



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 148 OF 2013

JOSEPH KIPKORIR KETER.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Joseph Kipkorir Keter is the appellant herein, having been convicted on an offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.2 2006** by the Naivasha Principal Magistrate's Court. In the alternative, he faced a charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. After a full trial he was convicted on the main charge and was sentenced to 25 years imprisonment. He filed this appeal on 23/7/2013, and the grounds of appeal disclose that he only appealed against the sentence. In court, he maintained that his appeal is only against the sentence.

The Learned State Counsel, Mr. Chebii, opposed the appeal on sentence and urged the court to make it more severe because such offences are rampant and a deterrent sentence was necessary. Counsel also observed that the appeal was filed out of time without the leave of the court and therefore irregularly before the court.

The judgment was read on 9/7/2013, and the appeal was filed on 23/7/2014. The fourteen days allowed to file an appeal lapsed on 23/7/2014. The appeal was therefore filed within time and is properly before the court.

The brief facts of the case before the trial court were that the complainant NWK, a child aged about 10 years was on 2/11/2010 called by the appellant who was a friend to the father, she went to his house and he did bad manners to her. She demonstrated what was done to her in her private parts. She said that infact the appellant had done that to her several times. On that day, she told Mama W (GM), PW4 who told her husband who then reported to the elders as a result of which the appellant was arrested. PW1's father (PW2) did confirm that the appellant was his friend who used to live nearby and frequented his house. The complainant was examined by Dr. Njiiri on 4/11/2010 and the doctor found that the child's hymen was broken though the other genitalia were normal. The doctor opined that there was prior vaginal penetration of the complainant. The court was satisfied that the appellant was satisfactorily identified by the complainant as the person who had defiled her and had defiled her therebefore, taking advantage of his friendship with the father.

The prosecution produced in evidence the child's health clinic card which confirmed that she was born on 26/12/2001 and was only 10 years old at the time she was defiled. Under **Section 8(2)** of the **Sexual Offences Act**, the only sentence allowed for such an offence is life imprisonment. **Section 8(2)** reads:-

“8(2). 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 **Sexual Offences Act** is a statute of strict liability.

The trial court therefore erred when it gave an illegal sentence of 25 years. Although the court has taken into account the appellant’s plea on appeal, the court has to act within the law and the law is that the appellant having taken advantage of the very innocent child whom he should have been protecting, he should be kept away for the whole of his life so that he does not advantage and harm to other children. For that reason, I hereby set aside the illegal sentence of 25 years imprisonment, and instead sentence appellant to life imprisonment. The appeal is hereby dismissed. It is so ordered.

DATED and DELIVERED this 23rd day of May, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Chirchir for the State

Kennedy – Court Assistant