



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL 187 OF 2011**

**JOSEPH WAMBUA MBUVI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. J. Omange PM in Criminal Case No. 1560 of 2011 delivered on 11<sup>th</sup> October 2011 at the Chief Magistrate's Court at Machakos)**

**JUDGMENT**

The Appellant was convicted of, and sentenced to serve life imprisonment for the offence of defilement of a child, contrary to section 8(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 9<sup>th</sup> October 2011 at [particulars withheld] , Kathiani Location in Machakos County within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M N M, a child aged 11 years.

The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 9<sup>th</sup> October 2011 at [particulars withheld] , Kathiani Location in Machakos County within Eastern Province, he intentionally and unlawfully touched the vagina of M N M , a child aged 11 years with his penis.

The Appellant pleaded guilty to the main offence when he was arraigned before the trial Court on 11<sup>th</sup> October 2011, and was convicted on his own plea of guilty and sentenced to life imprisonment. The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in his Amended Supplementary Grounds of Appeal and submissions he availed to the Court, wherein he states that the trial magistrate erred in law and facts by convicting and sentencing him without complying with Article 50 (2) (b) of the Constitution.

According to the Appellant, the trial court did not accord him a fair hearing as it contravened section 207 of the Criminal Procedure Code as encapsulated in the case of **Adam vs Republic 1973 E.A 445** as regards the taking of a plea of guilty. Further, that it was not clear if he understood the Kiswahili language and ought to have been afforded an interpreter when the charge was being read to him. The Appellant urged this Court to consider the years he has spent in incarceration, and exercise its powers under section 364(1), 354 and 358 of the Criminal Procedure Code.

The prosecution did not file any response to, or submissions on the appeal despite being given several opportunities to do so.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The issue in this appeal is whether the plea of guilty by the Appellant was unequivocal. The procedure to be applied in taking a plea of guilty were well enunciated in the case of **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

***“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***

***(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.***

***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***

***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***

***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”***

The procedure as laid out in **Adan vs Republic (supra)** is also provided for under section 207 of the Criminal Procedure Code which provides as follows:

**(1)The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**

**(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**

**Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

**(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**

**(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.**

Coming to the present appeal, the record of the trial court indicates that the proceedings during taking of the plea by the Appellant on 11<sup>th</sup> October 2015 was as follows:

**“Name of magistrate : J. Omenge - P.M**

**Name of prosecutor: I.P Kavoo**

**Name of interpreter: Mbithe. Interpretation English/Swahili**

**Accused present**

**The substance of the charge and every element of it read and explained · to accused and**

**understood. Accused in his own words replies: It is true I slept with the child.**

**On Court explaining charge in Kiswahili- I did it**

**Court : Plea of guilty entered.**

**Prosecutor: Reads facts in Kiswahili which accused understands.**

**On 9th October 2011 complainant M N M was in homestead where her mother works as house help. The accused who also works as shamba boy invited complainant to his home . Complainant took child aged 11 years who is in class 5 at Kathiani to his bed and had carnal knowledge of the child without her consent. Child reported to her mother and she was escorted to Kathiani police. Accused taken to station and child taken to hospital. I wish to produce medical report exhibit 1, P3 for M N M , exhibit 2, P3 for complainant p.exhibit 3.**

**J . OMANGE- P.M**

**Accused : Facts are correct. I had sex with the child. I have accepted. I did it.**

**Court: Accused is convicted on his own plea of guilty”**

The record shows that the charge and facts were read out to the Appellant in Kiswahili by an interpreter and explained to him by the Court and he responded thereto. The Appellant's response was clear and unequivocal and he could not have replied as he did and two times, if he did not understand the charges and facts that were read out to him.

It is evident he admitted more than once to having sex with the complainant as was stated in the facts and his plea of guilty was therefore unequivocal. The elements of defilement of penetration and positive identification of the Appellant were thereby shown by the facts. The other element of age were also proved by the P3 filled for the complainant produced by the Prosecution as its Exhibit 2, which indicated that the complainant was 11 years old.

Lastly, I note that the even though the Appellant was a first offender, the minimum sentence for the offence of defilement of a child aged 11 years is life imprisonment, and this Court therefore has no discretion to revise or reduce the sentence imposed upon the Appellant.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, Act No. 3 of 2006, and the sentence imposed upon him of life imprisonment is also upheld.

It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 27<sup>th</sup> DAY OF OCTOBER 2016.**

**P. NYAMWEYA**

**JUDGE**