**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO. 34 OF 2013**

**HARUN KIPKEMOI LANGAT----------APPELLANT.**

**VS.**

**REPUBLIC ----------RESPONDENT**

*(Being an Appeal from the conviction delivered and sentence awarded by the Learned Senior Resident Magistrate at Sotik (J.A. KASAM) on 30th July 2013 in Sotik Senior Resident Magistrate's Court Criminal Case No. 42 of 2013)*

**JUDGMENT.**

1. **HARUN KIPKEMO LANGAT** hereinafter referred to as the Appellant was charged and convicted of the offence of ***Defilement Contrary to Section 8(1) as read with 58(3) of the Sexual Offence Act No. 3 of 2006.***
2. The particulars were that the Appellant on diverse dates between 1st and 23rd December 2012 at Tengecha in Konoin District within Bomet County, intentionally caused his penis to penetrate the vagina of **VC** a child aged 15 years.
3. 
4. Upon conviction he was sentenced to 20 years imprisonment.
5. 
6. He was aggrieved by the conviction and sentence and filed through Mr. Motanya advocate the following supplementary grounds of appeal:
7. 

i. *THAT the Learned Magistrate erred in law and in fact in failing to read and explain to the appellant the charge and all the ingredients in the appellant's language or in a language he understands.*
ii. *THAT the Learned Magistrate erred in law and in fact in that she shifted the burden of proof in seeking the defnece to challenge the prosecution's case in several instances.*
iii. 
iv. *THAT the appellant did not have the benefit of legal counsel.*
v. 
vi. *THAT the Learned Magistrate erred in law and in fact in failing to consider the mitigating circumstances of the case.*
vii. 
viii. *THAT the Learned Magistrate erred in law and in fact in that she failed to ascertain that the facts were well stated to the appellant and the appellant given an opportunity to dispute, explain or to add any relevant facts. If the appellant did not agree to the facts he would have raised any questions for his guilt and his reply ought to have been recorded.*
ix. 

x. *THAT the Learned Magistrate erred in law and in fact by failing to satisfy that the plea was totally unequivocal and that the appellant understood the elements of the offence and its penalty.*
xi.
xii. *THAT the Learned trial Magistrate erred in law and fact in failing to find that no DNA test was done to ascertain the paternity and or the pregnancy of the girl child, a mere report the girl child tested positive of the pregnancy, is not prove that the appellant was responsible for the pregnancy. The prosecution ought to have applied to the Court for DNA test to be conducted after the girl delivered which was not done leaving wide gaps in the prosecution case and benefit of doubt ought to have been given to the appellant.*
xiii.
xiv. *THAT the Learned trial Magistrate erred in law and fact in failing to find that the charge sheet by the prosecution was fatally defective and was curable by Section 382 (2) of the Criminal Procedure Code as the correction section of Sexual Offence Act No.3 of 2006 was not preferred entered instead and the prosecution were in a hurry to charge the appellant under Section 8(1) (3) Sexual Offence Act and not Section 8(1) as read in Section 8(3) since 8(1) define the charge and 8(3) spells/create the penalty/sentence. Further the prosecution fail to state the use of act date of defilement and only indicated on diverse dates between 1st and 23rd December 2012. The girl might been having sex with other men between those diverse dates and not necessary the appellant.*
xv.
xvi. *THAT the Learned Magistrate erred in that she imposed a sentence which is manifestly excessive considering all the circumstances of the case.*
xvii.
xviii. *THAT the sentence awarded was harsh and excessive in all the circumstances of this case.*
xix.

1. A summary of what transpired in this case is that the Appellant was arraigned before the Senior Resident Magistrate Sotik on 30th July 2013 for plea.
2.
3. The Charge was read to him and he pleaded guilty. The prosecutor then stated the facts which the Appellant said were very true.
4. He was convicted and sentenced to 20 years imprisonment.
5.
6. When the appeal came for hearing Mr. Motanya for the Appellant argued all the grounds of appeal together. He relied on two main grounds:
7.

i. *That the language of interpretation was not shown.*
ii.
iii. *The plea was not unequivocal.*

1. In reply M/s Kivali the Learned State Counsel conceded the appeal on the grounds that;
2.

i. *The Appellant faced a serious offence and was not informed of his right to legal representation.*
ii.
iii. *He was not cautioned on his plea of guilty on such a serious charge.*
iv.

1. On the issue of retrial she said she would not push for it as the girl/complainant was now aged 17 years and was married. She feared the girl may not turn up for the hearing.
2.
3. I have considered the record, the grounds of appeal and the submissions. The record does not show the language in which the charge was read though the language of response is shown as Kiswahili.
4.

5. 10. Upon pleading guilty to the charge whose minimum sentence is 20 years imprisonment it was imperative for the Learned trial Magistrate to warn the Appellant of the consequences of his pleading guilty to such a serious charge.
6.
7. 11. The record does not show that any such warning was given to the Appellant. Its for this reason that the State concedes the appeal.
8. The record shows that the Appellant was 18 years old when he appeared in court on 30/7/2013. How old was he at the time of the commission of the offence between 1st and 23rd December 2012.?
9.
10. 12. He was said to have been working at a hotel in Tengecha when the incident took place. What could his level of education have been for him to be said to understand Kiswahili if at all the the charge was read to him in Kiswahili.?
11.
12. 13. Failure to indicate the language in which the charge was read and failure to warn him of the consequences of his pleading guilty to such a serious charge makes the whole process a mistrial.
13.
14. 14. The next issue to consider is whether there should be a retrial.
15. In the case of ***EKIMAT VS REPUBLIC – (2005) 1 KLR 182*** the Court of Appeal (C.A.) set out what needs to be considered before making an order for retrial. It stated this:
16.

1. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not follow that a retrial should be ordered.
2. *A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.*
3.

1. The Appellant has served only two years of the imprisonment term of twenty years and this could have been a suitable case for retrial. However considering what the State has indicated on the availability of the complainant it may be an exercise in futility to order for a retrial.
2.
3. 15. The need to order for a retrial may be quite noble but if the complainant does not turn up to testify it may result in an injustice to the Appellant.
4.
5. 16. I therefore allow the appeal and quash the conviction. The sentence is set aside. The appellant to be released unless lawfully held under a separate warrant.
6.

**Dated and signed this 18th day of September, 2015.**

**H.I. ONG'UDI**

**JUDGE.**

**Delivered in Open Court this 25th day of September 2015.**

**H.I. ONG'UDI**

**JUDGE.**

**In the presence of:**

M/s Mwangi for state.

Mr. Motanya for Appellant.

Kenei – Court Assistant.

Interprates Eng/Kipsigis.

Appellant – Present.