



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC CRIMINAL APPLICATION NO. 130 OF 2011**

**RASHID OYOO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original conviction and sentence in Criminal Case number 1262 of 2011 of the Chief Magistrate's Municipal Court at Kisumu – Mr. T. Obuttu Esq.)**

**JUDGMENT**

The appellant herein was charged with two (2) counts namely Operating Pornography Contrary to Section 16 (1) (A) as read with Section 16 (1) (E) of the Sexual Offences Act.

The particulars of the charge are that on the 23<sup>rd</sup> day of September 2011 at about 10:30 p.m within Kisumu Municipality in Kisumu District of Kisumu county was found operating and showing pornography pictures without authority.

The second count was, causing Public nuisance contrary to Section 3 (P) as read with Section 4 “A” of the MCK General Nuisances by laws 2008.

The particulars of the charge are that on the 23<sup>rd</sup> September 2011 at about 10:30 p.m within Kisumu Municipality in Kisumu District of Kisumu County was found causing public nuisances by showing pornography pictures to members of public.

On his own plea the appellant was sentence on count 1 to pay Kshs. 500,000 in default five (5) years imprisonment and on count 2 Kshs. 1,000 in default fourteen (14) days imprisonment. The appellant filed five grounds of Appeal namely:-

- 1. The learned trial magistrate failed to consider that police did not inform me of my rights and communicate and with an advocate and other persons whose assistance is necessary for a proper plea to take being a layman contrary to Section 49 (1) of the Constitution of Kenya.**
- 2. The learned trial magistrate erred in law and facts by convicting me for an offence on my own plea of guilt without production of the exhibit allegedly recovered from the scene.**
- 3. The learned trial magistrate erred in law and facts by convicting me without informing me of my rights of not pleading guilty and the consequences of pleading guilty to the offence promptly.**

**4. The learned trial magistrate admitted the facts of the prosecution after my plea of guilty without support of such exhibits which was contrary to Section 50 (4) of the Constitution of Kenya and for me to confirm the genuineness or the right exhibits produced.**

**5. The learned trial magistrate failed to consider my mitigation on non custodial sentence contrary to Section 50 (2) of the constitution of Kenya and moreso order made for the return of my properties recovered as exhibits contrary to Section 50 (2) of the constitution of Kenya.**

When this matter come up for hearing the respondent counsel conceded to the appeal. I have listened to the counsel for the appellant and in particular the submission raised orally in court. Section 16 (1) (a) in which the appellant was charged against reads:-

**16 (1) (a) any person including a juristic person who**

**(a) Knowingly displays, shows, exposes, or exhibits obscene images, words or sounds by means of print, audio – visual or any other media to a child with intention of encouraging or enabling a child to engage in sexual acts”.**

**(e) Offences or attempts to do any act which is an offence under this Section;**

.....

The prosecution didn't prove that the offence was committed in the presence of a child. **M.A** was not proved to have been a child. The appeal on this ground succeed.

Further as contended by the appellant there was no production of any exhibits. The pornographic material or used condoms were never produced. This shows the shoddy investigation by the prosecution.

Consequently, I shall allow the appeal and order the release of the appellant unless lawfully held. In the event that the appellant had paid any fine then the same should be refunded.

Order accordingly.

**Dated, signed and delivered at Kisumu this 5<sup>th</sup> of March 2012**

**H. K. CHEMITEI**  
**JUDGE**

**In the presence of:**

.....**for State**

.....**Appellant in person**

*HKC/aao*