



No. 111/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 167 OF 2011

JOSEPH NJERU KIMANTHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Joseph Njeru Kimanthi**, the appellant was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act, No 3 of 2006. Particulars thereof being that on the 1st day of July 2010 at Mwangea Sub-Location in Mumoni District within Eastern Province intentionally and unlawfully caused his penis to penetrate the vagina of **M K** a child aged 8 years. In the alternative he is charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006. Particulars thereof being that on the 1st day of July 2010 at Mwangea Sub-Location, Mumoni District within Eastern Province intentionally touched the vagina of **M K** a child aged 8 years.
2. The appellant was tried, convicted and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence he has appealed on grounds that;-

The Trial Magistrate erred in law and fact by relying on contradictory evidence; omitting evidence of crucial witnesses; failing to consider relevant evidence and failing to accept the defence tendered as having not been misplaced.

3. **Mrs. Abuga**, the Learned State Counsel conceded to the appeal. She faulted the trial magistrate for making an order transferring the case to another subordinate court without being seized with powers to so order. In the circumstances she prayed for an order for a retrial. She stated that the appellant would suffer no prejudice following such an order.
4. A perusal of proceedings at page 8 shows that after PW1 testified the case came up for further hearing. On the 16th November, 2010 Counsel for the appellant notified the court that he preferred the matter to be heard at Kyuso Law Courts. Following his averment the court made an order transferring the case from Mwingi Law Courts to Kyuso Law Courts. The matter was consequently heard and disposed off by Senior Resident Magistrate, Kyuso.
5. A Magistrate presiding over a subordinate court of first class can only transfer a case to another magistrate within the local limits of that courts jurisdiction(**vide Section 79 of the Criminal Procedure Code**).
6. When it comes to transfer of the case to another jurisdiction, it is only the High Court that is seized of jurisdiction to transfer the case. (**vide Section 81 of the Criminal Procedure Code**).
7. This case was before Mwingi Law Courts which is of a different jurisdiction from Kyuso Law

Courts. It was therefore illegal for the trial Magistrate to transfer it for another jurisdiction. Consequently, there was a legal defect in the original trial. The proceedings that resulted being a nullity must be quashed.

8. The Learned State Counsel did seek a retrial. In the case of *Mwangi versus Republic [1983] KLR 522 Honcox JA, Chesoni and Nyarangi, Ag JJA held:-*

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that after a proper consideration of the admissible and potentially admissible evidence, a conviction might result”

9. I have carefully considered the appeal and I am of the opinion that this is a proper case where an order for a retrial should issue.
10. In this regard I do order that the appellant shall be produced before Senior Resident Magistrate Kyuso Law Court for purposes of taking a fresh plea in this case on the **12/11/2013**.
11. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE