



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 11 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KY.....RESPONDENT**

**R U L I N G**

1. By a letter dated the 24<sup>th</sup> day of **November, 2017** **Hon. Z. J. Nyakundi, Senior Principal Magistrate** acting pursuant to the provisions of **Section 363** of the **Criminal Procedure Code (CPC)** forwarded this file to me with remarks that a **DNA Report** that was produced in the case was placed on the wrong file while the one that was in that particular file was placed herein. As a result of the confusion the Accused person was acquitted when in actual fact he should have been convicted as there was overwhelming evidence.

2. Pursuant to the provisions of **Section 364(2)** of the **Criminal Procedure Code** this Court issued summons requiring attendance of the individual which was to be executed by the **Officer Commanding Mutomo Police Station**. The matter came up for mention several times without any success. Consequently this Court summoned the **OCS, Mutomo** to give an explanation of what had transpired. On the **18<sup>th</sup> April, 2018** the **OCS, No. 23266 C I Paul Kemia** stated that after the acquittal the individual relocated from his area of residence and moved to an unknown place, efforts made by the **Chief Ikanga** and the Community Policing Agent to locate him were fruitless. When the matter came up on the **13<sup>th</sup> November, 2018** a year later, it was indicated that the **OCS** had been transferred.

3. The Accused in the matter was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between the month of **October, 2015** and **November, 2015** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **JM**, a girl aged **15 years**.

4. Facts of the case were that in the course of the month of **October, 2015** the Complainant had consensual sex with the Accused who to her knowledge was her father's cousin. They had another episode in **November, 2015**. As a result she conceived and was delivered of a child on **8<sup>th</sup> July, 2016**. Consequently the Accused was arrested and charged. Having heard the matter the trial Court did not believe the Complainant, hence returned a verdict of not guilty. He acquitted the Accused under **Section 210** of the **Criminal Procedure Code** despite the fact that the report of the Government Analyst indicated that there were **99.99+%** more chances that he was the biological father of the child sired by the Complainant.

5. **Section 364(2)(4)** of the **Criminal Procedure Code** provides thus:

***“(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***

***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***

***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.”***

Unless the Accused person is found and given the opportunity of being heard, this Court cannot make any orders converting the order of the trial Court. In the premises, this file shall be closed but a warrant of arrest shall issue and remain in force such that when the individual who was accused is found he can be brought before the Court for purposes of opening a file for Revision and subsequent orders may be made by the Court.

6. It is so ordered.

**Dated, Signed and Delivered at Kitui this 5<sup>th</sup> day of February, 2019.**

**L. N. MUTENDE**

**JUDGE**