



**REPUBLIC OF KENYA**

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

**HCCRA NO: 2 OF 2016**

**E M O.....APPLICANT**

**-V E R S U S-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. This is the judgement of the Criminal Appeal No: **70 of 2015**. The Appellant E M O was charged in Nyamira Principal Magistrate's Court, in case No: **900 of 2015** for defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual Offences Act No: **3 of 2006**, on **Count I**.

Particulars thereof were that on the **20<sup>th</sup>** day of **July, 2015** at [particulars withheld] in Nyamira Sub-county within Nyamira County intentionally and unlawfully caused his penis to penetrate the anus of **K O M** a child aged 7 years.

**Alternative Charge was:**

Committing an indecent Act with a child contrary to **Section 11 (1)** of the Sexual Offences Act No: **3 of 2006**.

Particulars were: On the **20<sup>th</sup>** day of July, 2015 at [particulars withheld] in Nyamira Sub-county intentionally and unlawfully touched the anus of **K O M**, a child aged 7 years with his penis.

**COUNT II:**

**E M O** was charged with: Defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the Sexual Offences Act, No. **3 of 2006**.

Particulars were that on the **16<sup>th</sup>** day of **July, 2015** at [particulars withheld] in Nyamira Sub-county intentionally and unlawfully caused his penis to penetrate the anus of **K O M**, a child aged 9 years.

Further, there was also an alternative charge as per charge sheet.

**COUNT III:**

**E M O** was further charged for defilement contrary to **Section 8 (1)** as read with **8 (2)** of the Sexual Offences Act: No. **3 of 2006**.

The particulars thereof were that on **20<sup>th</sup> July, 2015** at [particulars withheld] in Nyamira Sub-county within Nyamira County intentionally and unlawfully caused his penis to penetrate the anus of **B A N**, a child aged 6 years.

There was further alternative charge and particulars thereof as per charge sheet on Count **III**.

2. The appellant when asked to plead to the (3) three counts, he pleaded guilty to all counts. The accused (now the appellant) was found guilty on his own plea and convicted accordingly.

He was then sentenced to life imprisonment on each of the three counts of defilement, the sentence was to run concurrently.

3. The appellant being dissatisfied has now brought this appeal. He filed (7) Grounds of appeal. However, at the hearing his Advocate **MORACHA** decided to abandon grounds 1, 2, 5, and 7 respectively. The grounds to be relied on are:

3. That the learned trial magistrate erred in law and fact by meting an excessive sentence against on allowed by law (penal code.)
4. That the learned trial magistrate erred in law and fact by sentencing the appellant without first making & finding whether by accepting the charges the appellant was warned and that his pleading guilty was unequivocal without coercion or intimidation.
6. That the learned trial magistrate erred in law and fact by sentencing the appellant without due regard to his age.

#### 4. **SUBMISSIONS:**

a) The appellant submitted as follows:-

- i) On grounds 3 above, the sentence meted out of life imprisonment was excessive; it ought to have been 10 years.
- ii) On grounds 4 above, there was coercion and intimidation on part of police that the appellant was made to believe that if he pleaded guilty, he would be acquitted. That this coercion influenced his readiness to admit guilty.
- iii) On ground 6 above, that at the time of the offence and in court, the appellant was a minor, he was 17 years old. Therefore, he ought to have been fined as a minor.

b) The Respondent submitted as follows: He opposed the appeal on the following grounds:-

- i) On issue of age, there was age assessment report dated 29<sup>th</sup>, July 2015 by DR. GOGA FREDRICK who worked at Nyamira Hospital, where it was established that the appellant's age was between 18 -20 years. By the birth certificate produced in court as an exhibit (13) the appellant was born on 4<sup>th</sup> May, 1997 making him aged 18 years on 20<sup>th</sup> July, 2015 at the time of committing the offence and at his trial.
- ii) On the issue of non-unequivocal plea. The Respondent submitted that the court explained to the appellant every element of the offence he faced. Thus by pleading guilty he had been explained the impact of the offence and its consequences. MR. OCHIENG' cited the court of appeal case of Adan -Vs- Republic (1973) E.A 445 Counsel also cited Section 207 of the Criminal Procedure Code.
- iii) On issue of coercion and intimidation, this is an afterthought and was not raised at the trial.
- iv) On sentence, the applicable law is not in our penal code. The appellant was charged under Sexual Offences Act, No. of 3 of 2006. This Act provides the penalties for each offence committed. It will be noted that the three boys sodomized i.e. K O M, K O M and B A N, were aged between 6, 7 & 9 respectively, all being below 11 years of age.

The Sexual Offences Act No: 3 of 2006 provides that anybody committing offence of Defilement with any child or children below the age of 11 years, must be sentenced to life imprisonment.

v) On the issue whether the sentence was excessive or not, the Respondent left it to the court.

5. First appellate court is to read the testimonies of the lower court, evaluate the evidence and reach an independent conclusion, having regard to the fact that you neither saw nor heard the testimonies. See Okeno Vs Republic (1972) 32.

#### 6. **ANALYSIS OF THE COURT PROCEEDINGS:**

The court record indicates that the accused was explained the substance of charges and every element thereof in the language he understood, who being asked whether he admits the truth of the charges replies:- to

Count I – **True**

Count II – **True**

Count III – **True**

The accused was unrepresented and being a young person, did not know the working of the court. The court did not warn the accused of the gravity of the offence, to which he was now pleading, of its penalty implications to this.

Had he had the benefit of legal counsel, most likely he would have been forewarned of what he was about to do.

#### 7. **FINDINGS:**

Although the appellant pleaded guilty to the three counts. He could not appreciate its import, perhaps what this would entail to him, being young and perhaps confused.

The court ought to have directed him to seek counsel or tell him that the offence he was pleading to carried life imprisonment.

With this, perhaps he would not have pleaded to these charges. If the accused had been on trial, perhaps he would have had the opportunity to raise the issues he is now raising i.e. intimidation and coercion. There was no trial as such. The appellant simply pleaded guilty, the court convicted him and what remained was sentencing.

It may well be true, that police coerced him to admit the offences through intimidation and or on legitimate expectation that he would be acquitted or made to serve very short sentence as he had been assured by those investigating the case. I accord him the benefit of doubt.

8. For those reasons, I order the release of the appellant forthwith. He has already served two (2) years imprisonment. That in my view, will suffice. He has learnt a lesson.

Therefore, the appellant is at liberty unless otherwise lawfully held.

**Dated and delivered at Nyamira High Court this 24<sup>th</sup> day of November, 2017.**

**C.B. NAGILAH**

**JUDGE**

**In the presence of:-**

**Moracha** for the Appellant

**Emmah** for the Respondent

**Mercy** Court Clerk