



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 76 OF 2011**

*LESIT, J*

**RAPHEL GIKUNDA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT.**

**JUDGEMENT**

1. The Appellant was convicted of defilement contrary to section 8(1) and section 8(3) of the Sexual Offences Act, after pleading guilty to the charge. He was sentenced to 25 years imprisonment. Being aggrieved by the sentence he filed his Petition of Appeal in which he raises three grounds as follows:
  1. **That the sentence imposed against me is rather too harsh and excessive and pray for a reduction of the same.**
  2. **That the entire case for prosecution was not proved beyond reasonable doubts as required by the law.**
  3. **That as I cannot recall all what was not proved to the required standard of beyond reasonable doubt.**
2. In his submissions on appeal the Appellant urged that he was not challenging the conviction but only the sentence. He urged that he had reformed and would like to go back to the society and build his family. He stated that he loved the complainant and that she got his baby and that she was with him.
3. The State has opposed this appeal. Ms Mwangi learned State Counsel represented the state in this appeal. The learned state counsel urged that the offence carries a minimum sentence of 20 years and that Appellant was sentenced to 25 years. Counsel urged that Appellant was not remorseful even on the date the appeal was heard.
4. I have carefully considered this appeal. The Appellant pleaded guilty to the charge on the day of plea. That is proof of remorse. He still stood as on the same footing even when he came for this appeal. I saw no basis for the learned state counsel's submission that the Appellant was not remorseful for the offence.

5. I have considered the facts of the case as led by the prosecution. It shows that the Appellant was living with the complainant's mother at the time. The Appellant then eloped with the complainant. By the time the Appellant was arrested, the complainant was 20 weeks pregnant by the Appellant. The Appellant admits that he had eloped with the complainant.
6. The Sexual Offences Act does not recognize traditional or cultural practices so that the word 'elope or 'co-habiting' do not exist in that Act. That is quite unfortunate because there are certain cultural or social conduct which should not be ignored even when creating an innovative far reaching law as the Sexual Offences Act. I say far reaching because the innovative offences created under the Sexual Offences Act cannot go unnoticed. For instance the juristic persons and the creation of offences capable to be committed by such person. The creating of a vulnerable witness and the provisions enabling evidence to be given by intermediary witness on behalf of vulnerable witness.
7. Given these creativity I do not want to accept that some provisions could not have been innovated to make provisions that enable the court to deal with "offences" in circumstances such as teenage sex, co-habitation between underage persons etcetera.
8. The instant case would have best been treated as a cultural or social practice especially if it is true the complainant and Appellant co-habited at all. This is on record that Appellant and complainant were cohabiting as man and wife by the time of arrest. The complainant was even expecting the Appellant's child. Appellant pleads he was building his family not committing an offence at the time.
9. There is no excuse for taking away a child of 14 years and making them ones wife. That is a violation and is a serious act. But can one criminalize what is a societal problem or a common societal behavior? That I leave to Parliament to answer. The truth is that this law does need re-thinking and re-drafting to take into account all these and other concerns over this law. Not to mention the sentences provided under the Act are in some cases not only excessively high but also oust the discretion of the court in passing same. So that the courts discretion to determine the suitable sentence is removed. It is painful at times especially in deserving cases.
10. Having said the above I get back to the appeal. The Appellant pleaded guilty to the charge. That proves his remorsefulness for the action. He was given five years above the minimum sentence for the offence. The learned trial magistrate stated in sentence that.

**“Accused is deserving of a harsher sentence since he is a step father to the girl and had an affair with the mother. What he has done is deplorable, immoral and offends African traditions”**

11. I am not excusing the behavior of all concerned in this case. However, I think that there was not sufficient facts before the court to give a basis of conclusions made by the learned trial magistrate. For instance how old was the complainant's mother. What about the Appellant. There is a bit of speculation in learned trial magistrate's conclusion. On that basis I find that the conclusion was without basis and therefore the learned trial magistrate misdirected himself and therefore passed an excessive sentence.
12. On that basis I will allow appeal against sentence by setting aside the sentence of 25 years and in substitution thereof give the minimum sentence provided under the Act of 20 years imprisonment. The Appellant succeeds to that extent.

**DATED SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF OCTOBER, 2013.**

**J. LESIIT**

**JUDGE**