



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**Criminal Appeal 421 of 2003**

*(Appeal from the original conviction and sentence in Criminal Case No. 336 of 2003 in the Resident Magistrate’s Court at Kangema by R. N. Muriuki (Miss) – R.M.)*

JOHN MWANGI CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

John Mwangi Chege hereinafter referred to as the Appellant was tried and convicted by the Resident Magistrate Kangema for the offence of Defilement of a girl contrary to Section 145 (1) of the Penal Code. He was sentenced to serve a period of 7 years imprisonment. Being dissatisfied He has appealed against his conviction and sentence.

The particulars of the charge of which the Appellant was convicted alleged that “**John Mwangi Chege: on the 30<sup>th</sup> May 2003 at Karuruma village in Murang’a District within Central Province had carnal knowledge of [particulars withheld] a girl under the age of fourteen years.**”

It is apparent from Section 145 (1) of the Penal Code (*as amended by Act 5 of 2003*) that the offence of defilement is committed only where there is “*unlawful*” carnal knowledge of a girl under the age of 16 years. This is consistent with the holding of Ondeyo J. in the case of **Ngeno vs Republic [2002] 1 KLR 457** that failure to state in the particulars that the carnal knowledge was unlawful renders a charge of Defilement fatally defective, and such a charge cannot stand as it discloses no offence.

In this case the appellant’s trial was defective as there was no proper charge before the court as the particulars alleged against the Appellant as reproduced above did not allege that He had “*unlawfully*” carnal knowledge of the Complainant. The trial was for all intents and purposes a mistrial. It follows that the Appellant’s conviction cannot stand. The same is therefore quashed and set aside.

The next issue is whether the Appellant should be subjected to a retrial.

In the case of Fatehali Manji vs Republic [1966] E A 343. The court of appeal held as follows:-

**“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial, where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”**

In the case of **Mwangi v/s Republic [1983] KLR 522** the court of appeal held as follows:

**“an order for a retrial is the proper order to make when an Accused has not had a satisfactory trial and a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result.”**

Being guided by the above authorities, it is evident that the trial of the Appellant was defective as the

charge of which He was tried did not disclose any offence. Although it is noted that the Appellant was convicted on 14<sup>th</sup> August 2003 and has therefore already served 1 year and 4 months imprisonment out of the 7 year jail term that was imposed on him, the appellant was facing a serious charge of defilement, an offence whose prevalence has now become a matter of public concern.

I do not find it necessary to go into the details of the evidence that was adduced before the trial Court, suffice it is to state that the evidence adduced before the trial court reveals that there was ***prima facie*** evidence upon which a conviction might result if a proper charge is brought against the Appellant. In my view, given the above and the fact that the Complainant is a step-daughter of the Appellant it is in the interest of justice that an order for retrial be made so that the case can be properly determined on the law and facts.

In the premises it is hereby ordered that the Appellant shall be remanded in police custody to be produced before a court of competent jurisdiction (*other than the court which tried him*) for retrial on a properly framed charge of defilement.

Those shall be the orders of this Court.

***Dated, signed and delivered this 29<sup>th</sup> day of December 2004.***

**H. M. OKWENGU**

**JUDGE**