



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 58 OF 2016**

**PATRICK KIOKO MULWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 5275 of 2011 in the Chief Magistrate's Court at Thika by Hon L. Wachira Senior Resident Magistrate (SRM) on 21<sup>st</sup> October 2011)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Patrick Kioko Mulwa, was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 15<sup>th</sup> day of October 2011 in Muranga County within the Republic of Kenya, by use of his genital organ namely penis, committed an act which caused penetration to the genital organ namely, vagina of I M (hereinafter referred to as the ("Complainant") a girl aged 9 years.
2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the charge were that on the aforesaid date and place he committed an indecent act with the Complainant by touching her private parts namely vagina.
3. He pleaded guilty to the offence where upon which the Learned Trial Magistrate, Hon L. Wachira, Senior Resident Magistrate, convicted him on his own pleas of guilty and sentenced him to serve life imprisonment.
4. Being dissatisfied with the said judgment, the Appellant filed a Chamber Summons application seeking leave to file his appeal out of time which application was allowed. The Petition was deemed to have been duly filed and served. He relied on three (3) Grounds of Appeal. On 21<sup>st</sup> March 2018, he filed a Memorandum of Appeal and Written Submissions.
5. When the matter came up for hearing on 21<sup>st</sup> March 2018, the State submitted orally in court.

**LEGAL ANALYSIS**

6. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.**

7. Having considered the Appellant's and State's Written Submissions, it appeared to this court that the issues that were before it for determination:-

1. **Whether or not the Charge Sheet was defective; and**
2. **Whether or not sentence was harsh, severe and manifestly excessive warranting interference by this court.**

**I. CHARGE SHEET**

8. Grounds of Appeal Nos (1), (2) and (3) were dealt with together as they were related.

9. The Appellant submitted that the Charge Sheet omitted the word “unlawful” connoting that the offence he was charged with was lawful. He argued that under Section 43 of the Sexual Offences Act, an act is intentional and unlawful if it is committed:-

**a. In any coercive circumstances;**

**b. Under false pretences or by fraudulent means;**

**c. In respect of a person who is incapable of appreciating the nature of an act which causes the offence.**

10. He relied on the case of **Criminal Case No 352 of 2004 Peris Wairimu Gichuru vs Republic** wherein Kasango J found the Charge sheet to have been defective as the word “unlawful” had been omitted and therefore urged this court to allow his Appeal because no offence had been disclosed therein.

11. On its part, the State submitted that the Charge sheet disclosed the offence that the Appellant committed because it had indicated the date and place of the offence, the name and age of the Complainant. It also pointed out that he took the plea in the normal manner and relied on the case of **Aden vs Republic** in this regard. It urged this court to dismiss his Appeal because he pleaded guilty.

12. Where an accused person has pleaded guilty, the jurisdiction of an appellate court is limited to determining the legality and extent of the sentence. Section 348 of the Criminal Procedure Code Cap 75 Laws of Kenya stipulates as follows:-

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”.**

13. Section 8(1) of the Sexual Offences Act that provides as follows:-

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.**

14. It is obvious that an offence stipulated under any law can never be lawful. The omission to include the word “unlawful” cannot therefore render a Charge Sheet defective. There is nothing in the said provision that requires that the word “unlawful” must be included when drafting the charge. Notably, the word “unlawful” is missing from the provision.

15. Having said so, Section 382 of the Criminal Procedure Code provides that no finding, sentence or order passed by a court of competent jurisdiction can be reversed or altered on account of an error or omission in a charge.

16. Section 382 of the Criminal Procedure Code states that:-

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”**

17. In the absence of any demonstration by the Appellant of what prejudice he suffered due to the non-inclusion of the word “unlawful” in the Charge sheet, this court was not persuaded to find that the said Charge Sheet as drafted was defective. His plea was proper as the said facts of the offence were read out to him.

18. In the circumstances foregoing, his Grounds of Appeal No (1), (2) and (3) were not merited and the same are hereby dismissed.

## **II. SENTENCE**

19. The Appellant did not raise the issue of the legality and extent of his sentence as a Ground of Appeal. However, in his oral submissions the Appellant prayed that this court reduce his sentence because he was aged eighteen (18) years at the time he committed the offence. He pointed out that he was an orphan and consequently there was no one who could confirm his age.

20. On its part, the State argued that an Age Assessment was done and the same showed that the Appellant was over eighteen (18) years at the time he committed the offence.

21. A perusal of the court file showed that on 2<sup>nd</sup> November 2017, the Court ordered that the Appellant be taken for an age assessment. The Radiologist Dr R Nyabanda from Kenyatta National Hospital submitted a Radiological Report Form dated 18<sup>th</sup> September 2017 that showed that the Appellant herein was over twenty five (25) years at the time of the medical examination.

22. In view of the fact that the incident was said to have occurred in 2011 and the Assessment Report gave the Appellant’s age as having

been over twenty five (25) years, he was then born in 1992. That made him about nineteen (19) years at the time of commission of the same. There was therefore no limitation of the sentence that could be meted under Section 8 (3) of the Sexual Offences Act.

23. Section 8 (2) of the Sexual Offences Act provides that:-

**“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.”**

24. Accordingly, this court agreed with the Learned Trial Magistrate and the State that there was only one (1) sentence that could have been meted upon the Appellant and that is life imprisonment.

**DISPOSITION**

25. For the foregoing reasons, the upshot of this court decision was that the Appellant’s Appeal that was lodged on 21<sup>st</sup> March 2018 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction and the sentence that was meted upon the Appellant herein as they were both lawful and fitting.

26. It is so ordered.

**DATED at NAIROBI this 28<sup>th</sup> day of July 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at KIAMBU this 30<sup>th</sup> day of July 2018**

**C.MEOLI**

**JUDGE**