



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.21 OF 2016

GEORGE KANGUTHI MAINGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.2602 of 2014 of the Principal Magistrate's Court at Tigania by Hon. P.M Wechuli – Resident Magistrate)

JUDGMENT

The appellant, **GEORGE KANGUTHI MAINGI**, was convicted on two counts of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act.

The particulars of the offences were that on 13th December 2014 at [particulars withheld] village, Tigania West District of Meru County intentionally caused his penis to penetrate the vagina of **A.M** a child aged 9 years and that of **E.K**, a girl aged 7 years.

The appellant was found guilty of the offences and sentenced to serve life imprisonment. The sentence was ordered to run concurrently. He now appeals against both conviction and sentence.

The appellant was unrepresented. He raised eight grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and in facts by convicting him without sufficient evidence on record.
2. That the learned trial magistrate erred in law and in facts by meting out an excessive sentence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

When the complainants' mother went to fetch some water and returned home temporarily, she found the appellant defiling one of her daughters. He chased her away while armed. He defiled the other girl as well.

The appellant denied involvement in the offence. He claimed he was framed up by the police who wanted

to buy his land.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

The charge was wrongly drafted. It ought to have read:

"... contrary to section 8 (1) as read with section 8 (2) ..."

The appellant understood the charges against him and fully participated in the proceedings. I therefore find that the appellant was not prejudiced. The defect is curable under section 382 of the Criminal Procedure Code.

The two minor complainants testified on what the appellant did to them. Their mother Martha Karimi (PW3) returned home and found the appellant defiling one of her daughters. Her evidence corroborated that of the minors. The defence he raised was displaced by the evidence by the prosecution. The learned trial magistrate had ample evidence to convict on except in count two. The medical evidence by Geoffrey Muthomi Murithi (PW4) was that medical evidence in respect of **E.K** showed that there was an attempted defilement. The learned trial magistrate ought to have convicted him on the alternative charge. I therefore quash the conviction on the second count and set aside the sentence therein. I substitute the same with conviction on the alternative charge.

When the learned trial magistrate convicted on the substantive charges, the correct position is to indicate that he made no findings on the alternative charges, but not to indicate that they were spent.

Where there is more than one life sentences or where there is a life sentence and another lesser one, an accused ought to be sentenced to only one life sentence while the other one or others are held in abeyance.

Section 8(2) of the Sexual Offences act provides:

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.

It is clear that the sentence under this section is mandatory. The sentence meted out by the trial magistrate was therefore legal and the only one for that matter.

Having made the foregoing observations, the appellant's appeal partly succeed on sentence. His appeal on conviction is dismissed. He will serve the sentence in count one while that one in count two is held in abeyance.

DATED at Meru this 20th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE