



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO.128 OF 2010**

**J. E. K.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence imposed by A. Kaniaru Principal Magistrate sitting at Murang'a in Principal Magistrate's Criminal Case No.1326 of 2010 delivered on 28<sup>th</sup> May 2011).*

**J U D G M E N T**

J.E. K. the appellant herein, pleaded guilty to a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that between the 22<sup>nd</sup> day of May 2010 and 26<sup>th</sup> day of May 2010 in Central Province did cause his penis to penetrate the vagina of M. W. a child aged 11 years. He was then sentenced to serve life imprisonment. Being aggrieved he preferred this appeal. On appeal the Appellant put forward the following grounds of appeal in his petition:

***“1. That due to my naivety in matters of law, I pleaded guilty to the charge.***

2. *That I was not explained the consequences of a conviction under Section 8 of the Sexual Offences Act.*
3. *That I was convicted immediately after being arraigned without giving me time to make consultations and advice.*
4. *That I was coerced by the police into admitting a charge I never committed or was partisan to through threats and intimidation.*
5. *That I was also cheated into pleading guilty under the promise that I would be released.*
6. *That there was a deep rooted grudge between I and the complainant's mother which led to my fabrication.*
7. *That my fundamental rights as enshrined under Section 72(3) (b) Constitution were violated after my arrest."*

When this appeal came up for hearing the appellant relied on written submissions. Miss Ngalyuka, Learned Senior State Counsel indicated to this court that the entire trial was a mistrial. She urged this court to declare the appellant's trial as a mistrial and to order for a retrial to be undertaken. The appellant was not opposed to a fresh trial. I have carefully perused the record and it is clear that the charge was read and explained to the appellant. The court prosecutor outlined the facts upon which the charge is founded. The law envisaged that the facts outlined should establish the particulars of the charge. It is alleged that the appellant defiled the complainant. The facts outlined did not include the medical report hence there was no evidence of penetration nor defilement. It is therefore obvious that the facts as outlined did not establish the offence the appellant was convicted for. At the time of taking plea, the P3 Form had not been filled. I am convinced the appeal was properly conceded. Miss Ngalyuka has beseeched this court to order for a retrial. I do not think this is a proper case to order for retrial. If I make the order, the prosecution will obviously rectify the defect by preparing and presenting a medical report. I am unable to comprehend the reasons why the court prosecutor was in a hurry to present facts without the medical report. I doubt whether the act was an innocent mistake. I will allow the appeal. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

**Dated and delivered this 2<sup>nd</sup> day of December, 2011.**

**J. K. SERGON**  
**JUDGE**