



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 41 OF 2014**

**TOBIAS IMENDE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM MASENO PM'S  
COURT: A. R. KITHINJI AG. SPM**

**IN CRIMINAL CASE NO.326 OF 2014.]**

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

1. The appellant was charged with the offence of defilement Contrary to Section 8(1)(4) of the Sexual Offences Act No.3/06. The particulars were that on diverse dates between 19th and 22nd day of March 2014 in [particulars withheld] Sub-Location, Ipali Location within the County of Vihiga intentionally caused his penis to penetrate the vagina of B J a child aged 17 years.

2. The alternative charge charge was committing an Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act No.3/06. The particulars were that on diverse dates of 19th and 22nd days of March 2014 in [particulars withheld] Sub-Location, Ipali Location within the County of Vihiga intentionally touched the vagina of B J with his penis a child aged 17 years.

3. On his own plea of guilty the appellant was convicted and sentenced to 15 years imprisonment hence this appeal. In his petition of Appeal the appellant basically states that he was duped by the investigating officer into admitting the charge without taking into consideration the related consequences. He further submitted that he thought that he was pleading on a charge of being found in possession of chang'a and not defilement. He consequently prayed for a retrial.

4. The learned state counsel has opposed the appeal citing Section 382 of the Criminal Procedure Code where a party who has pleaded guilty to a charge cannot appeal against it except on the illegality of the sentence.,

5. The court has perused the proceedings and heard the parties herein. It is true that the appellant pleaded to the charge and was soundly convicted. Taking into consideration the submissions by the appellant herein who is 20 years old, I am inclined to order a retrial in the matter. It appears from the facts as read out to the appellant that both the complainant and the appellant were arrested and taken for treatment at Ipali Centre. However there was no report produced infavour of the appellant. Perhaps this would have aided the court in arriving at a proper conclusive decision.

6. Nonetheless taking into consideration the circumstances obtaining herein it will only be fair and just to have a retrial which I hereby order by setting aside the lower court's judgment.

The retrial be conducted by another magistrate with equal jurisdiction.

**Dated, signed and delivered this 27th July 2015.**

**H. K. CHEMITEI**

**J U D G E**