



No. 78/13

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.73 OF 2011

DANIEL NGUI MUSYAAPPELLANT

VERSUS

RESPONDENT.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court, Criminal Case No. (S.). 1/2010 by Hon. B.M. Kimemia, SRM on 23/3/2011)

JUDGMENT

1. **Daniel Ngui Muasya** (*appellant*) was charged and convicted of the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 21 years imprisonment.
2. The appellant being aggrieved by the conviction and sentence lodged this appeal.
3. In his amended grounds of appeal he states that his constitutional rights were violated following failure of the trial magistrate to comply with section 214 of the Criminal Procedure Code when the charge was amended; the trial magistrate erred in law and fact when he failed to comply with section 85(2) of the Criminal Procedure Code; relied on contradictory evidence and failed to act by relying on evidence of an incompetent witness.
4. **Mrs Abuga**, the learned State Counsel conceded to the appeal. It was her submission that when the charges were amended on the 7th July, 2010 the appellant was not called upon to take the plea. Section 214 of the Criminal Procedure Code was therefore not complied with. In the premises she called upon the court to order a retrial as evidence tendered was watertight. The appellant having not served a substantial part of the sentence, she argued that he would not be prejudiced.
5. I have carefully analysed and re-evaluated the evidence adduced in this case. Being an appellate court in determining whether or not to order a retrial, I must bear in mind that a retrial can be ordered where the original trial was defective (see *Maliji versus Republic 1966 E.A. 343*) and an appellate court should not order a retrial unless there is relevant evidence that would definitely result into a conviction (see *Mwangi versus Republic 1983 KLR 522*). As importance is also whether the appellant will be prejudiced.
6. It is apparent that on the 7th July 2010 the trial magistrate allowed substitution of the charge the appellant faced. This was done in accordance with section 214 of the Criminal Procedure Code which stipulate as follows:-

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or

addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

provided that -

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge”

The learned magistrate however failed to comply with the law as aforesaid.

7. Looking at the evidence, if the case is heard afresh it will definitely result into a conviction of the appellant.
8. The appellant was sentenced to 21 years imprisonment. He has served two (2) years imprisonment. A substantial part of the sentence has not been served. In the circumstances if a retrial is ordered he will not be prejudiced.
9. Accordingly, I order a retrial in the case. The appellant shall be produced before **Kitui Principal Magistrate’s Court** for purposes of taking plea on the **16th September 2013**
10. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of SEPTEMBER, 2013.

L.N. MUTENDE

JUDGE