



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Criminal Appeal 164 of 2008**

**BENSON WAMBUA MBUVI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was tried and convicted by the Senior Resident Magistrate Siakago for the offence of Defilement contrary to Section 8 (1) (3) of the sexual offences Act No. 3 of 2006. He was sentenced to 10 years imprisonment. Being aggrieved by that conviction and sentence, he filed this appeal through Mogusu and Co. Advocates. He proffered 4 grounds of appeal. Among these grounds were the following:-

***(1) That the learned Trial Magistrate erred and misdirected himself in law in failing to uphold the Appellant's right to protection of law under Section 77 of the constitution.***

***(2) That the Trial Magistrate erred in law by giving an ambiguous sentence in respect of the 2 counts.***

I have singled out these 2 grounds because on their own they would determine the fate of this appeal.

Learned counsel for the state conceded the appeal on ground 2. He stated that the language of the court was not indicated in the proceedings although it is clear that the appellant did understand the language used and was therefore able to cross-examine the witnesses. The law is however clear on this point. The trial court for the avoidance of doubt must indicate the language used to conduct the proceedings. This is the only way the court can confirm that indeed the accused person did understand the language used. The court of Appeal decisions in;

***CISSE DJIBRILLA –V- R, Cr. App. No. 221/2006;***

***DIBA WAKO KIYATO- V- R (1982-88) 1 KAR 1974;***

***MBAE MARIJANI & ANOTHER –V- R Cr. Appeal No. 306***

***& 305/06*** are cases in point.

Since this appeal was conceded, I do not need to re-analyse the evidence adduced before the trial court for the purposes of this Judgment. I would however like to state that the learned trial magistrate should have indicated clearly whether he had convicted the appellant on the main charge and sentenced

him for the same. This is imperative and very important where there are more than one count in the charge sheet, be they other independent counts or just alternative counts. On these grounds, I find that the appeal was properly conceded. The state counsel has asked for a retrial saying that the evidence before the trial court was very strong and that the witnesses are still available to testify, and that they are not just asking for a retrial so that they can fill in the gaps in the prosecution case. I have considered the evidence adduced before the trial court. I agree with the learned state counsel that there was an eye witness in this case who corroborated the complainant's evidence. The appellant was "***caught red handed with his pants down***" as it were.

Although he did not actually have carnal knowledge of the complainant, he did remove her underpants and lay on her in an attempt to have carnal knowledge of her. He did not defile her but there was sufficient evidence to sustain a conviction on the alternative charge. I note that the offence is of a serious nature. He was convicted and sentenced less than 1 year ago and will not therefore be unduly prejudiced by a retrial. I therefore allow this appeal quash the conviction, set aside the sentence and order that the appellant be retried on the charge of indecent acts with a child which was the alternative charge before any magistrate of competent jurisdiction in Embu Law Courts.

He is therefore ordered released from prison and taken to the police station where he will be charged and presented to the Chief Magistrate's Court for plea, and fixing of a hearing date.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 23<sup>rd</sup> day of July 2009.

**In presence of:-Appellant and Mr. Omwega for order. Appellant be taken before the C.M. Embu on Monday 27/7/2009.**

**W. KARANJA**

**JUDGE**