



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL REVISION NO. 6 OF 2004**

**(SECTION 363 & 364 C.P.C.)**

**PETER MIANO MWAI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

This case has come to this court for perusal under Section 362 of the Civil Procedure Code. Having perused the file, it is apparent that the Accused was charged with the offence of “child abuse ” Contrary to Section 15 of the Children’s Act Number 8 of 2001 Laws of Kenya.

The particulars of the offence state as follows:-

**Peter Miano Mwai: on diverse dates between months of March 2003 and May 2003 at [particulars withheld] in Kirinyagah District of the Central Province unlawfully engaged into sexual activity with a child under the age of 18 years a child protected from sexual exploitation namely [NWM] and exposed her to pregnancy. Section 15 of the Children’s Act Number 8 of 2001 states as follows:- ild shall be protected from sexual exploitation and use in prostitution, induceme nt or coercion to engage in sexual activity and exposure to obscene materials.”**

It is obvious that this provision provides protection to a child from sexual exploitation and use in prostitution or engagement in sexual activity. Read in isolation Section 15 of the Children’s Act does not create any offence but provides a right to a child which is enforceable under Section 22 of the same Act which states as follows:-

***Section 22 (1): “Subject to sub -section (2) if any person alleges that any of the provisio ns of Section 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the Child . (2) The High Court shall hear and determine an application made by a person in pursuance of sub -section (1) and may make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).”***

This matter was not however brought under Section 22 of the Children’s Act for enforcement

of the rights of the child, but has been brought as a criminal charge against the Accused. The charge against the Accused is badly drafted as Section 15 generally does not create any offence. In particular the section does not create the offence of child abuse.

The section can only create an offence if read together with Section 20 which states as follows:-

***Section 20: "Notwithstanding penalties contained in any other law, where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in Section 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine."***

The offence created is not 'child abuse' but "willfully infringing on the rights of a child of protection from sexual exploitation." Contrary to Section 15 as read with Section 20 of the Children's Act. The trial Magistrate therefore ought to have rejected the charge filed against the Accused under Section 89 (5) of the Criminal Procedure Code.

An issue also arose in the Lower court as to whether the trial Court had jurisdiction to hear the case against the Accused since the trial Magistrate was not gazetted under Section 73 (d) (ii) of the Children's Act. The ruling of the trial Magistrate in this regard is proper as it is in accordance with Section 73 (d) (iii) of the Children's Act which states as follows:

**"where in the course of any proceedings in a Children's Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age or where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate is under eighteen years of age, nothing in this section shall prevent the court if it thinks fit from proceeding with the hearing and determination of the case."**

It is apparent from the proceedings in this case that the person to whom the proceedings relate is a child under the age of 18 years whereas the person charged (Accused) is over the age of eighteen years. It is thus within the discretion of the trial court to proceed with the case if it deems it appropriate.

Nevertheless, in the light of the defective charge brought against the Accused person, I find it necessary to exercise powers under Section 364 (1) (b) of the Criminal Procedure Code and review the ruling of the trial Magistrate dated 13th August 2004 with regard to the charge against the Accused. Accordingly I set aside the order accepting the charge and substitute it thereof with an order refusing to admit the charge under Section 89 (5) of the Criminal Procedure Code on the grounds that the charge filed is defective.

For the avoidance of doubt, it is hereby directed that the Accused person may be discharged of the defective charge, but the prosecution shall be at liberty to rearrest him and prefer appropriate charges against him. Those shall be the orders of this court.

**Dated this 29 th day of December 2004.**

**H. M. OKWENGU**

**JUDGE**