



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 13 OF 2011**

*(From Original Conviction and Sentence in Criminal Case No. 150 of 2010 of the Senior Resident Magistrate's Court at Kaloleni: S. Wewa – S.R.M.)*

**KENNEDY KONDE MUNGA ..... APPELLANT**

**=VERSUS=**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant herein **KENNEDY KONDE MUNGA** has filed this appeal to challenge his conviction and sentence by the learned Resident Magistrate sitting at Mombasa Law Courts. The Appellant had been arraigned in court on 2<sup>nd</sup> August 2010 on a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

***“On diverse dates on [sic] the month of April 2010 in Kaloleni District within Coast province committed an act which caused penetration of a genital organ namely a penis into a genital organ namely vagina of D.A. a child aged 17 years”***

In addition the accused faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant entered a plea of **‘not guilty’** to both charges and his trial commenced before the lower court on 26<sup>th</sup> August 2010. The prosecution led by **INSPECTOR KIPTANUI** called a total of five (5) witnesses in support of their case.

**PW1 D.A** a child aged 17 years told the court that in July 2009, her mother had sent her to the nearby shops to purchase medicine. On the way she met Ken (accused) who was their neighbour. The accused made approaches seeking friendship with her. The complainant relented and the two commenced a love affair, which love affair was kept secret because the accused was a married man. **PW1** told court that upon a pre-arranged signal she would follow the accused to the toilets where they would engage in sexual intercourse. The accused would often buy her gifts. In March 2010 the complainant realized that she was pregnant. The accused gave her some tablets with a view to inducing an abortion. The complainant did not take the pills but threw them away. The teachers in her school realized that the complainant was pregnant and called in her parents. She was taken to hospital where a test confirmed that she was about 28 weeks pregnant. The matter was reported to Kaloleni Police Station. The complainant

revealed that it was the accused who was responsible for her pregnancy. The accused was then arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He opted to give an unsworn statement in which he denied any involvement in a sexual relationship with the complainant and also denied being the father of her unborn child. On 29<sup>th</sup> November 2010 the learned trial magistrate delivered his judgment in which he convicted the Appellant on the main charge of defilement and sentenced him to serve three (3) years probation. Upon revision by the High Court this sentence was later substituted with a term of 15 years imprisonment. Being aggrieved by both his conviction and sentence the Appellant filed this present appeal. **MR. ATANCHA** argued the appeal on behalf of the Appellant. **MR. ONSERIO** who appeared for the State opposed the appeal.

One of the grounds relied upon by Mr. Atancha in his submissions is that the charge sheet as framed was fatally defective. Counsel submits that the charge sheet does not comply with S. 137(d) of the Criminal Procedure Code because the complainant is only identified by her initials D.A. as opposed to the use of her full names. S. 37(d) provides:

***“(d) the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name [my own emphasis] or his abode, style, degree or occupation ....”***

This provision makes it quite clear that failure to identify an individual by his or her correct name does not render a charge invalid. Similarly the identification of the complainant in the charge sheet by use of her initials only does not in my view invalidate the charge at all.

As Mr. Onserio has pointed out the charge which the accused faced was brought under the Sexual Offences Act. The complainant was a minor. S. 76(5) of the Children Act 200 provides:

***“In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name identity home or last place of residence, school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise” [my emphasis]***

This provision exists to protect the identity of children who are vulnerable citizens from any form of publication by name or by photograph in legal proceedings. This provision can be read hand in hand with S. 137(d) of the Criminal Procedure Code. I find it is right and is proper procedure to refrain from referring to a child (any person under the age of 18) by his/her full name in any legal proceedings. The use of the initials of the complainant therefore complied with the law and in no way invalidated the charge. In addition I find that no prejudice was visited upon the accused by the reference to the complainant by her initials only. The complainant did testify before the court and did identify herself by her full names. Her identity was not in any doubt and the accused through his advocate were at liberty to cross-examine her on her testimony. I find no merit in this ground of the appeal and I do hereby dismiss the same.

Having said that I turn to consider the content of the evidence adduced before the trial court. The complainant in this case was a minor. An age-assessment report showed her to be 17 years of age. Thus she had no legal capacity to consent to a sexual relationship with the accused. In her evidence **PW1** told the court that it was the accused who befriended her, had sex with her and made her pregnant. She identified the accused as **‘Ken’** a neighbour whom she knew very well. According to her evidence they met several times for sex thus there is little likelihood that she was mistaken in her identification of the accused. Both the complainant's parents **J.O.R (PW2)** and **R.R PW3** confirm that the accused was their neighbour and that his name was Ken.

**PW1** told the court that she did not reveal the affair to anyone firstly because though a minor, she was a willing and active participant in the same and secondly because accused had warned her to keep the affair secret since he was a married man and obviously did not want his wife to discover his

adultery. **PW1** admits that she initially lied about who was responsible for her pregnancy. She states at age 5 line 17:

***“When I was asked by the parents I said it was another boy, you are in the dock because its you who told me to lie. It true its you”***

The complainant being a young impressionable child, believed herself to be in love would have obviously been influenced by the accused to lie about the affair in order to protect himself. **PW1** goes further to state:

***”At the police station I mentioned one Ken .... I named you. I kept quiet because you told me never to disclose you”***

Here **PW1** is clear that it was the accused with whom she was engaging in sex. As stated earlier this happened several times over a period from July 2009 to April 2010. She knew accused very well. There is no possibility of mistaken identity.

In his defence the accused claims that the charges were fabricated against him due to a grudge he had with the complainant’s mother over her stolen utensils. It is strange that the first time accused mentions this disagreement is during his statement in defence. He did not cross-examine the complainant’s mother **PW3** about this at all. I am inclined not to believe this defence. I find it is merely a story concocted by accused to try and shift blame from himself. **DW2 S.K** does not help matters at all. He claims that the disagreement the two families was over the fact that the accused objected to his wife attending church with the complainant’s parents. This defence witness contradicts the defence given by the accused. **DW2** was a friend to the accused, it is clear that he only came to court to try and clear his friend (accused) from all blame. In my view he was not a truthful witness. Lastly on this point both **PW2** and **PW3** the complainant’s parents told the court that the accuseds family made several approaches to try and get them to drop the matter. If the accused had never had any involvement with the complainant as he claimed why would he and his family be seeking to persuade the complainant’s family to settle the matter?

The fact that the accused and **PW1** were involved in a relationship is made clear by the evidence of **PW4 G.K** a friend to **PW1**. She told the court that on one occasion the complainant requested her to deliver a letter to accused. She too identifies the accused in court. Likewise **PW5 PC (W) CAROLYNE KANGOTHO**, who interrogated **PW1** at the police station told court that the girl named Ken (accused) as the one who defiled her. It is apparent that **PW1** stuck to her story all along. She named accused as her lover and no other person. **PW1** had no reason to lie against the accused. I am satisfied that there has been a clear and positive identification of the accused.

**PW6 JACK NYONGESA** a medical officer at St. Lukes Hospital told court that he examined the complainant on 30<sup>th</sup> July 2010. Both a physical examination and a urine test confirmed her to be pregnant. He estimated the age of the pregnancy to be approximately 32 weeks i.e. 8 months. By July 2010 when she was examined the complainant had been having sex with the accused for about 1 year from July 2009. From the several acts of intercourse it is quite possible that this pregnancy occurred, thus I am satisfied that it has been proved the complainant was indeed defiled by the Appellant which acts of defilement resulted in her pregnancy. Her evidence is corroborated by that of her parents and by the P3 form. The pregnancy provides clear proof penetration did occur. The Appellant’s conviction was sound both in law and in fact and I do hereby confirm the same.

After conviction the Appellant was allowed an opportunity to mitigate. The trial magistrate thereafter sentenced him to serve three (3) years probation. This sentence was later revised by the High Court to fifteen (15) years imprisonment. This is the minimum sentence provided for by S. 8(4) of the Sexual Offences Act which provides:

***“A person who commits an offence of defilement with a child between the age of sixteen to eighteen years is liable upon conviction to imprisonment for a term of not less [my emphasis] than fifteen***

*years”*

I am satisfied that the sentence imposed is the lawful sentence for such offence. The Appellant an adult married man chose to take advantage of the ignorance and gullibility of a young school child, luring her with cheap gifts into a seedy love affair in toilets! He ought to have known much better. Such men deserve a stiff and deterrent sentence. In my view the fifteen (15) year sentence is appropriate and I do uphold the same. Thus this appeal fails in its entirety. The conviction and sentence imposed on the Appellant are hereby confirmed and upheld.

**Dated and Delivered in Mombasa this 10<sup>th</sup> day of February 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Magolo holding brief for Mr. Atancha  
Mr. Onserio for State