



**REPUBLIC OF KENYA**

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

**Criminal Appeal 11 of 2008**

**ERRO OBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Erro Oba was charged with the offence of penetration contrary to section 3(1) of the Sexual Offence Act No. 3 (1) of 2006. The particulars of the offence state that on the 25<sup>th</sup> day of November 2007 at Ngomongo village in Laikipia District within Rift Valley Province penetrated the genital organ namely vagina of [particulars withheld pursuant to section 76(5) of the Children Act, 2001] an imbecile aged 17 years. Although the charge sheet indicates an alternative charge, the records do not show that such an alternative charge was framed in the charge sheet. After trial, the appellant was convicted on his own plea of guilt and sentenced to 20 years imprisonment. He is now dissatisfied with the sentence.

During the hearing of this appeal the State conceded to this appeal on the grounds that the charge as drawn is defective for failure to include the terms ‘*intentionally or unlawful*’ as provided for under Section 3 of the Sexual Offences Act. This being a first appeal, this court has a duty to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the sentence. In so doing the court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of Njoroge vs. Republic [1987] KLR 19.

On the issue of sentence, the principles to bring to bear on whether or not to alter a sentence passed by the trial court are articulated in the case of Ogalo s/o Owour [1954] E.A.C.A. at page 270 where the Court of Appeal held as follows:

*“The court does not alter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”*

This appeal however turns on whether the appellant who was charged and tried based on a defective charge should be set at liberty since the charge as drawn did not disclose any offence known in law. Section 3(1)(a) of the Sexual Offences Act provides as follows:

*“3.(1)(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;”*

In this particular case, the charge as drawn by the prosecution is defective. This is a serious offence where the appellant defiled a mentally challenged victim of about 17 years old. The appellant was convicted on his own plea of guilt. In addition he is appealing in this matter only on sentence. This court has agonised on whether to refer this matter for retrial. However in the case of Ekimat vs. Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported) the Court of Appeal reiterated the principle that:

*“In the case of Ahmed Sumar v Republic [1964]E.A. 481, at page 483, the predecessor to this court stated as follows:*

*‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.’*

The court continued at the same page paragraph H and stated:

*“We are also referred to the judgment in Pascal Clement Braganza v. R [1957] E.A. 152. In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.’*

*There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”*

A retrial is not recommended because the defect which vitiated this conviction is associated with the prosecution who failed to draw the charge sheet according to the provisions of the law. The charge as drawn did not disclose any offence as provided for by the law for leaving out the words; ‘intentionally or unlawfully’. However I am compelled to give an opinion in regard to sexual offences where a mentally challenged victim is involved, such words; “intentionally or unlawfully” are not necessary because the victim has no capacity to give consent. This recommendation could be considered when the Sexual Offences Act is reviewed for possible amendments. As the law stands today, my hands are tied, this appeal has to be allowed and the sentence imposed by the trial court set aside. Unless the appellant is otherwise lawfully held he is to be set at liberty.

Judgment read and signed on 29<sup>th</sup> day of January 2009

**M. KOOME**

**JUDGE**