



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.89 OF 2015**

**DENNIS ELIJAH.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(2) read with Section 8(3) of the Sexual Offences Act No.3/06. The particulars were that on the 14th day of April 2014 at Chemelil Location in Muhoroni District within Kisumu County intentionally caused his penis to penetrate the vagina of M A O aged 12 years

2. The alternative count was Indecent Act Contrary to Section 11(1) of the Sexual Offence Act No.3/06. The particulars were that on the 14th day of August, 2014 at Chemelil Location in Muhoroni District within Kisumu County intentionally and unlawfully touched the private parts namely vagina of M A O aged 12 years.

3. On his own plea of guilty the appellant was convicted and sentenced to 30 years imprisonment thus this appeal. The basic contents of the appellant's petition is purely mitigation. He states that at the particular moment he was very confused and did not know or appreciate the nature of the consequence of his action.

4. On his part the learned state counsel opposed the appeal stating that ignorance of the law was not a defence.

5. I have read the proceedings and its clear that the appellant pleaded to the charge. However at the level of mitigation he stated as follows:

**“She is the one who insisted to sleep with me I am 21 years old. She forced me.”**

6. Although the appellant had pleaded guilty, I find that the mitigation had raised other issues which perhaps the trial court ought to have paused and considered. In fact the court did not imagine how a 12 years old could force a 21 years old fellow to sleep with her.

7. What is more intriguing is that there was no proof of the age of the complainant save the P3 form produced. In Sexual Offences establishing the age of the victim is very crucial and critical. This is because in the long run it will determine the question of sentencing.

8. I thus find that even though the plea was clear, there are other underlying circumstances as stated above which included crucially the age of the minor which was not established. I think it would be dangerous to sustain both the conviction and sentence.

9. Nonetheless, this is a matter which should be retried. The same is still young enough having been concluded in April 2014. I presume the witnesses are still available.

10. In the premises, the appeal is allowed. The matter is referred to the lower court for retrial before a new trial magistrate with competent jurisdiction.

Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 15TH DAY OF DECEMBER, 2015.**

**H. K. CHEMITEI**

**J U D G E**