PIUS KIOKO …..……..……..….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate

B. Ochieng PM delivered on 7/02/2008 in Makindu Criminal Case No. 94 of 2008)

J U D G M E N T

The appellant was charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 7th January 2008 at midnight at Kibwezi District within Eastern Province, committed an act which caused penetration to CN aged 8 years. In the alternative, he was charged with sexual assault contrary to section 51(1) (B) of the same Act.

He was recorded as having pleaded guilty and was convicted and sentenced to serve twenty (20) years imprisonment with hard labour.

He has now appealed to this court. His grounds of appeal are four. However, they can be merged into two. Firstly, that he was detained for 23 days before being charged in court. Secondly, that he was not explained the consequences which were to come upon pleading to the charge.

With regard to the alleged contravention of section 77 of the Constitution (now replaced), the delay of 23 days in custody before arraignment in court, courts have held that the remedy is a cause of action for an award of damages. Such violation of rights cannot *per se*, vitiate a proper conviction in a criminal case. In addition, each case has to be considered on its own circumstances and facts. I dismiss this ground.

The appellant also complains that no explanation was given to him on the consequences of conviction on the charge. Section 207 of the Criminal Procedure Code (Cap 75) is clear on this. There is no requirement that an accused person be given an explanation regarding the sentence he is likely to suffer, when he is brought to court to answer the charge. What is required is that the substance of the charge and its elements are read and explained to him in a language he understands, and that he should be required to plead to the same.

Therefore the complaint that the appellant was not informed of the consequences or sentence he was likely to suffer on conviction, has no legal basis. I dismiss that ground.

This being a first appeal, I have to evaluate the charge and the whole record and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

I have perused the record. On 7th February 2008, the relevant part of the record, with regard to taking the

plea, is as follows:

“The substance of the charge explained to the accused and understood in Kikamba.

Accused in his own words replies in Kikamba-"It is true I defiled the complainant who was a minor aged 8 years.”

Thereafter the facts were given by the prosecutor. The appellant is then recorded as having stated:

“Accused: Facts are true and properly put.”

In my view, taking into account all the above contents of the record, the plea of guilty of the appellant was unequivocal.

The sentence imposed was 20 years imprisonment with hard labour. The sentence of 20 years imprisonment is provided for under section 8(3) of the Sexual Offences Act. It is a sentence for defilement on a girl aged between 12 and 15 years. There is no limb for hard labour.

The appellant was convicted of defiling a girl of 8 years. Under section 8 (2) of the Act, the offence carries a sentence of life imprisonment. The State has, in this appeal, not asked for enhancement of sentence. Hence I will retain the sentence of 20 years imprisonment imposed by the lower court. The limb of hard labour, in my view, is illegal. The law does not provide for hard labour. I will have to quash the limb of hard labour.

In the result, I allow the appeal in part. The conviction is upheld. The sentence of twenty (20) years imprisonment is upheld. The hard labour imposed in the sentence of the subordinate court is hereby set aside.

Orders accordingly.

Dated and delivered at Machakos this **26th** day of **June** 2012.

George Dulu
Judge

In presence of:-
Appellant present in person
N/A for State
Nyalo-Court clerk.