REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 284 OF 2011

ERICK SARUNI..... APPELLANT

VERSUS

REPUBLIC OF KENYA….....RESPONDENT

[From original conviction and sentence in Narok S.P.M.CR.C.NO.266 of 2011 by Hon. W. N. Njage, SPM dated 9th November, 2011]

J U D G M E N T

The appellant was charged with the offence of **defilement of a Girl child** contrary to S**ection 8 (1)** and **(4)** of the **Sexual Offences Act No. 3** of **2006.**

The appellant was convicted and sentenced to serve a term of fifteen (15) years imprisonment. Being aggrieved by the judgment of Honourable W. N. Njage, Senior Principal Magistrate Narok preferred this appeal against conviction and sentence. He listed five (5) grounds of appeal in his petition of appeal which grounds are as listed hereunder:

1. that he is a first offender;
2. that he is very remorseful of the crime committed and humbly promise not to make a repeat of the same;
3. that he learnt the hard way that crime does not pay as it infringe the rights of others;
4. that he did the crime under the influence of alcohol which he promises to shun that he humbly entreat the court to exercise its prerogative and substitute the sentence to a non-custodial one or slash to current on with a lesser harsh sentence to enable him go home to mend his life.

At the hearing of the Appeal, the Appellant abandoned his appeal on conviction and opted to proceed only on the appeal against sentence.

After hearing the oral submissions of the appellant and Learned Prosecuting Counsel for the State, Mr Marete. This court finds only one issue for determination, relating to sentence.

It was the Appellants contention that he was a first offender and that the sentence was heavy and prayed for its reduction. The appeal was opposed and Prosecuting Counsel for the State, whilst sympathizing with the appellant, submitted that the sentence imposed was as provided by the law.

Counsel further submitted that PW1 in evidence testified to have been staying together with the appellant and that P.W.1 was aged 16 years. This court was urged to uphold the sentence imposed.

This court being the first appellate court, it is duly bound to re-assess and re-evaluate the evidence and come up with an independent conclusion. Refer to the case of **Okeno V. Republic.**

PW4 Leonard Mankonde a clinical officer at Naragie Enkare Health centre testified to having examined PW1 and produced the P3 Form ("Pexb 1") as an Exhibit. This exhibit is what the trial magistrate used to sentence the appellant as it shows that the complainant (PW4) was aged 16 years.

This court notes that PW4 did not adduce any evidence as to the basis of this assessment nor was any age assessment Report tendered into court by this witness.

It is trite law that in Sexual Offences that the age of the complainant is the key factor that will determine the sentence to be imposed by the court.

In his defence the Appellant states that he was misled by the complainant's parents into believing that the complainant was aged 18 years.

This court opines that it is upon the prosecution to prove age and the onus does not shift to the Appellant to do so. This court finds for the reasons stated above that the age of the complainant was not proved by the prosecution. There is therefore no legal basis for the sentence imposed.

This court finds that the appeal is meritorious. The conviction is upheld and the sentence imposed is commuted to the term served.

The Appellant shall be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 21st day of June, 2013.

A. MSHILA

JUDGE