



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO.39 OF 2016**  
**DAVID OMONDI NDEJE.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in S. O Criminal Case Number 37 of 2016 in Senior Principal Magistrate’s Court at Nyandoby Hon. M.C. Nyingei (RM) on 22nd September, 2016)*

**JUDGMENT**

**The Trial**

1. The Appellant herein **David OmondiNdeje** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

**On 13.9.16 at [particulars withheld] within Kisumu County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of J.P.A a girl aged 9 years**

2. The charge was read out and explained to the accused person in Dholuo language which he understands and he replied:-

Accused – **“It is true.”**

3. The prosecution proceeded to give facts as follows:-

**“On 13.9.16 around 7.00 am, the complainant was on her way to school and she met accused who was known to her. He pulled her to a nearby bush and forcefully forced his penis to penetrate the vagina of the victim JPA. The victim raised an alarm and accused ran away. The complainant went back home and she found her mother and told her what had happened and that accused had forcefully had sexual intercourse with her. She took the victim to Jaramogi Oginga Odinga Teaching and Referral Hospital where she was treated and admitted. She reported to police station and a P3 form and a Post Rape Care Form were issued. I have birth certificate for the victim born on 15.8.08. ....**

The Appellant replied;-

**“The facts are true. It was at 7.45 am”**

4. The learned trial magistrate proceeded to enter a plea of guilty against the accused who was suspected to be a minor and convicted him on his own plea. The court ordered for an age assessment of accused. Report dated 20.9.16 which shows that appellant was 18 years was availed to court on 22.9.16.

5. The prosecution indicated that the appellant was a 1<sup>st</sup> offender. In mitigation, accused stated that he was a first offender and stated that he would not repeat again. In sentencing the Appellant, the trial magistrate had this to say:-

**“I have considered the mitigation of the accused person and taken into consideration the provisions of the Sentencing Policy. Given that accused is 18 years old and the victim is 9 years, I shall sentence the accused persons to life imprisonment as is provided by the law.**

6. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 19.12.17, appellant raised 3 grounds to wit:-

**1. That he pleaded guilty to the charge under duress after being coerced, intimidated, tortured and tricked by the police and members of public**

**2. That he was not availed to court within the stipulated time and no reason was given by the police**

**3. That his age assessment report was erroneous**

7. The appellant is appealing both on conviction and sentence. In the case of Adan Vs Republic [1973] EA LR 445, the court set out the steps to be followed by a court when taking plea. It was adopted in Kariuki Vs Republic [1954] KLR 809 where it was held:-

**(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;**

**(b) he should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;**

**(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

**(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply – Adan v Republic [1973] EA 445”.**

8. Courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. In the case of In Paulo MalimiMbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported), the court held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened.

9. In Simon GitauKinene v Republic [2016] eKLR, the court held as follows:

**“In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened.”**

10. In this case, the record shows that after appellant pleaded guilty he was “warned of the sentence by

***the court***". The particulars of the warning are not stated. There is therefore no evidence that the appellant was warned about the seriousness of the offence that he was pleading to. In those circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to unequivocally warn the Accused Person of the consequences of a guilty plea. This was clearly not done.

### **Decision**

11. In the end, therefore, the court makes the following orders:

- 1. The guilty plea entered against the appellant is hereby set aside.**
- 2. The sentenced imposed on the Appellant is hereby consequently set aside.**
- 3. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.**
- 4. The Appellant shall be presented before the Senior Principal Magistrate, Nyando Law Courts on Thursday, 22<sup>nd</sup> February, 2018 for taking plea afresh before any other magistrate other than Learned Honourable *M.C. Nyingei (RM)* who initially heard the case.**

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF February 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix and Caroline

Appellant - In Person

For the State - Ms Wafula