



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 57 OF 2016**

**MOSES MURIITHI MUNGANIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No. 245 of 2011 of the Chief Magistrate's Court at Meru by Hon. D.W Mburu – Principal Magistrate)*

**JUDGMENT**

The appellant, **MOSES MURIITHI MUNGANIA**, was charged with an offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 21<sup>st</sup> March 2011 at [Particulars withheld] village in [Particulars withheld] District of the Meru County, the appellant intentionally caused his penis to penetrate the vagina of **G.M**, a girl aged 14 years.

The appellant was convicted and sentenced to 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact by convicting him on a defective charge.
2. That the learned trial magistrate erred in law and fact by commencing trial without conducting a voir dire.
3. That the learned trial magistrate erred in law and facts by convicting him without evidence of penetration.

The state conceded to the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case are briefly as follows:

The appellant lured the complainant aged 14 years into his house with sweets. When she went in, he defiled her.

In his defence the appellant contended he was framed up for the complainant's mother had a grudge with him.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

After my perusal of the record, I have noted that the evidence of PW1, a minor aged 14 years was taken without the voir dire examination. This was before Hon. S.K.N Andriessen. The learned magistrate remarked:

**"PW1- minor 14 years to give affirmed evidence."**

The court of appeal in the case of appeal in the case of **KINYUA V. R [2004] I KLR 256** at page 265 said:-

**"There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"**

**In the case of ELPHAS MUGO V REPUBLIC [2016]** the court of appeal at Nyeri held that failure to observe this procedure was a mistrial. This is what the court said:

**"The effect of these procedural errors is that the appellant's trial was vitiated and was a mistrial."**

In the instant case I must find that this was a mistrial.

I will not address the issue of sufficiency of evidence for the order I am about to make.

I am remitting this matter to Meru Chief Magistrate's Court for retrial.

The trial should be before any other magistrate other than S.K.N Andriessen and D.W Mburu.

The matter to be mentioned before the Chief Magistrate on 12<sup>th</sup> January 2017 for further orders.

**DATED at Meru 20<sup>th</sup> day of December 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**