



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Misc. Appli. 45 of 2008

REPUBLIC APPLICANT

VERSUS

FRANCIS KIVAI KITONYI RESPONDENT JUDGMENT

1. Francis Kivai Kitonyi was the accused person in **Machakos CM’S Court Criminal Case No. 2284/2007**. He faced the charge of defilement contrary to Section 8 (1) as read with sub-section 3 thereof of the Sexual Offences Act, 2006. It was alleged that **“on the 10th day of July 2007 at [particulars withheld pursuant to section 76 (5) of the Children Act] being a male person intentionally and unlawfully had carnal knowledge of K. W. a girl aged 13 years.”** In the alternative, that on the same day and place he **“indecently assaulted K. W. by touching her private parts.”**

2. On 19/7/2007, he appeared before M.N. Gicheru Esq, SPM and the record reads as follows:-

“Coram

Magistrate: M.N. Gicheru SPM

Prosecutor: C.I Kamau

Court clerk: Nyalo

Interpretation

Accused present/absent Represented by:-

The substance of the charge and every element thereof has been read and explained by the court to the accused person inlanguage which he/she understands who on being asked whether he/she admits or denies the truth of the charge replies:-

Main count – It is true

Alternative count –

Prosecutor: The complainant herein is aged 13 years old. On 10/7/2007 at about 5.00 p.m she was sent by her mother to fetch firewood in the bush. The accused followed her and lured her to his house 1 km away. Once in the house, the accused removed her pants and had sexual intercourse with her. He had intercourse with her the whole night and on the following day, he locked the complainant in the house and left. He continued with this for 4 days. He would have sexual intercourse with her at night and lock her in the house during the day. The mother made a report of her missing daughter to the police. Police on 13/7/2007 got a report of the complainant and found her in the accused’s house. The accused was arrested and charged. The complainant was examined at Machakos District Hospital. It was confirmed that the girl had indeed been defiled. I have the P3 form with me and I produce as an exhibit.

Accused: The facts are true. I defiled the girl for two (2) days.

Court: Accused is convicted on own plea of guilty on the main count of defilement.

M.N. GICHERU (SPM)

19/7/2007

Prosecutor: The accused may be treated as a first offender as I do not have his records.

Accused in Mitigation: The girl said she wanted to get married. She followed me to my place. She said she would not go home. I informed my parents. My parents were to go to hers. I was arrested before I could go to her parents.

Court: Sentence at 2.00 p.m. today.

M.N. GICHERU (SPM)

19/7/07

Later:

Coram as before

Accused

Sentence

I have considered that the accused is a first offender who has pleaded guilty. However the offence was committed deliberately and involved a small girl who will live with the trauma of the defilement for life. It is incredible that the accused could have been marrying a 13 year old child. I sentence the accused person to imprisonment for twenty (20) years.

M.N. GICHERU (SPM)

19/7/07”

3. The grounds of the Appeal before me are as follows:-

i. “The Learned Trial Magistrate erred in convicting the Appellant on a plea which was unequivocal.

ii. The Learned Trial Magistrate erred in conducting the proceedings in a language which was not understood by the Appellant.

iii. The Learned Trial magistrate erred in law and in fact in failing to appreciate that indeed the matters/facts presented before him did not confirm sufficient material to convict the appellant.

iv. The Learned Trial Magistrate erred in failing to enquire as to whether there had been put in process the motions of a Kamba customary marriage and thus in the circumstances whether an offence had been committed.

v. The Learned Trial Magistrate erred in failing to appreciate that when the appellant was called upon to respond to the facts stated, he did not admit the same.

vi. The Learned Trial Magistrate erred in both law and fact by conducting a trial which condoned the contravening of the Appellant’s guaranteed constitutional rights as provided by Section 72 (3) of the Constitution without any explanation whatsoever, whether justified or not by the prosecution.

vii. The Learned Trial Magistrate erred in law and in fact in failing to consider whether a defence under Section 8 (5) & 6 of the Sexual Offence Act had been raised.

viii. The Learned Trial magistrate erred in failing to make a social inquiry before sentencing the appellant and the sentence imposed was inappropriate in the circumstance.”

4. At the hearing, learned state counsel Mr Wang’onde conceded the Appeal and it is clear why; the language in which the pleas was taken is missing! I have seen the original record and it is indeed so. I have reproduced that record above and indeed the column for interpretation and language are all blank. It may have been an oversight on the part of the learned magistrate but it matters not. It has been said time and

time again and emphatically so in “**Adan vs R (1973)**” 358.

5. That being the law, the trial in the subordinate court was a nullity and I so declare. The Appeal is allowed and the conviction quashed and sentence set aside. The issue of a retrial is not contested and Mr Makundi for the Appellant admits that this is a fit case for a retrial. I see no reason why not.

6. The Appeal is consequently allowed and the appellant shall be retried at the Machakos CM’S Court by anyone other than M.N. Gicheru Esq SPM. Pending plea before that court, he shall remain in lawful custody.

7. Orders accordingly.

Dated and delivered at Machakos this 23rd day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Appellant present in person**

Mr Wang’ondy for Republic

ISAAC LENAOLA

JUDGE