



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 133 OF 2010**

**DAVID GITONGA NYAGA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....PROSECUTOR**

**From original conviction and sentence in Criminal Case No.1528 of 2009 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI – PM on 3/8/2010**

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

**DAVID GITONGA NYAGA** the Appellant herein was charged with the offence of defilement of a girl contrary to section 8(2) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

**DAVID GITONGA NYAGA:** On the 3<sup>rd</sup> day of October 2009 at about 2.00pm in Embu District within the Eastern Province, willfully and unlawfully defiled one MM age 11 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

**DAVID GITONGA NYAGA:** On the 3<sup>rd</sup> day of October 2009 at about 2.00pm in Embu District within the Eastern Province, committed an indecent act with a child namely MM aged 11 years by touching her private parts.

The Appellant was convicted of the offence of defilement and sentenced to life imprisonment. He filed this appeal citing several grounds as follows;

- 1. That the learned trial Magistrate erred in both law and facts by failing to give the Appellant the necessary document to help him to prepare his defence.***
- 2. That the trial Magistrate overlooked by not putting into consideration the doctor's examination which manifested that the injury was for a long time.***

**3. That the learned trial Magistrate erred in both points of law and fact by not considering the complainant was forced by her mother to tell how she had been assaulted.**

**4. That the learned trial Magistrate erred by both point of law and fact by not considering that there was someone who claimed to have seen the complainant come out of a house purported to have been the accused and the person though qualifies to have been a key witness was not brought before Court to testify to the effect.**

**5. That the trial Magistrate erred in both law and in fact by not considering the P3 form where the doctor was also liable for examination to prove the accused was involved.**

When the appeal came for hearing the learned State Counsel conceded the appeal citing lack of proof of the age of the minor. She therefore asked for a retrial. It is clear from the evidence on record that the age of PW1 was not established. The Appellant was convicted and sentenced on 3/8/2010 to life imprisonment. He has only served three (3) years. I find it just that the matter should go for retrial. The retrial should be conducted speedily and must be concluded within six (6) months. The Appellant to be remanded in custody until he appears before the Chief Magistrate for plea and further orders on 5/8/2013.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1<sup>ST</sup> DAY OF AUGUST 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**Ingahizu for State**

**Appellant**

**Bernard – C/c**