



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIVASHA**  
**HCCRA NO. 46 OF 2014**  
**(FORMERLY NAKURU CRIMINAL APPEAL NO. 174 OF 13)**  
**(Being an appeal against conviction and sentence**  
**in Naivasha Criminal Case No. 2724/2012- E. Boke P.M. )**  
**K K.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
**DIRECTIONS**

1. This is one of the appeals transferred to this court from the High Court in Nakuru when a High Court was established in Naivasha. The Appellant herein was charged before the Chief Magistrate's court at Naivasha with the offence of Defilement contrary to section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on 7<sup>th</sup> September, 2012 he caused his penis to penetrate the vagina of C.N., a girl aged 5 years. He was charged in the alternative with the offence of Indecent Act with a child contrary to section 11 (4) of the Sexual Offences Act. He denied the charges and was unrepresented during the trial.

At the conclusion of the trial he was convicted on the main charge and ordered to be detained at the President's Pleasure under section 167 (1) (a) of the Criminal Procedure Code.

2. From the record of proceedings on 15/11/12 following the evidence of the Complainant, the Appellant claimed to be a minor but upon assessment was confirmed to be an adult. On the basis of a pre bail report dated 23/11/12 to the effect that the Appellant claimed to be mentally challenged, the court ordered a mental assessment be carried out. A report by the Government Psychiatrist **Dr. Njau E.N.** dated 22/1/2013 stated inter alia that:

**“On mental status assessment I found him to be mentally unsound, he has moderate mental retardation, he has low intelligence (IQ) and poor Judgment.”**

The doctor found him unfit to stand trial due to the mental retardation. The court directed that the proceedings be conducted under section 167 Criminal Procedure Code.

3. Following his conviction, the Appellant appealed to this court stating that he was wrongly convicted on fabricated evidence due to a grudge with the complainant's mother and that the court relied on hearsay evidence while dismissing his defence unduly. These grounds were discarded and amended

grounds filed on the hearing date as follows:

1. **“THAT the Pundit trial magistrate erred both in law and facts when she involved the provisions of Section 167 Criminal procedure code to proceed with the trial and making the decision herein yet failed to find that the Provisions do no apply in the present case.**
2. **THAT the learned trial magistrate erred in law and facts when he failed to find that the Appellant was sounded unfit to stand trial.**
3. **THAT the learned trial magistrate erred in law and facts when she conducted the trial contrary to section 198/1 criminal procedure code which made it difficult for the Appellant to follow up the trial**
4. **THAT the Pundit trial magistrate erred in law and facts when she conducted an unfair trial against the spirit of constitution by failing to communicate right of representation” (sic)**

4. On the hearing of the appeal, the Appellant referred to his mental status and relied on submissions which he said were prepared on his behalf at the prison. The said written submissions highlight in regard to ground 1 & 2 the contents of the Psychiatrist’s report and faults the trial magistrate for proceeding with the trial under section 167 Criminal Procedure Code.

Emphasizing the doctor’s finding that the appellant was **“unfit to stand trial”**, it was argued that this was equivalent to a finding of insanity hence section 167 of the Criminal Procedure Code did not apply. Instances in the trial during which the Appellant declined to cross examine witnesses were cited as evidence of his alleged unsound mind.

5. On the 3<sup>rd</sup> & 4<sup>th</sup> ground, it is submitted that the trial was conducted in contravention of Section 198 of the Criminal Procedure Code and article 50 (2) of the Constitution with regard to representation by an advocate at state expense. In the result, the trial was unfair and failed to uphold the principle in article 159 (2) (a) that justice be done to all irrespective of status.

6. The DPP through Mr. Kibelion opposed the appeal stating that section 167 of the Criminal Procedure Code was properly applied once the Appellant’s mental state was noted early in the trial. He argued that the mental assessment report did not declare the Appellant insane and that the court noted that he could not follow the proceedings. He pointed to the fact that the Appellant cross-examined some witnesses but not others demonstrating the fluctuating state of his mind. He reiterated the evidence at the trial affirming that the conviction was proper and final orders lawful. He urged the court to uphold trial court’s findings.

7. Briefly, the appellant was convicted on the evidence of six prosecution witnesses which the court found had proved the case against him on the main count. I have gone through the entire record of appeal but did not find any evidence that the conviction and order made pursuant to section 167 (1) (a) had been confirmed by the High Court in terms of the said section. It was only while preparing judgment in this case that I stumbled on the confirmation order dated 31<sup>st</sup> October 2013 by **Emukule J** and which was filed in the original court file. The said order, seemingly was not included in the record of appeal and was therefore not considered by this court when the appeal was presented.

8. Thus, this appeal ought not to have been admitted or entertained at all as there exists an order of a court of concurrent jurisdiction confirming the conviction and orders made by the trial court. To proceed with matter further would amount to sitting an appeal on the confirmation orders of a court of concurrent jurisdiction. In the circumstances, I must declare the entire proceedings related to this appeal, right from admission to be a nullity and of no consequence.

9. In view of the confirmation order dated 31<sup>st</sup> October, 2013 I direct that the said order and a copy of the proceedings of the trial be forwarded to the Minister for the time being responsible in accordance with Section 167 (4) of the Criminal Procedure Code.

Delivered and Signed this **13<sup>TH</sup>** day of **May** 2016.

**C. Meoli**

**JUDGE**

In the presence of:

For the DPP                      Mr. Koima

For the Appellant              N/A

Appellant                        In person

Mr. Barasa                        Court Clerk