



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAPENGURIA**  
**REVISION OF THE JUDGMENT AND SENTENCE**  
**AGAINST THE 2<sup>ND</sup> ACCUSED SOLOMON LOCHAM,**  
**KAPENGURIA CRIMINAL CASE NO.718 OF 2013**

**REVISION**

The Principal Magistrate Kapenguria, Hon. D. M. Machage, availed this file to the High Court for review under section 364 (1) of the Criminal Procedure Code.

Brief issues of the case are that there were two accused persons in the file namely Wicklife Sacher Lokape and Solomon Locham. Both were charged in the same charge sheet with a similar offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006. Wicklife Sacher Lokape was charged in the first count whereby he allegedly defiled one P C C, a girl aged 16 years old, on 9<sup>th</sup> day of July 2013.

Solomon Locham was charged in the second count with defilement of the same girl, but on 10<sup>th</sup> day of July 2013 and at a different location.

The cases were heard together where two witnesses testified on 11/12/2013. On 15/10/2014, a hearing date, the 2<sup>nd</sup> accused, one Solomon Locham was absent. Warrant of arrest was issued. One witness was present and the court ordered for the matter to proceed in the absence of the 2<sup>nd</sup> accused. The matter so proceeded to the end. The judgment was passed on 18/8/2015 by **Hon. M. M. WACHIRA, a Resident Magistrate**. He found each accused guilty of the offence in the main count and sentenced each to serve 15 years imprisonment.

On 8/9/2015 the 2<sup>nd</sup> accused was arrested and arraigned **before Hon. P. Y Kulecho, a Resident Magistrate**. He had been sentenced in absentia and prosecutor applied for his commitment to prison to commence serving the 15 years sentence. He was given a chance to mitigate before he was sent to prison to start serving the sentence.

The legal question which arises is whether the proceedings against the 2<sup>nd</sup> accused were right, given the provision of section 206(1) & (2) of the Criminal Procedure Code. It reads;

***1. If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.***

**2. If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.**

The above provision shows clearly that only where an accused person is charged with an offence which is a misdemeanour can the trial Magistrate proceed in his or her absence. The Sexual Offences Act No.3 of 2006 does not describe offences in terms of Felonies and Misdemeanours. However the Penal Code which define the two words comes in handy for assistance.

Under section 4, which is on interpretation, a felony is indicated to mean:-

An offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.

Misdemeanour is said to mean any offence which is not a felony.

Under section 8(1) to (4) of the Sexual Offences Act, the least sentence one can get for the offence of defilement, of which depends on the age of the survivor, is 15 years imprisonment. Maximum is life imprisonment. The offence is therefore a felony. The trial Magistrate in Criminal file No.718/2013 was not entitled in law to proceed in absence of the 2<sup>nd</sup> accused, who had absconded.

After the 2<sup>nd</sup> accused was arrested and arraigned in court, the provisions of section 206(2) of the Criminal Procedure Code were not complied with. It's probable his absence in court was as a result of a cause of which was beyond his control.

The order by the trial Magistrate for issuance of warrant of arrest and to proceed in absence of the 2<sup>nd</sup> accused was made at the first instance the 2<sup>nd</sup> accused was absent. This was not right as the accused was not allowed time to probably surface and offer an explanation. In other words, at that moment there were no enough grounds to reasonably conclude that the 2<sup>nd</sup> accused had absconded and was not willing or available on another day to further participate in the trial.

The procedure adopted by the trial Magistrate deprived the 2<sup>nd</sup> accused of his right to be present throughout his trial as envisaged under section 194 of the Criminal Procedure Code and Article 50(f) of the Constitution which states that an accused person should be present when being tried, unless his or her conduct make it impossible for trial to proceed. Proceeding without him amounts to mistrial.

On the ground I do find existence of a weighty cause to review the said trial against him. ***I have done so, quashed the conviction and sentence, and do order a retrial before the Principal Magistrate, Kapenguria.***

**STEPHEN GITHINJI J**

**13/10/2015**