



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 98 OF 2009**

ALI NOOR ABDI.....APPLICANT  
VERSUS  
REPUBLIC .....RESPONDENT

**JUDGMENT**

**Para 1.** The Appellant was charged with the offence of defilement of a girl aged 14 years contrary to **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 18<sup>th</sup> January 2009 in Lagdera District within North Eastern Province the Appellant penetrate the genital organ of a girl aged 14 years.

**Para 2.** In the alternative the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. That on the 18<sup>th</sup> January 2009 at the same venue he touched A's private parts.

**Para 3.** He was convicted on the evidence of four witnesses who included Dr. Abdikadir who produced a P3 form that was blank in the area that should have given his opinion on whether there was penetration or not. The other three witnesses included PW2, the Complainant who said the Appellant gained entry into her house on the 1<sup>st</sup> September 2009 and found her sleeping.

**Para 4.** The Appellant pulled up her dress and began to have sexual intercourse with her. She managed to scream before the Appellant covered her mouth with his hand. Her scream brought PW3 her mother who told the court that she found the Appellant naked and in the act of ravishing her daughter. She pulled him of her daughter by one of his legs. He ran away.

**Para 5.** Both PW2 and PW3 said there was light in the house. PW4 P. C. Murgor Juma said the two witnesses made a report to him the following morning at 7a.m. That PW2 said she identified the assailant using a torch and that she identified him as Ali Abdi Noor.

**Para 6.** The Appellant being dissatisfied with the conviction filed an appeal relying on six grounds of appeal in which he pointed out several issues. These were that the judgment read to him belonged to one Joseph Musyoki Munyoki and not himself, that the P3 was of no use to the case, that he was not accorded a fair trial, that the amended charge sheet was not read to him, that the proceedings were contradictory and confusing and that the trial court should not have rejected his sworn defence.

**Para 7.** Indeed the judgment on record is titled Republic v Joseph Musyoki Munyoki but that is the typed judgment which was forwarded to the High Court on appeal. The handwritten judgment refers only to Ali Noor Abdi. The typed judgment also refers to Ali Noor Abdi throughout its body despite being titled Joseph Musyoki Munyoki.

**Para 8.** The court therefore concluded that this was a typographical error and since all else in the body of the judgment tallies entirely with the learned trial magistrates handwritten script the court finds that no prejudice was occasioned to the Appellant by this oversight.

**Para 9.** The court agrees with the Appellant that the P3 form produced in evidence by PW1 was if no use to the prosecution's case whatsoever in a case of this nature. It is perplexing that the Doctor who filled it left out the most crucial part which would have assisted the court to make a finding of fact as to whether or not there was penetration.

**Para 10.** The Doctor did not even give his opinion as to the age of the child since there was a dispute as to whether she was aged 14 years as the prosecution stated or 17 years as the defence maintained. Either way she would still be a minor, but the medical finding would have augmented the evidence of one side or the other.

**Para 11.** The investigating officer too, knowing what offence he was investigating, was satisfied to introduce a P3 in evidence which was blank in the material part.

**Para 12.** The court also noted that from the records the charge sheet was amended on 25<sup>th</sup> February 2009 yet the record of court does not reflect that the amended charge sheet was read to the Appellant and his plea recorded a fresh.

**Para 13.** The court has therefore considered all the pieces of evidence on record and found that it is weak on the following grounds:

**Para 14.** Identification of the Appellant by a torch in the circumstances explained in the evidence was not sufficient to sustain a conviction especially when both PW2 and PW3 are on record as stating that the person they were identifying was a stranger to them and there is no evidence of how he was identified for purposes of arrest.

**Para 15.** Corroboration through medical evidence is of paramount importance in cases of bodily assault and more so if the assault falls under sexual offences. The P3 produced in evidence in this case was as good as producing none since it made no mention of the issues it was supposed to corroborate.

**Para 16.** Under the **Sexual Offences Act No. 3 of 2006** at **Section 8** the age of the victim is significant because it not only determines what subsection the assailant may be charged under, but it also determines the sentence upon conviction. No evidence of age was adduced to prove the complainant's age. This should have been determined from her birth certificates in the absence of which the P3 should have included a portion on age assessment.

**Para 17.** Failure to read the amended charge sheet to the Applicant was fatal too because it is the right of the Appellant to be accorded a fair trial as enshrined in **Section 77** of the **old Constitution** and **Section 50** of the **new Constitution**. A fair trial includes the accused being told exactly what he is charged with and time and place when he is said to have committed the offence to enable him defend himself adequately. Since this is the court of the first appeal, the High Court has mandate to look at the evidence adduced before the trial court afresh, to re-evaluate and re-examine it to reach its own independent decision on whether the trial court directed itself properly on the facts before it and the law applicable and on whether or not to uphold the conviction of the Appellant. See **KOECH AND ANOR V. REPUBLIC [2004] 2KLR**

**Para 18.** The questions for determination herein were whether the Appellant was identified as the person who defiled PW2, whether the court could safely found a conviction on a sexual offence against a minor

without medical corroboration and whether the failure to read the amended charge sheet to the appellant amounted to a miscarriage of justice.

**Para 19.** The court finds that the identification evidence was not sound enough to sustain a conviction. The court also finds that absence of medical evidence to corroborate both the age and the fact of defilement was fatal in this case and failure to read the amended charge sheet to the Appellant did prejudice him as he had no way of knowing the full substance of what he was charged with.

**Para 20.** The court finds that there is a doubt in the prosecution case, both on the main charge and on the alternative charge and grants benefit thereof to the Appellant. The court allows the appeal and sets the Appellant free forthwith unless otherwise lawfully held.

Signed dated and delivered in open court this 25<sup>th</sup> Day of **October**, 2011.

**L. A. ACHODE**  
**JUDGE**  
**25<sup>th</sup> October 2011**