REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 20 OF 2015

ROBA UMURO .....APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence in Criminal Case No.193 of 2008 of the Principal Magistrate's Court at Marsabit by Joshua Kiarie – Principal Magistrate)

JUDGMENT

The appellant, **ROBA UMURO**, was Charged with an Offence of defilement of a child between the age of twelve and fifteen years contrary to section 8(3) of the Sexual Offences Act,2006.He was alternatively charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 18th October 2010 in Chalbi District within Eastern Province, the appellant defiled **O.I** a child aged 14 years. Alternatively, he unlawfully and indecently touched the private parts of **O.I,** a girl child aged fourteen years.

Initially the appellant pleaded not guilty to the offences and the trial commenced. However, after the prosecution had called five witnesses, he applied to be allowed to change his plea and his prayer was granted. When the charge was read to him, he pleaded guilty to the substantive charge. He was convicted and sentenced to twenty years imprisonment. He now appeals against both conviction and sentence.

The appellant raised four grounds of appeal as follows:

1.That the trial magistrate erred in law and facts by failing to make a finding that he was remorseful.

2. That the trial magistrate erred in law and facts in convicting him without offering him a chance to mitigate.

3. That the proceedings were in a language he did not understand; he only understood Borana.

4.That the sentence imposed on him was excessively harsh.

The state opposed the appeal and was represented by Mr. Motende, the learned counsel. He contended that there was sufficient evidence on record. It would appear he failed to take note of the fact that the appellant was convicted on own plea of guilty. Had he noted this fact, he would have contended and rightly so that this appeal offends the provisions of section 348 of the Criminal Procedure Code which

provides 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”

After the prosecution had called five witnesses, the appellant applied to be allowed to change his plea. His application was allowed and after he pleaded guilty, he was convicted and sentenced. He now appeals against both conviction and sentence.

The record is clear on the day when the appellant changed his plea, the interpretation was done in Borana. I have perused the record when witnesses were called and again I noted that the record indicates that PW1 and PW2 testified in Borana and the rest of the witnesses interpretation was done into Borana language. In all the instances the appellant fully participated in the trial. He cannot be heard to claim that due to language barrier, he was unable to follow proceedings.

Before the appellant was sentenced, the record shows that he was given a chance to mitigate which he did. The learned trial magistrate remarked that he had considered the mitigation. The grounds raised by the appellant do not have a basis.

The only outstanding issue is on the legality of the sentence and whether the same is manifestly harsh. The appellant was sentenced to twenty years imprisonment.

The Sexual Offences Act, section 8(3) provides as follows:

> **"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

The minimum sentence provided under this section is that of not **“less than twenty years imprisonment.”** He was therefore given the bare minimum sentence provided by the law. I cannot therefore disturb the sentence for doing so will be illegal. It follows that it cannot be termed as harsh.

The upshot of the foregoing is that the appeal of the appellant must fail. He will serve the sentence meted out by the learned trial magistrate.

DATED at Marsabit 16th day of June 2016

KIARIE WAWERU KIARIE

JUDGE