



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 213 OF 2013

ALEX JOHN MUTATI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offences Case No. 22 of 2013 by

Hon. S.A Ogoti, R.M on 2/9/13)

JUDGMENT

1. **Alex John Mutati**, the appellant was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Acts No. 3 of 2006**. Particulars thereof being that on the 28th August, 2013 at 3.00pm in **Ikutha District** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the anus of **MM** a child aged three and half 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 thereof being that on the 28th August, 2013 at 3.00pm in **Ikutha District** within **Kitui County**, intentionally touched the private parts of **MM** a child aged three and half years with his penis.
3. On being arraigned before court for trial, the charge was read to the appellant who pleaded guilty. He was convicted and sentenced to life imprisonment.
4. Being dissatisfied by the decision of the court he appealed on grounds that;-
 - i. No services of an interpreter were provided which was in contravention of **Article 50(2)** of the **Constitution**;
 - ii. No warning was given of the consequences of admitting the charge;
 - iii. The appellant was not informed of the right to appeal within 14 days.
5. Seeking a retrial the appellant relied upon written submissions.
6. In a response thereto, the State counsel, **Ms Njuguna** opposed the appeal. She stated that the plea was unequivocal. The charge was read in Kikamba language, that the appellant understood. The appellant was cautioned of the consequences of the plea of guilty. Evidence was disclosed by the facts. She concluded by stating that if it is proved that the appellant's right were violated he could seek compensation in monetary terms.

7. This being the first appeal, I am reminded of the duty to re-consider the record and come up with my own conclusions.

8. When the appellant was produced in court, the charge was read to him in 'kamba' a language that he understood. The interpretation was done by 'Janet' a court interpreter therefore services of an interpreter were availed and discharged as required by the law (*see Said Hassan Nuno versus Republic [2010] eKLR*).

9. The court duly cautioned him of the consequences of pleading guilty as indicated on record. This court stated thus:-

“Are you aware that you are pleading guilty to an offence that can see you jailed for life?”.

The appellant responded:-

“I agree but I ask for forgiveness”:

10. Facts were then presented which disclosed the age of the child and the injury sustained by the child. Evidence pointing to the accused as the assailant was circumstantial. The appellant admitted facts as outlined and was found guilty by the court.

11. **Section 207 (2) of the Criminal Procedure Code** provides:-

“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”. Emphasis mine.

12. It is mandatory for the court to convict and specifically indicate as such. In this case the court entered a plea of guilty but failed to convict the appellant prior to imposing the sentence. This was an error on the part of the court that violates the decision reached.

13. In the circumstances I allow the appeal, set aside the sentence imposed and order a retrial. The appellant shall be tried by another court of competent jurisdiction. In the meantime he will remain in custody and shall be produced before the **Principal Magistrate’s Court at Mutomo** on the **12th February, 2015** for a retrial.

DATED, SIGNED and DELIVERED at MACHAKOS this 22ND day of JANUARY, 2015.

L.N. MUTENDE

JUDGE