



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 116 OF 2012**

**DENNIS TUMBO MUNENE .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

***(From the original conviction and sentence in Criminal Case Number 1338 of 2008 in the Senior Resident Magistrate's court at Gichugu – Hon. T.M. MWANGI –(SRM)***

**JUDGMENT**

The appellant **DENNIS TUMBO MUNENE** was tried and convicted on a charge of committing an indecent act contrary to **section 11(6) of the Sexual offences Act (the Act)**.

It was alleged that on the 3<sup>rd</sup> day of November 2008 in Kirinyaga District of the Central Province, the appellant indecently assaulted **RNG**, a girl under the age of eleven years by touching her private parts.

The appellant had also been charged with the offence of defilement contrary to **Section 8(1) of the Act**. He was acquitted of this charge in the course of the trial under **Section 210 of the Criminal Procedure Code (the code)** due to lack of sufficient evidence.

The record of the lower court shows that the trial opened before Hon. B.J. Ndeda (SRM) who after hearing six witnesses was transferred to another station. The proceedings were taken over by Hon. T.M. Mwangi (SRM) on 14<sup>th</sup> October 2010 who following the appellant's election under **Section 200 of the Code** continued with the trial from where Hon. Ndeda stopped. Hon. Mwangi concluded the hearing after which he convicted the appellant for the offence of committing an indecent act contrary to **Section 11(6) of the Act**.

I have noted that this offence was charged in a separate count indicated as count 2 though ideally it ought to have been included as an alternative charge to the main count of defilement.

Be that as it may, the appellant upon conviction was sentenced to fifteen years imprisonment. It is against that conviction and sentence that the appellant filed this appeal.

In his grounds of appeal embraced in his petition of appeal and others in supplementary grounds of appeal filed later by his counsel Mr Ngangah, the appellant raised several broad issues challenging his conviction. In the main, he complained that the learned trial magistrate erred in law and in fact by convicting him even though the complainant's age had not been established and in failing to appreciate that the prosecution's evidence was contradictory and insufficient to sustain a conviction.

He also complained that the trial magistrate erred in law by failing to undertake a *voire dire* examination of the complainant who was a minor before receiving her evidence as required by the law.

When prosecuting the appeal, Nj Ngangah, learned counsel for the appellant made oral submissions in which he faulted the appellant's conviction on other grounds not covered in either the memorandum of appeal or in the supplementary grounds of appeal.

He contended that the appellant's conviction was illegal as it was based on **Section 11(6)** of the **Act** which was repealed by Gazette NO. 7 of 2007. He argued that since the appellant was convicted on 24<sup>th</sup> June 2011 about four years later, the appellant's conviction was based on a non-existent law.

In addition, counsel invited the court to note that besides failure to conduct a *voire dire* examination on the complainant, there were other procedural irregularities in the trial which ought to vitiate the conviction.

He noted that the trial court did not indicate the language used during the trial which went against the concept of fair hearing as doubts were created whether or not the appellant understood the proceedings.

Further, Mr Ngangah submitted that the prosecution's failure in this case to prove the actual age of the complainant was fatal to its case considering that age of the victim is an essential ingredient of offences charged under the **Act** and that failure to prove the complainant's age meant that the offence had not been proved.

The state through learned state counsel M/S Macharia did not oppose the appeal. She conceded to the appeal mainly on grounds that at the time the appellant was convicted, **Section 11(6)** of the **Act** had already been repealed and was therefore non-existent. She also agreed with the submissions made by Mr Nganga that there were procedural irregularities in the trial concerning non-disclosure of the language used in the proceedings and failure of the learned trial magistrate to conduct a *voire dire* examination before taking the complainant's evidence.

I have considered the grounds of appeal and the submissions made by both learned counsel for the appellant and the state.

I have also perused the record of the lower court. I have noted that indeed the appellant was convicted with the offence of committing an indecent act contrary to **Section 11(6)** of the **Act** and was subsequently sentenced to fifteen years imprisonment.

I am in total agreement with the submissions by learned counsel that by the time the appellant was convicted and sentenced, the offence for which he was convicted was unknown in our law since the law which had hitherto created it had been repealed by Act NO. 7 of 2007. The appellant had allegedly committed the offence on the 3<sup>rd</sup> day of November 2008 which was about an year after the law was repealed.

**Article 50(2) (n)** of the **Constitution** provides that:-

*“Every accused person has a right to fair trial which includes the right;*

*(a).....*

*(n) Not to be convicted for an act or omission that at the time it was committed or omitted was not;*

*(1) An offence in Kenya or*

*(11) A crime under international law.*

The offence for which the appellant was convicted was obviously not a crime under international law nor

was it an offence in the Republic of Kenya at the time it was allegedly committed. The appellant's conviction therefore violated his constitutional right under Art 50 (2) (n) and by extension his right to a fair trial.

He should not have been prosecuted for the offence in the first place. His conviction was therefore a nullity in law and it goes without saying that it cannot be allowed to stand.

The above finding is sufficient to dispose off this appeal and in the circumstances, I do not find it necessary to consider the existence or otherwise of the procedural and evidential anomalies in the conduct of the proceedings cited by both counsel for the appellant and the state in their submissions.

In the end, I find merit in the appeal and I hereby allow it. I quash the appellant's conviction and set aside the sentence.

The appellant is to be set at liberty forthwith unless otherwise lawfully held.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17<sup>th</sup> DAY OF JANUARY 2014 in the presence of:**

The appellant

Mr Sitati for the state

Kariuki Court Clerk