



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 250 OF 2012

DAVID KETER ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **David Keter Rotich** was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(1) of the Sexual Offences Act, No. 3 of 2006. It was alleged that on the 16th day of July, 2011 at 4.a.m. at *[particulars withheld]* village in Transmara East District of Narok county, did casue his penis to penetrate the vagina of S C who was a child of 17 years old.

2. Alternatively he was also charged with indecent Act of a girl contrary to section 11(1) of Sexual Offences Act, No. 3 of 2006. When it was alleged that on the 16th day of July, 2011 at 4.a.n. at *[particulars withheld]* village in Transmara East District, did intentionally and unlawfully cause his penis to come into contact with the breasts and vagina of the girl aged 17 years.

3. The trial commenced at Kilgoris, the appellant was convicted, and sentenced to 15 years imprisonment for the offence of defilement contrary to section 8(1) of the Sexual Offences Act 2006. The judgment was delivered on 17th October, 2012.

4. The appellant now brings his appeal against both the conviction and sentence hereof. His appeal filed on 25th October, 2012 sets out six(6) grounds of appeal as herebelow:

1. That the trial magistrate erred in both points of law and facts by failing to notice that the prosecution case was not only insufficient, by affricative, speculative, discredited and lack of proper probative value.

2. THAT the sentence of 15 years that was meted on me is disproportionate, inhuman, demeaning degrading in that my constitutional rights and freedoms envisaged in article 50(2)(b)(c)(g) and (h) of the current 2010 constitution was totally violated therefore I pray that this Honourable court to order for a judicial review or an order of habeas corpus for the interest of justice.

3. THAT I am a fairly young man and therefore ought to be given a second chance in life therefore the court should consider this fact since the sentence of 15 years meted on me was too high comparing the offence committed.

4. *THAT my right to mitigating circumstances who negated and/or if the right was ever exercised then it was never considered in mitigation is an essential tool in sentencing.*

5. *THAT I pray that this honourable court exercises its authority and responsibility conferred upon by the constitution re-evaluate the circumstances which led to my admission and set I at liberty or any other order deem fit to grant.*

6. *THAT I wish to be present during the hearing of this appeal and that more grounds will be adduced in support of this appeal thereof.*

5. **The appellant's submissions.**

The appellant filed his written submission in support of his appeal.

6. **The respondent's submissions**

The victim- the complainant herein- was alleged to be 17 years old. However, at the time of trial, the victim who was called as a witness turned hostile. And her statement to the police was produced as exhibit. In that statement, it was indicated that the appellant was co-habiting with the alleged victim. That was the only piece of evidence that connected the appellant with defilement. PW- the medical officer- testified that DW1- the alleged victim- decline to be examined.

7. The respondent submitted that due to the fact of co-habitation,contrained to concede to this appeal because from the record, there is no evidence that PW1, was defiled by the appellant. The trial magistrate relied on the fact that the two were co-habiting. This, in my view case not be beyond reasonable doubt, proof of defilement.

8. **Conclusion.**

In view of the concession by the respondent, this court has no alternative but to allow the application by the appellant. Thus the conviction and sentence is hereby quashed. The appellant is therefore set at liberty unless otherwise lawfully held.

9. It is so ordered.

Dated and delivered at KISII this 13th day of February, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Appellant in person.

Majale for the respondent

Edwin Mongare Court Clerk.