



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 165 OF 2013

ALAN LUMWANJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence of S.N. Mwangi – AG. SRM in Vihiga Senior Principal Magistrate’s Court Criminal Case No. 53 of 2013 delivered on 16th January, 2013.)

J U D G M E N T

1. The appellant Allan Lumwanji was on the 14th day of January, 2013 arraigned in court for the offence of defilement of a boy child contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on the 7th day of January, 2013 in Vihiga County within Western Province intentionally and unlawfully defiled a boy child namely DL (name withheld) by causing his genital organ namely penis to penetrate into her (sic) genital organ namely anus to the said boy aged 12 years.
3. He was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 7th day of January, 2013 in Vihiga County within Western Province intentionally and unlawfully caused his genital organ namely penis to make contact with a genital (sic) organ namely anus of a boy namely DL (name withheld) aged 12 years.
4. On the main count being read out to the appellant in Kiswahili language on 14th January, 2013, he responded in the same language that it was true.
5. The facts were read out to the appellant who did not respond to the same as the prosecutor prayed he be given upto 16th January, 2013 to produce the treatment book and P3 form of the complainant which were not ready.
6. On 16th January, 2013 the said documents were produced in court as exhibits 1 and 2 respectively, whereby the appellant indicated to the court that the facts were correct. The learned trial magistrate then entered a plea of guilty on the main count.
7. The appellant was given room to mitigate, which he did. In mitigation he sought forgiveness from the court and stated that he will never repeat the same again. He also indicated that he was assaulted when he was arrested and he had pains in his body.
8. The learned trial magistrate sentenced the appellant to life imprisonment. The appellant being dissatisfied with the conviction and sentence meted out to him, filed this appeal.
9. The court notes that the appellant having been convicted on his own plea of guilt, his only recourse lies in an appeal against the sentence of life imprisonment.
10. The leading case in an appeal such as this one before me is that of **Adan vs. Republic [1973]**

EA at 445 where the Court of Appeal held as follows:-

- i. *The trial magistrate should read and explain to the accused the charge and all ingredients in the accused’s language or in a language he understands;*
- ii. *He should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;*
- iii. *The prosecution may then immediately state the facts and the accused person should be given an opportunity to dispute or explain the facts or to add any relevant facts;*
- iv. *If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded, 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.”*

11. In the instant case, the plea was clear and unequivocal. The language which the appellant understands was indicated in the proceedings as Kiswahili. Despite the case having been adjourned from 14th January, 2013, to 16th January, 2013 for production of the complainant’s treatment notes and P3 form, the appellant informed the court that the facts were correct. The appellant had a window of opportunity within which he could have changed his mind.

12. The appellant in his submissions prayed for a retrial and reduction of the sentence. A retrial for the reason that he was beaten and molested to accept the offence against him and that the learned trial magistrate overlooked his mitigation.

13. It is my finding that the appellant was under no pressure in court to admit having committed the offence, it is also apparent from the proceedings that the appellant informed the court of having been assaulted on 16th January, 2013 during mitigation and the learned trial magistrate ordered that he be taken to hospital for treatment. He did not mention about the said beatings on 14th January, 2013.

14. Although Mr. Ng’etich, prosecuting counsel supported the sentence of life imprisonment, the minimum sentence provided under the provisions of section 8 (3) of the Sexual Offences Act, 2006, is twenty (20) years imprisonment.

15. I find that the sentence of life imprisonment for a first offender was harsh considering that the learned trial magistrate had a discretion to impose a lesser sentence on the appellant. The appellant in his mitigation was remorseful for having committed the offence. He told the court the following:-

“I want court (sic) to forgive me and I will never repeat the same again.”

16. I hereby allow the appeal on sentence and substitute the sentence of life imprisonment with a sentence of twenty years imprisonment. The appellant has the right to appeal against sentence within 14 days.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **28TH** day of **APRIL**, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent**

..... **Court Assistant**