



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 28 OF 2012

GILBERT KIPKORIR KOSGEY APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant herein i.e **Gilbert Kipkorir Kosgey**, was convicted on his own plea of guilty for the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 2nd day of May, 2012 at [particulars withheld] in Konoin District within Rift Valley Province, intentionally caused his penis to penetrate the vagina of **V.C**, a child aged 2½ years. The Appellant was sentenced to serve life imprisonment. Being aggrieved, he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his petition:

1. **That my lordship, I pleaded guilty to the charge after being misdirected by the police officers to plead guilty.**
2. **That my lordship, I pray for a retrial since I was sick by the time I was arraigned in court.**
3. **That my lordship, I am 15 years and school going child and this sentence will ruin my life in future.**
4. **That my lordship, I was severally beaten and tortured by the mob after being mistaken to have committed the offence.**
5. **That my lordship, I had a grudge with the complainant's mother who suddenly raised an alarm that I had defiled her daughters.**
6. **Your lordship, the sentence is harsh and excessive bearing in mind that I didn't commit the offence.**
7. **Your lordship, I pray that the sentence be quashed and set aside.**
8. **I wish to be present during the hearing of this appeal.**

When the appeal came up for hearing, **Mr. Mutai** learned Senior Prosecution Counsel, conceded the appeal but urged this court to order for a retrial. It is the submission of Mr. Mutai that the Appellant should have been convicted and sentenced under the Children Act. He urged this court to declare the

Appellant's trial as a mistrial.

I have carefully re-evaluated the case that was before the trial court and it is evident that the Appellant did not undergo age assessment before he was convicted. His age was assessed at 16 years after this court issued an order directing the District Medical Officer to do so. It is therefore obvious that the Appellant should have been examined and treated as a child before being tried before the trial court. I am convinced the learned Senior Prosecution Counsel properly conceded the appeal. The remaining issue is whether this case is fit to go for retrial. In Mwangi =VS= R [1983] K.L.R 522, the Court of Appeal restated the principles which must be taken into account before making an order for retrial. At page 523, it was held *inter alia*;

“That a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result”

In Ruhi =VS= Republic [1985] K.L.R 373, this court at page 375 expressly stated that before ordering for a retrial, the court must consider whether it is fair and just to do so. In the appeal before this court there is no doubt that the Appellant was dealt with as an adult. He pleaded guilty to the charge and proceeded to confirm the facts outlined in support of the charge. I have re-examined the medical documents presented and facts outlined and I am of the view that the prosecution has a very strong case which may sustain a conviction if properly considered. I think if an order for retrial is made it will not prejudice the Appellant's rights. Consequently, the appeal is allowed. The conviction is quashed and the sentences are set aside. I direct that the Appellant undergoes a fresh trial in Sotik Principal Magistrate's Court, before another magistrate of competent jurisdiction other than Honourable M.O. Okuche. The Appellant to be held in custody awaiting his retrial. The aforesaid retrial should be given priority. Let the file be mentioned before the trial court on 25th September, 2013 for further orders and directions regarding the hearing of the case.

Dated, signed and delivered this 20th day of September, 2013

J.K. SERGON

JUDGE

In open court in the presence of the Appellant in person and

Mr. Mutai for Director of Public Prosecution