She was subjected to medical examination. The police investigated the case and arrested the Appellant, he was charged.

4. When put on his defence the Appellant who testified under oath denied having committed the offence. He stated that the Complainant's parents had a grudge against him. That her mother owed him money. When he asked for it she asked him to wait. Thereafter she sent her daughter and son to threaten him. She was also not happy because he took her job as a Supervisor of Workers and the person who used to deliver milk. In **August, 2015** the Complainant's mother assaulted his son for informing him (Appellant) that she had sold a cow. Whenever they would loose any item they would find it at the home of the Complainant. He concluded his testimony by stating that the Complainant's mother threatened to beat him up.

5. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant was the one who defiled the Complainant. He convicted him and sentenced him to **fifteen (15) years imprisonment**.

6. Aggrieved by the conviction and sentence the Appellant appealed on grounds that:

- The age of the Complainant was not proved.
- Investigations were being carried out after the Complainant and other witnesses had testified and documentary evidence tendered without first supplying the same to the Appellant.
- Documents relating to the age of the Complainant were adduced by a person who was not the author.
- Evidence of the grudge that existed between the Appellant and mother of the Complainant was ignored.

7 The Appeal was canvassed by way of written submissions. It was the Appellants submissions that initially the age of the Complainant was given as **14 years**. After the last witness testified the Prosecution applied to amend the charge to reflect her age as **16 years**. The Appellant was then called upon to plead to the charge and the Prosecution closed its case. This per the Appellant was a mistrial. He called for a retrial.

8. Secondly, he argued that the trial Magistrate entertained doubts as to evidence adduced to support the Prosecution's case but ended up convicting him.

9. Thirdly, it was stated that the Court relied upon a letter from a Head Teacher of **[particulars withheld] Primary School** that was adduced in evidence by **No. xxxxx Corporal Stephen Matasi** and a late birth registration application where the victim's date of birth was given as **28<sup>th</sup> February, 1999** which was a misdirection. That, these documents were adduced in Court after the Prosecution was assisted by the Court.

10. It was also argued that sexual intercourse was not the only cause of laceration leading to breaking of a hymen and that the grudge that existed between the Complainant's mother and the Appellant was disregarded.

11. In response the State/Respondent through learned State Counsel **Mr. Wanjala** submitted that other than the mentioned documents, PW2 the Complainant's mother adduced in evidence a Baptism Card that bore the date of birth of the Complainant as **28<sup>th</sup> February, 1999**. That the evidence of the Complainant that she was dragged into the thicket was corroborated by that of PW3 and PW4. The Doctor confirmed the injuries sustained by the Complainant and the defence put up was not specific as to the wrongs done to the Appellant.

12. This being a first Appellate Court, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. **(See Okeno vs. Republic (1972) EA 32)**.

13. Having re-considered the whole record of the trial Court afresh it is apparent that the charge was amended after PW6 **Dorcas Kavuli**, the Medical Officer testified. The provision of the law under which it was done was not cited. However, this was pursuant to **Section 214** of the **Criminal Procedure Code** that provides thus:

***“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

*Provided that—*

*(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

*(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*

*(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*

*(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”*

14. The application to substitute the charge was made by the Prosecuting Officer and allowed by the Court. The amendment was done before the Prosecution closed its case which is procedural. After the amendment, the Court called upon the Appellant to plead to the charge. However he was not given the opportunity of exercising the discretion to demand the recalling of witnesses who had testified to either testify afresh or for further cross examination. It was a requirement for the Court to notify him of that right to enable him to elect to seek them to be recalled or not. Failure to comply with the law was a mistrial. The question to be considered is whether an order for a retrial should issue.

15. In the case of **Makupe vs. Republic (1984) KLR 523** the Court of Appeal stated that:

*“In general, a retrial will be ordered when the original trial was illegal or defective, it will be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial, even when a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant (or accused).”*

16. Looking at the instant case the Prosecution was required to prove:

i) The age of the Complainant.

ii) The act of penetration into the genitalia of the Complainant by the genitalia of a male person and;

iii) That the person who committed the act of penetration was the Appellant.

17. The Prosecution adduced evidence pointing at the Appellant as the person who defiled the Complainant.

18. Medical evidence adduced proved the act of penetration. The defence put up was considered by the trial Magistrate prior to reaching the verdict. It will therefore be in the interest of justice to have the Appellant retried.

19. In the premises I do order that the Appellant shall be retried before a Magistrate of competent jurisdiction other than **Hon. S. K. Ngii**. He will be produced before the **Mutomo Senior Principal Magistrate's Court** on **6<sup>th</sup> November, 2017** for a retrial.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 31st day of October 2017.**

**L. N. MUTENDE**

**JUDGE**