



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.38 OF 2016

HALAKE ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.1723 of 2015 of the Chief Magistrate's Court at Maua by S Soita– Senior Principal Magistrate)

JUDGMENT

The appellant, **HALAKE ABDI**, was charged and convicted for the Offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 28th May 2015 in **Garbatulla** sub County, of Isiolo County intentionally caused his penis to penetrate the vagina of **N.S** a child aged 8 years.

The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.

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

- 1.That the learned trial magistrate erred in law and facts by convicting the appellant without sufficient evidence.
2. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant contrary to the provisions of Children Act.

The state opposed the appeal and was represented by Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

The appellant sent for the complainant , a girl aged 8 years and defiled her.

On his part the appellant denied any involvement in the offence.

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.**

For the offence of defilement to be said to have been proved the following ingredients must be proved beyond any reasonable doubts:

- (a) The age of the complainant,
- (b) Penetration of (in case of a male complainant) or into the genitalia; and
- (c) The identity of the perpetrator.

In the instant case these three ingredients were proved to the required standards and the learned trial magistrate cannot be faulted.

On 17th August 2015 the appellant stated in court that he was sixteen years old. The court ordered for an age assessment report but none was availed to the court until this matter was concluded. This was an error on the part of the trial court. Though later during his defence and mitigation the appellant said he was 20 years old, this did not take away the responsibility of the court to ascertain the age of the person on trial. This is because of the different procedure for the trial and the subsequent modes of dealing with minor offenders.

When the appellant came before me he appeared to be very young and I ordered for an age assessment and a report to be availed. The report was filed in court from Meru level five and it indicated that the appellants age was between 16 and 17 years. This means that at the time of sentencing he was a minor. His trial therefore fell under the ambit of the Children act cap141 Laws of Kenya. Section 189 provides:

The words “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children’s Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.

The learned trial magistrate used these forbidden words. I am therefore making an order that the said words be expunged and in their place be substituted with the appropriate ones.

Section 191 of the Children Act provides for several methods of dealing with minor offenders. So as to avoid a situation where that appellant may be denied a chance to appeal against an order I may make, I am remitting this matter to Maua Chief Magistrate's court for an appropriate order. The appellant to be presented to court on 4th January 2017.

To the extent of sentence only does this appeal succeed.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE