



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 5 OF 2015
VINCENT ONYANGO -----APPELLANT
VERSUS
REPUBLIC -----RESPONDENT

(Appeal arising from conviction and sentence from Chief Magistrate's Court Sexual Offence Case No. 19 of 2015 imposed by D.O. Ogola Chief Magistrate on 21st January 2015)

JUDGMENT

1. On 21st January 2015, Vincent Onyango (The Appellant) pleaded guilty to the offence of Defilement of a Girl contrary to Section 8(1)(2) of the Sexual Offences Act 2006. Upon his conviction he was sentenced to serve a prison term of 15 years.
2. The record shows that before sentence was passed, the Appellant said the following in mitigation;

“I am asking for leniency. I am a first offender. I am sick and I lose my mind occasionally. I did a bad thing and I am totally sorry. I am a sole breadwinner of my 3 children who would suffer. I have a sick wife. My family would suffer and become destitute if I am jailed. Since I was arrested, I have not taken medicine”

This Court agrees with the State Counsel that the words **“I am sick and I lose my mind occasionally”** invited the Court to consider whether in fact the Appellant was raising a Defence. The Defence he may have been raising was that of Insanity (Section 12 of the Penal Code).

3. It is for this reason that the plea would not be entirely unequivocal. I quash the conviction and set aside the Sentence imposed on him. In his written submissions to Court The Appellant asked this Court to either set him free absolutely or to place him on retrial. A retrial, in my view, would be the more appropriate order to make.
4. The Predecessors to the Court of Appeal in **Fatehali Maji vs the Republic** [1966] EA 344 said this of when a Retrial should be ordered;

“We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following: In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial would be ordered; each case must depend on its particular facts and circumstances and an order for retail should

only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the Accused person”

5. Although the Appellant was charged with Defiling a girl of 13 years, the P3 Form produced in Court showed that the Girl was about 15 years old at the time of alleged the offence. A person who defiles a Girl of 15 years commits an offence under Section 8(1)(3) of the Sexual Offences Act The punishment for that offence is a minimum sentence of 20 years imprisonment. If the Appellant were to be properly convicted then he would be liable to serve a prison term of 20 years. It is of course true that the Appellant has suffered incarceration on account of a conviction which has now been quashed. Whilst service of one (1) year in prison cannot be diminished it is nevertheless not substantial compared to the possible term of 20 years. In any event that period served can be discounted in the event of a conviction. There is also the right of the victim who would have an interest that the complaint made be processed on merit. In particular because there was an admission by the Appellant that there was defilement. These would be good reasons for this Court to order a retrial.
6. I reach this Decision notwithstanding that the current illness of the Appellant may have swayed me to go the other way. True, at the hearing of the Appeal, the Appellant looked sickly but whether he shall be in a position to stand retrial will be a decision for the Retrial Court to make.
7. For this reason I order that the Appellant be retried before a Magistrate of competent jurisdiction other than D.O. Ogola CM who convicted him.
8. Fresh plea shall be taken immediately before the Chief Magistrate’s Court at Busia. The Appellant to attend Court accordingly.

Dated, signed and delivered at Busia this 24th day of February 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Orwasa - C/Assistant

Appellant present in person

Owiti - for Respondent