



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 16 of 2012

MARTIN OTIENO OBILO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence in Criminal Case number 229 of 2012 of the
Principal Magistrate's Court**

at Winam – Mr. P. C. Biwott Esq)

JUDGMENT

The appellant herein was charged with two counts namely:-

a) Defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 25th January 2012 at Kisumu East District within Nyanza province intentionally caused his penis to penetrate the vagina of VA a child aged four (4) years.

b) Committing an indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 25th January 2012 at Kibos area in Kisumu East District within Nyanza Province intentionally touched the vagina of VA a child aged four (4) years with his penis.

On his own plea of guilty the appellants was sentenced to life imprisonment hence this appeal. The petition of appeal has five grounds which can be summarized as mitigation, namely that the appellant prays for leniency, that he is an orphan and that he prays for a second chance.

The appellant during his submissions largely dwelt on the relationship between him and his stepmother. He said that it was her who encouraged her to plead guilty so that he could be released. He however denied having committed the offence.

The State opposed the appeal and argued that the plea was unequivocal and therefore under the provisions of Section 348 of the Criminal Procedure Code the appellant is barred from submitting otherwise.

I have carefully scanned through the proceedings at the lower court and indeed it is not in doubt that the appellant pleaded to the charges and even after the facts were read to him he still confirmed the same.

I have also had the opportunity of perusing the P3 as well as Post Rape Care forms. From which were

produced at the trial court. Both and especially the P3 form confirm that the complaint was sexually assaulted. If this were not true the appellant would not have admitted and further he would not be appealing solely on the gravity of the sentence.

In the course of this appeal and going by the nature of this case I did order that a probation report be availed on behalf of the appellant. The same was not favourable towards him.

On the issue therefore of his plea of guilt this court hands are tied by the provisions of Section 348 of the Criminal Procedure Code which states :-

“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”.

In regard to the sentence the law has not given any other option except that which the appellant was given .

It is saddening to note further that the appellant has all along known his HIV status. By defiling the minor one can only conclude that his desire was to infect her as well as cause grievous harm which he did.

I also take note of the fact that the appellant is a known criminal offender. Having been let free on probation for the offence of stealing he ought to have learned his lesson. His plea that he has now learned that” once beaten twice “shy” is not true. He was beaten once but he has failed to learn his lesson and has failed to be “shy”.

It is unfortunate that the appellant is an orphan as well as HIV positive. But the law must be upheld his status notwithstanding. The feelings of the minor victim ought to be taken into account too. For the foregoing reasons this appeal is hereby dismissed.

Dated, signed and delivered at Kisumu this 21st day of January 2013

**H. K. CHEMITEI
JUDGE**

In the presence of:

.....for State Counsel

..... Appellant

HKC/aao