



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 221 OF 2013**

***(From original conviction and sentence in Criminal Case No. 1073 of 2011 of the Principal Magistrate's Court at Kajiado, S. O. Temu – SRM)***

**LEMAYIAN TOM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant, Lemayian Tom was charged with the offence of rape contrary to Section 3(1)(a)(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of offence are that on the 17<sup>th</sup> day of August, 2011 at about 12.00 p.m. at Kikuru Location area in Kajiado District within the Rift Valley Province, did intentionally and unlawfully cause his penis to penetrate the vagina of M L without her consent.

2. In the alternative the Appellant was charged with the offence of indecent act with an adult contrary to Section 11(6) of the Sexual Offences Act No. 3 of 2001.

The particulars of offence are that on the 17<sup>th</sup> day of August 2011 at about 12.00 p.m. at Kikuru Location area in Kajiado District within the Rift Valley Province, did intentionally and unlawfully cause his penis to come into contact with the vagina of M L without her consent.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. However, the Appellant pleaded guilty when his case came up for mention on 9<sup>th</sup> September, 2011.

4. The facts read out were that on the material day at around 11.00 a.m. the complainant was from the river where she had gone to fetch water. The Appellant started seducing the 21 year old complainant. The complainant refused the advances by the Appellant to have sex with him. The Appellant then got hold of the complainant, pushed her into the bushes, over-powered her and pinned her down. The Appellant then removed the complainant's innerwear then removed his trouser and proceeded to have sex with the complainant severally. When the Appellant finished with her the complainant screamed and members of public responded, gave chase and arrested the Appellant.

5. The complainant was taken to Kajiado District Hospital where she was examined and treated. A P3 form was filled in and it was confirmed that the complainant had signs of recent coitas with inflamed labia minora. The P3 form was produced in court as an exhibit.

6. During mitigation, the Appellant stated that he was 17 years old. The court referred the Appellant for age assessment at Kajiado District Hospital. The age assessment was carried out by Dr. Muia who gave the Appellant's age as above 18 years. The trial court then proceeded to sentence the Appellant to ten (10) years imprisonment.

7. The appeal is on sentence only. The Appellant has prayed for leniency and for a non-custodial sentence. He has further stated that he is remorseful and regrets the offence. That he has reformed while in prison and he is married and the sole breadwinner of both his immediate and extended family. The Appellant further stated that he is an orphan and prayed for his sentence to be reduced to the period already served.

8. I have considered the record of appeal. The Appellant pleaded guilty. The trial court fully complied with the procedures for plea taking. (See **Adan Vs Republic (1973) EA 445**).

9. The sentence of ten years is within the law. Section 3(3) of the Sexual Offences Act provides for imprisonment for a term of not less than ten years for a conviction for the offence of rape. The sentence can be enhanced to imprisonment for life.

10. With the law having provided a minimum sentence, the hands of the court are tied. Consequently, I find no merits in the appeal and dismiss the same.

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**B. THURANIRA JADEN**

**Dated** and delivered at Machakos this 28<sup>th</sup> day of October, 2015

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**B. THURANIRA JADEN**

**JUDGE**