



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 47B OF 2013

JUSTUS OGACHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is a criminal appeal by one **Justus Ogachi**. He was charged with the offence of defilement contrary to section 8(1) as read with sub-section 3 of the Sexual Offences Act no. 3 of 2006. The particulars were that on the 15th march, 2013 at [Particulars Withheld] farm in Borabu District within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of one V M O a girl then aged 6 years. He pleaded not guilty. A subsequent trial at the Senior Resident Magistrate's court at Keroka, being criminal case No. 224 of 2013 he was found guilty and convicted of the said offence and sentenced to life imprisonment.

2. The appeal raises several grounds:-

1. *That the trial magistrate erred n law and fact in accepting the prosecution as proved beyond reasonable doubt.*
2. *That the trial magistrate erred in law and fact in trusting the prosecution side only.*
3. *That the trial magistrate erred in law and fact in not noticing that the prosecution case was full of contradiction and inconstence*
4. *That the trial magistrate misdirected himself grossly in rejecting the appellant's mitigation.*
5. *That the life sentence as imposed was overly harsh and excessive.*

3. Further, the appellant orally complemented his appeal by saying:

That he stayed in remand for three (3) months, that he was sick during this period of remand, his mother died during this period. He was, therefore, confused, and this state of confusion, he pleaded guilty. He pray that there be a re-trial of his case.

4. The respondent- the prosecution- oppose this appeal. The state says that in the appellant's grounds of appeal, nowhere in those grounds, does him mentioned that he was sick during the remand.
5. The prosecution gave chronological events of the accused person case mentions. First he was arraigned in court on 10th March, 2013 when charges were read to him and he returned a plea of Not guilty. Subsequently, the case came for mention on 29th April, 2013- here he informed the court that he was unwell. The trial magistrate ordered that the accused be given medical

attention. A third mention was on 9th May, 2013, the accused was present. Fourth mention was on 24th May, 2013- here the accused said he was unwell. Again the court ordered for him being given medical attention. The fifth mention was on 7th June, 2013, he was present. The hearing date was put on 18th June, 2013 when the matter came for the hearing, the charges were read to the accused afresh in English language, with an interpreter in a Ekegusii, the language he understood well. The answer to this charge was that it is true, that is, a plea of guilty. He was therefore convicted thus on his own plea of guilty and accordingly sentenced by the trial magistrate.

6. The facts were read out to the accused. And the facts were:

The accused on 15th March, 2013, raped 6 year old girl called V M. A P3 form was duly filled by the doctor and the findings was that the complainant had bruises on her labia and the hymen was broken, the virgina had discharge with offensive smell. There was spermatozoa seen in the vagina. The accused was also examined and a P.3 form produced which indicated that there were some purple cells in his private parts.

7. It is said that the victim passed by the house of the accused and he locked her and defiled her. When facts were read to him he said: facts are correct. I did the offence.
8. The state submitted that it was unequivocal plea of guilty. That being so, Section 8(2) OF Sexual Offence Act, under which the accused was convicted, provides only one sentence if the victim was a minor under the age 11. That sentence is imprisonment for life, there is no discretion. The age assessment for the minor was produced as an exhibit. She was below 11 years.
9. The appellant cannot, therefore, say that he had lost his mother and that is why he pleaded guilty.
10. Finally, the trial magistrate's hands were tied, once the accused gave unequivocal plea of guilty. The court can only intervene with the sentence, if it is shown that the trial magistrate considered the wrong principles, that should not have been considered. The state asks for the appeal to be dismissed.
11. In the light of the very forceful argument by the respondent i.e. that the accused pleaded guilty on his own volition, and upon conviction the trial magistrate had but one sentence to mete out on the accused: life sentence. The court finds that this appeal must but fail. However, the court has taken judicial notice that since the appellant pleaded guilty on his own volition and thus saved the court its precious judicial time, the court will reduce his sentence from life to 10 years subject to the period he has so far served the sentence.
12. It is so ordered.

Dated and delivered at **KISII** this 6th day of January, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Appellant in person.

Clare for the respondent.

Edwin Mongare Court Clerk.