

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.265 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. L. M. Wachira - PM delivered on 2nd October 2012 in Kibera CM. CR. Case No.4461 of 2012)

JAMES EMBODOKA LUVAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Embodoka Luvai was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, 2006**. The particulars of the offence were that on diverse dates between 25th December 2011 and 1st August 2012 at *[particulars withheld]* in Karen within Nairobi County, the Appellant caused his genital organs (penis) to penetrate the genital organs (vagina) of M S N, a child aged 8 years. He was alternatively charged with offence of **committing an indecent act with a child** contrary to **Section 11(1)** as read with **Section 2(5)** of the **Sexual Offences Act**. The particulars were that on diverse dates between 25th December 2011 and August 2012 at *[particulars withheld]* in Karen within Nairobi County, the Appellant **committed an indecent act** to M S N, a child aged 8 years by touching her private parts. When arraigned in court, the Appellant pleaded guilty to the main charge. The trial court convicted and sentenced him on his plea of guilty.

Dissatisfied with the conviction and sentence, he appealed. In his petition of appeal, he raises four (4) grounds. The first ground was that every element constituting the offence and the consequences of pleading guilty to the charge were not explained to him. He further states that he did not understand the charge. He relied on **Adan –Vs- Republic [1973] EA 445**, whereby the Court of Appeal held that before the plea of guilty is accepted and acted upon, vital safeguards must strictly be complied with. Amongst the requirement is that the recording of the plea of guilty must be that the accused understands the consequences of his plea. He further cited **Ngigi -Vs- Republic [1987] KLR 98**, where the High Court stated that the accused should be required to unequivocally admit or deny each and every element of the charge. The second ground stated that the facts read were defective in nature. He also complained that the birth certificate of the child was not produced at the time of the trial and so the age of the child was not ascertained. This was a violation of his right to a fair hearing under **Article 25(c)** of the **Constitution**. He cited **Bragaza -Vs- Republic [1951] EA 152**. The Appellant is seeking a retrial for the interest of justice. He relied on **Rwaru Mwangi –Vs- Republic Cr. Appeal No. 18 of 2006 (UR)**.

During the oral submissions of the appeal, the Appellant stated that the mother of the complainant disliked his family and therefore brought the case against him when he asked for the money he had worked for. Ms. Aluda for the State submitted that the Appellant did not claim not to have understood the charge when the matter came up for hearing on two occasions. The Appellant took advantage of his position in the house to commit the offence on more than one occasion. She urged the court to dismiss the appeal.

The background of the case is that the Appellant was an employee of the complainant's parents. They occasionally left the complainant in the care of the Appellant. When the parents were absent he would take advantage of the situation and touch her privates. He further sexually assaulted the complainant on

diverse dates as stated in the charge sheet. In September 2012, the parents noticed that the complainant had rash on her genitalia. When the mother of the complainant asked her, she replied that the Appellant had been touching her private parts. She was taken to the Nairobi Women Hospital and examined. The report proved that she was defiled. The P3 form and the medical report were produced as **Exhibits 1 and 2** respectively. The birth certificate of the complainant was also produced in court as **Exhibit 3** as proof that she was indeed eight (8) years at the material time.

The first appellate court has the duty to reconsider and re-evaluate the evidence that was adduced in the subordinate court and decide whether or not to uphold the conviction as stated in **Njoroge –Vs- Republic [1987] KLR 19**. The court has therefore evaluated the evidence and has the following issue to determine; Whether the Appellant committed the offence; the parents of the complainant occasionally left her with the Appellant to take care of her. On diverse dates mentioned in the charge sheet, he sexually assaulted the complainant. This was not known until September 2012 when the mother found the complainant with a rash on her genitals. When the mother of the complainant inquired from her, she replied that it was the Appellant who touched her private parts. The complainant was taken to Nairobi Women’s Hospital. She was examined. The report established that her hymen was ruptured. The Appellant was arraigned in court on two (2) occasions; 28th of September 2012 and 1st of October 2012. In both occasions, he replied **“it is true”** when the charge was read and explained to him. This proved that the Appellant understood and accepted the consequences of the plea. When the facts were read by the prosecution, the Appellant stated: **“the facts are correct”**.

The birth certificate of the complainant was produced in court as **Exhibit 3**. She was born in Addis Ababa, Ethiopia on the 27th of March 2004.

In the premises therefore, this court holds that the plea of guilty that was recorded by the trial court was unequivocal. The Appellant understood the charge and all the elements thereof. The appeal, although is the Appellant’s constitutional right, is an afterthought.

The Appeal lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MAY 2015

L. KIMARU

JUDGE