



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.05 OF 2015

P A E.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.127 of 2013 of the Principal Magistrate's Court at Marsabit by S.O Mogute – Ag. Senior Principal Magistrate)

JUDGMENT

The Appellant, **P A E**, was Charged with an Offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.He was charged with another offence of deliberate transmission of H.I.V contrary to section 26 (1) (a) of the Sexual Offences Act No. 3 2006. He was alternatively charged with an offence of indecent act contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 17th July 2012 at [Particulars Withheld] village in Loiyangalani District of Marsabit County, the appellant knowingly and intentionally caused his penis to penetrate into the vagina of I.I, a girl child aged 11 years. On the same day time and place he knowingly and intentionally infected I.I, a girl aged 11 years with H.I.V.alternatively, he did an indecent act by intentionally touching the thighs and vagina of I.I, a girl aged 11 years.

The appellant pleaded guilty and was convicted in the first and in the second counts and sentenced to serve 20 years imprisonment which was to run concurrently. He now appeals against both conviction and sentence.

The Appellant had only one ground of appeal. He complained that the charges were not read to him in Turkana language the only language he understood. The other purported grounds amount to mitigation.

The state opposed the appeal and was represented by Mr. Mwangangi, the learned counsel. He contended that the appeal offends the provisions of section 348 of the Criminal Procedure Code which provides as follows:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”

On 26.2.2013 when the accused was taken to court for plea,he informed the court that he did not understand Kiswahili well and requested for a Turkana interpreter. The plea was adjourned to the following day when Mr. Lekirang Nakope was availed. He translated from English to Turkana and vice

versa. It is not true therefore for the Appellant to allege that the proceedings were conducted in a language he did not understand.

The Sexual Offences Act, section 8 (2) provides as follows:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”

The age assessment of the victim indicated that she was in the age bracket of 11 to 12 years. The trial magistrate was alive to the fact that this assessment was not precise and this is why he gave the benefit of doubts to the appellant. He sentenced him under section 8 (3) of the Sexual Offences Act which caters for victims aged between 12 and 15 years. The minimum sentence provided under this section is that of not **“less than 20 years imprisonment.”** He was therefore given the bare minimum sentence provided by the law.

Section 26 (1) (a) of the Sexual Offences Act states:

“(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b)

(c)

shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life”

The learned trial magistrate meted out 5 years above the minimum. He had the discretion to enhance the sentence to life. He cannot be faulted.

In a nutshell, the appeal cannot stand. The same is dismissed and the conviction and the sentence by the trial court are upheld. The Appellant shall serve his sentence.

DATED at Marsabit 24th day of November 2015

KIARIE WAWERU KIARIE

JUDGE