



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.36 OF 2011**

**BETWEEN**

**JEFFERSON MURITHI MBUBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case No.210 of 2011*

*in Mukurweini SRM's Court dated 3rd March, 2011, Hon. F.M. Kombo, SRM)*

**JUDGMENT**

The appellant was charged with the offence of defilement of a boy contrary to **Section 8 (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on the 13th day of April 2010 in Mukurweini District within Central Province, committed an act which caused penetration with BM a boy aged 6 years.

He faced an alternative charge of Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of which were that on 13th day of April 2010 in Mukurweini District within Central Province unlawfully and intentionally committed an Indecent Act with B.M. an indecent act which he would not have allowed.

He pleaded not guilty, was tried, convicted and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence, he filed this appeal through his home grown grounds of appeal filed on 9th March 2011.

When the appeal came up for hearing before me, the appellant who was unrepresented filed an amended grounds of appeal as follows:-

- a. *He was convicted upon improperly obtained evidence.*
- b. *He was detained for more than 24 hours as provided for under **Section 72 (3)** of the **Constitution**.*

**Submissions**

It was submitted by the appellant that the evidence against him was improperly obtained and was aimed at framing him. It was submitted that the appellant was never taken for medical examination so as to link him with the offence and that he was not taken to court as was by law required. It was submitted that the prosecution evidence was based on hearsay and in particular PW3, PW4, PW5, PW6 and PW7.

Miss Maundu for the State submitted that the delay in taking the appellant to court was not inordinate and further submitted that if the court find that there was a delay then the appellant can apply for compensation. She submitted that there was no requirement from the appellant to be medically examined.

This being a first appeal, the court is required to re-assess the evidence tendered before the trial court afresh and come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.

On behalf of the prosecution, PW1 Dr. Salome wanjohi, a medical officer examined the complainant aged 6 years confirming that upon examination, the same had a scar in his anus with pus cell showing some form of infection. PW2 stated on oath that he was with the appellant and Maina when the appellant sent Maina to buy “Ngumu” burns at the shop. He then closed the door, threw him on bed and applied petroleum jelly on his buttocks before defiling him. When the appellant left he screamed and people came and arrested the appellant.

PW3 Peter Maina Muranga went with a group of people in response to the screams to the house where the appellant was and arrested him. PW4 Evan Bari Mwangi responded to the screams of his mother and found that PW2 had been sodomized by the appellant whom they arrested and escorted to Kabuta AP Post where under cross examination he confirmed that the appellant admitted the offence.

PW5 MWM the complainant's grand mother examined his buttocks and observed that petroleum jelly had been applied on them while PW6 S.M aged 13 years confirmed that he was in the house with the appellant and PW2 when he was sent to the shop to buy two cakes and one tobacco roll. When he came back he found the door closed and when he called out the complainant he took time to open and later informed him that the appellant had defiled him.

When put on his defence, the appellant gave unsworn statement and stated that he was employed as a shamba boy on the material day upon completing his duties he went to Kabuta market upto 7.00 p.m when he was arrested by people who said they did not want Merus in the area and taken to the AP camp on allegation that eh had defiled a child.

### Issues

From the proceedings and submissions herein, the following issues have been identified for determination of this appeal.

Whether the appellant's constitutional rights were violated and if so whether the said violation vitiated the trial.

Whether the prosecution case against the appellant was proved beyond reasonable doubt

On the issue of the constitutional right of the appellant, Miss Maundu for the State conceded that the appellant was arrested on 13th April 2010 but taken to court on 20th April 2010 six days later. From the record it is clear that the prosecution did not give any reason for the delay. It is therefore clear that the appellant's constitutional rights were violated. However the present jurisprudence as was stated in the case of **Julius Kamau Mbugua -vs- R. Criminal Appeal No.50 of 2008** where the Court of Appeal held that when the rights was violated:

**“the ensuing prosecution is not a nullity and that a prosecution would only be a nullity if any of the circumstances (such as prosecution for the same offence in relation to which the person had been tried and acquitted ---- “it is not correct to say that the court has no jurisdiction to try a suspect after his rights to personal liberty have been breached before he was charged.”**

I therefore hold the view that the said breach did not vitiate the trial and since the appellant can apply for compensation I will dismiss this ground of appeal.

On the issue of whether the prosecution case against the appellant was proved beyond reasonable doubt, I have analyzed the evidence tendered and in particular the evidence of PW1 and PW6 who was with the complainant and the appellant together with PW1's evidence and the appellant's defence against the evidence of PW4 on how the appellant was arrested and find that the appellant's conviction was safe the prosecution having proved its case against him beyond reasonable doubt.

I therefore find no merit on the appeal herein which I hereby dismiss.

**Signed and dated this                    day of                    2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this    25th    day of November    2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- Appellant

----- for State