REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 192 OF 2013

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1106 OF 2013 OF THE CHIEF MAGISTRATE'S COURT AT NAROK, Z. ABDUL, R.M.)

HARUN LOSHIRIAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1.Harun Leshirian *(the Appellant)* was charged with the offence of defilement of a child aged fifteen years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006 *(No. 3 of 2006)*. The Appellant pleaded guilty to the offence and was sentenced to the mandatory twenty years imprisonment provided for under Section 8(3) of the Sexual Offences Act aforesaid.

2. Unhappy with his sentence the accused has come to this court and set out five grounds of appeal -

1. he pleaded guilty to the offence,
2. that he is an orphan and never attended any school,
3. that he is illiterate and never understood the nature and gravity of the charge,
4. that he did not know the meaning of a full trial,
5. that his sentence be reduced.

3. Indeed as Mr. Nombi learned Prosecution Counsel submitted, none of these grounds is a true ground of, or complaint for appeal. On the first ground, the appeal indicts himself. He pleaded guilty. He "married" and was living with an underage girl. Any sexual activity with an under age girl is a defilement – which is defined as - ***"an act which causes penetration with a child, (that is a human being under the age of years).***

4. Because the accused pleaded guilty and was convicted and sentenced on his own plea, this court is prohibited by Section 348 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* from entertaining any appeal. I do not think that non-attendance of school and illiteracy are grounds for an appeal. Section 7 of the Penal Code *(Cap. 63, Laws of Kenya)* provides that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence. No provision of the Sexual Offence makes such declaration. Ignorance of the Sexual Offences Act is therefore no defence. Besides, the victim had no capacity to consent to the so-called *"Marriage"*. Section 42 of the Sexual Offences says -

"42. For the purposes of this Act, a person consents if he or she agrees by choice, and has

the freedom and capacity to make that choice."

5. If the ground that *"I did not know the meaning of a trial"* means that he did not understand the charge facing him and that therefore the plea of guilty was not *"unequivocal"* then he contradicts himself for he changed his plea *"not guilty"* to *"guilty"* when the victim *(his "wife")* had testified of the circumstances of their *"marriage"*. He clearly understood the charges facing him and his plea was unequivocal. His plea to the contrary is declined.

6. The sentence for defiling a child of between the age of twelve and fifteen years is prescribed by Section 8(3) as twenty years. The Appellant had no defence under Section 8(5) that the child deceived him to believe that she was over eighteen years of age at the time he "married" her or that he reasonably believed that the child was over the age of eighteen years. Even if the Appellant had raised this defence, the medical evidence showed that the child was about 15 years of age. This ground too would fail.

7. In the circumstances, I confirm both the conviction and sentence imposed by the lower court, and dismiss the appeal herein as having no merit at all.

8. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 14th day of November 2014

M. J. ANYARA EMUKULE

JUDGE