



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA T MURANG'A
CRIMINAL APPEAL NO 265 OF 2013

**(Appeal from Conviction and Sentence in Murang'a CM Criminal Case No 4 of 2013 – E N J Osoro,
Ag SPM)**

JESSE MAINA NDUTA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **Jesse Maina Nduta** was on 05/03/2013 convicted on his own plea of **defilement** contrary to **section 8(1) and (3)** of the **Sexual Offences Act, No 3 of 2006** (the **Act**). It was alleged in the particulars of the offence that on 28/02/2013 in Murang'a Town within Murang'a County he intentionally caused his penis to penetrate the vagina of one **FNM**, a child aged 6 years. He was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. Although both the learned counsel for the Appellant and the learned Prosecution Counsel are in agreement that the record of the trial court was “not signed at all” by the learned magistrate as required by law (and for that reason the Prosecution Counsel did not support the conviction), they are, with respect wrong. I have checked the original record of the trial court. The learned Principal Magistrate, E N J Osoro, signed the record in no fewer than six (6) places, including the conviction and the sentence. Her signature may not be flashy or elaborate; nevertheless it is her signature!

3. The charge as laid and admitted by the Appellant, however, has a fundamental flaw. The Appellant was charged under section 8 (1) and (3) of the Act. Subsections (2), (3) and (4) of the section prescribe different instances of defilement depending on the age of the child defiled and different penalties.

4. We have already noted that the Appellant was charged under subsections (1) and (3) of section 8. Subsection (3) states –

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”.

The particulars of the offence the Appellant faced stated that the child was aged 6 years. These particulars were at variance with the offence charged under subsection (3). The offence charged was not disclosed by the particulars alleged. The charge was thus fatally defective.

5. Similarly, though the Appellant was charged under section 8 (1) and (3), and he presumably admitted and was convicted of that offence, he was sentenced under subsection (2) of that section which states –

“(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

The offence under subsection (2) is different from that under subsection (3). It is a much more serious offence carrying mandatory life imprisonment.

6. In all these circumstances, even for a moment assuming that the charge was proper, it could not be said that the Appellant’s plea was unequivocal. But I have already found that the charge as laid was fatally defective.

7. I will allow the appeal in its entirety. The conviction is quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AT MURANG’A THIS 16TH DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 17TH DAY OF JULY 2015