



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 14 OF 2011**

NZOMO MAI ..... APPELLANT

VERSUS

REPUBLIC

*(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Resident Magistrate delivered on 21/01/2011 in Mutomo Resident Magistrate Criminal Case No. 215 of 2010)*

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*(Before Hon. B. Thurairaja J)*

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

1. The Appellant, Nzomo Mai was charged with the offence of **defilement contrary to section 8 (1) & (3) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on the 20<sup>th</sup> day of May 2010 at *[particulars withheld]* village, Kiatu Sub-location in Mathima Location, Mutomo District within the Eastern Province, defiled a girl aged 16 years, namely M T.

2. In the alternative, the Appellant was charged with the offence of **indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on the 20<sup>th</sup> day of May 2010 at *[particulars withheld]* village, Kiatu Sub-location, in Mathima Location, Mutomo District of the Eastern Province committed an act of indecency with M T a child aged 16 years by touching her private parts namely vagina and breasts.

3. When the Appellant was arraigned in court, he denied the offence. After a full trial, the Appellant was convicted and sentenced to fifteen (15) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
  - v. **That the prosecution case was not proved beyond reasonable doubts.**
  - v. **That the complainant's age was not ascertained.**
  - v. **That his mitigation was not considered.**
  - v. **That the charge in the alternative count was defective.**

4. During the hearing of the appeal, the Appellant relied on written submissions. The submissions

- essentially expounded the grounds of appeal.
5. The learned counsel for the State opposed the appeal and submitted that the prosecution case was proved beyond reasonable doubt.
  6. This being a first appeal, this court is bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
  7. The case for the prosecution was that on 20/5/2010 at about 11.00 a.m, the complainant PW1 **M T**, a 16 year old standard six girl had gone to do some casual work at the Appellant’s farm. While the Complainant was tilling the land, the Appellant went there and started talking to her, got hold of her and fell her down and had sex with her. The next day, the complainant informed her grandmother, PW5 **K M** what had transpired. The complainant continued to go to school but it was later discovered that she was pregnant. The matter was reported to the area chief and to police. The complainant was issued with a P3 form and escorted to hospital for examination. It was confirmed that the complainant was pregnant. The Appellant was then arrested and charged with the present offence.
  8. When put on his defence, the Appellant elected to remain silent.
  9. The complainant narrated to the court what transpired at the material time. It was the complainant’s evidence that the Appellant had sexual intercourse with her. The offence took place in broad daylight. The complainant knew the Appellant and was carrying out some casual work in his farm. This evidence of recognition is therefore free from any possibility of error.
  10. The evidence of the grandmother (PW5) is that the complainant informed her of the matter the next day. The grandmother’s evidence shows consistency between the evidence of the complainant in court and what she informed her grandmother soon after the offence. The complainant mentioned the name of the Appellant even at that stage as the culprit.
  11. The complainant’s evidence was that she was 16 years old and in standard six at the material time. The evidence of the head teacher of *[particulars withheld]* **Primary School**, PW4 **H M K** confirmed that the complainant was a standard six girl. The Clinical Officer, PW6 **Daniel Mulwa** gave the complainant’s age assessment as sixteen years and confirmed that she was pregnant.
  12. The evidence of PW7 **P.C. Benjamin Maundu** confirmed that a report was made to the police station and investigations carried out prior to the Appellant being charged.
  13. The Appellant exercised his right to remain silent in his defence. However, having evaluated the evidence on record, I am satisfied the prosecution case was proved beyond any reasonable doubts.
  14. The complainant was sixteen years old. It was therefore not necessary for the trial court to carry out a *voire dire* as the trial magistrate purported to. Although, **Section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** provides that a child of tender years be examined by the court to see whether the child understands the nature of an oath, **Section 2 of the Children’s Act** defines a child of tender years as a child under ten (10) years.
  15. One of the grounds of appeal raised by the Appellant is that no DNA test was carried out. However, the proviso to **section 124** of the Evidence Act stipulates as follows:-

**“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

16. The trial magistrate believed the evidence of the complainant. I have no reasons to differ with the trial magistrate who observed the demeanour of the witnesses.
17. I have considered whether the charge is defective or not. **Section 8 (1) of the Sexual Offences Act** states as follows:-

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

**Section 8 (3) of the Sexual Offences Act** provides as follows:-

**“A person who commits an offence of defilement with a child between the age of**

**twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years..”**

18. The Appellant was charged and convicted for the offence of defilement contrary to **section 8 (1) and (3) of the Sexual Offences Act**. The complainant was sixteen years old. The Appellant ought to have been charged under **section 8 (1) and (4) of the Sexual Offences Act** which provides for the offence and penalty for the defilement of a child between the age of sixteen to eighteen years.
19. The omission to state the correct provision of the law, that is, **section 8 (1) and (3)** instead of **8 (1) and (4) of the Sexual Offences Act** is curable under **Section 382 of the Criminal Procedure Code** which stipulates as follows:-

**“ Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”**

It is further observed that **Section 134 of the Criminal Procedure Code** provides for the components/ingredients of a charge sheet as follows:-

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

20. It was clear that from the onset, the Appellant knew that he faced the charge of defilement. Its particulars were clearly spelt out, which included the date, the place and the act constituting the offence and the name of the victim.
21. The trial magistrate convicted the Appellant for the offence of defilement in the main count and also proceeded to convict the Appellant for the alternative count of indecent act with a child. This was an error. The trial magistrate ought to have convicted the Appellant either for the main count or in the alternative count. I make a correction and enter a conviction in the main count of defilement contrary to **section 8 (1) and (4) of the Sexual Offences Act**. The sentence of fifteen (15) years is within the law.
22. With the foregoing, I find no merits in the appeal and dismiss the same. I uphold conviction and the sentence meted out by the lower court.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 24<sup>th</sup> day of February 2014.**

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**B. THURANIRA JADEN**

**JUDGE**