

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.233B OF 2012

[Arising from conviction and sentence in Narok Criminal Case No.1644 of 2012 by C.A. Nyakundi (SRM)]

AMOS MEMUSI KIOKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant AMOS MEMUSI KIOKI, was convicted on a charge of defilement of a boy aged 8 years contrary to **section 8(1) (b)** of the **Sexual Offences Act**, and sentenced to serve life imprisonment. The charge stated that on 5th December 2012 in Narok South District, the appellant wilfully and intentionally caused his penis to penetrate into the anus of K K a boy aged 8 years.

The appellant pleaded guilty to the offence.

He now challenges the outcome of that trial on grounds that he did not know the repercussions and he was in any event convicted on a non-existent offence.

At the hearing of the appeal, he was represented by Mr. Yenko, who submitted that the plea was not unequivocal and the appellant was not warned by the trial court about the severity of the sentence. He urges this court to be guided by the decision in James **Mwangi Murogi V R** where the State conceded that without prior warning on sentence, an appellant was likely to be prejudiced.

In opposing the appeal, Miss Nyakeira submitted on behalf of the State that there is no law requiring one to be warned before being convicted, except in capital cases where the mandatory sentence is death.

Counsel also argues that the charge was not fatally defective because the ingredients of the offence disclosed the offence charged as **section 8(1)** refers to the offence of causing penetration with a child of eight years.

On the first limb of the appeal, I have considered the **Mwangi** (*supra*) case, and I concur with the submissions made by Miss Nyakeira. As regards defective charge, **section 8(1)** of the **Sexual Offences Act** provides that that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Certainly **section 8(1) (b)** does not exist, yet it would be pretentious to claim that the appellant did not know the offence he pleaded to, because as the State Counsel submitted, the ingredients clearly disclosed an offence under section 8(1) and the additional (b) occasioned no prejudice whatsoever.

In any event, I think this is the kind of technical error which **Article 159(d)** of the Constitution of Kenya frowns upon – it will really go against the interest of what is fair and just to use that argument in this particular instance. Furthermore, I think section 382 of the Criminal Procedure Code offers refuge to the effect that:

“..... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal. . . . on account of an error, omission or irregularity in the complaint charge before or during trial. . . . unless the error, omission or irregularity has occasioned a failure of justice.”

My finding is that the irregularity has caused no injustice whatsoever. Consequently that limb of the appeal also fails; and the appeal is dismissed.

Delivered and dated this 19th day of May, 2014 at Nakuru.

H.A. OMONDI

JUDGE