KITONGA KAMALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court

Criminal Case No. 644 OF 2011 by Hon. H.M. Nyaberi- SRM on 11/1/.2010)

JUDGMENT

Kitonga Kamali, hereinafter "***the appellant***" was on 7th October, 2011 arraigned before the Senior Resident Magistrate's court at Mwingi charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars given were that on diverse dates of 18th and 19th May, 2011 at K V, N location in Mwingi East District within Kitui County, the appellant committed an act which caused penetration of his male genital organ, namely the penis into the female genital organ namely vagina of **K M**, a girl aged 17 years.

The appellant returned a plea of guilty. Accordingly, the trial court entered a plea of guilty against the appellant. The facts were subsequently given as follows:-

"***On the 18th May, 2011 the complainant K M who is a girl aged 17 years and a pupil at K Primary School within N location was sent by her mother to the home of WM to collect KShs.500/-. On arrival at the said home at about 9.00 a.m. she was given the money. At about 1.00 p.m. she left for her parent's home. While on her way home, she met the accused who greeted her and exchanged a few words. He requested her to accompany him to his home to give her a message for her mother. She accepted the request and accompanied him. On arrival at the accused home, he excused himself to go and extract some honey which he was to give her to take to her mother. He never came home until 9.00 p.m. when he came with some honey. He never gave her the honey to take to her mother instead he gave her the honey to eat with his children. The complainant then requested the accused to give her a torch and escort her to her parent's home. The accused said it was too late and requested her to sleep. He prepared a special room for her whereas his children used their normal room. In the middle of the night, the accused went to the room of the complainant where he carried her to his room while threatening to kill her if she raised an alarm. He pinned her on his bed, removed her underwear and subsequently started defilement. He spent about a half an hour while committing the act. He thereafter released her to go and spend the remaining part of the night in the room he prepared. He cautioned her not to inform her mother that she spent a night at his home. The following morning at about 7.00 a.m., he told her to go first to W\'s home so that it could be seen she slept there. She went as directed where she did some casual work and was paid KShs.400/-. Finally, she went home and did not reveal to her mother what had transpired that previous night. On 19th May, 2011 the complainant went to school as normal. When coming back home in the evening and while in company of her younger siblings, they met the accused. The accused called her aside to tell her that he had a message for her mother. He told her younger siblings to continue proceeding home. When they had left, he***

dragged the complainant to a nearby bush where he demanded sexual favours. He threatened her not to raise any alarm. He also promised her gifts if she complied. He removed her pant and defiled her for a half an hour. After the act he dressed her up and subsequently escorted her to her parent's home. Before arriving, they met the complainant's aunt namely K M. She suspected them. On interrogating the complainant, she answered her rudely. The accused left her and went to his home. After a month the complainant revealed the ordeal to her mother after experiencing stomach upset and on noticing vaginal discharge. The mother suspected that she might have conceived and subsequently informed the area assistant chief and the school administration. The accused was arrested and escorted to Nguni police post. The complainant was brought to Mwingi district hospital where she was tested for pregnancy. She was found to be pregnant. Due to lapse of time, no sexual activity was noted. I wish to produce the P3 form as exhibit 1. The complainant age was assessed at 17 years old. Age assessment report Exhibit 2. Treatment notes including lab test as exhibit 3. The accused was finally charged with this offence".

Upon the appellant confirming as correct the facts narrated by the prosecution as aforesaid, the trial court convicted the appellant on his own plea of guilty. Upon such conviction, the appellant was sentenced to 15 years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal claiming that at the time of plea, and being a layman, he thought that the offence was fineable, he was a young man whose life will be affected to his detriment by the long incarceration, he was seeking a non-custodial sentence, he was remorseful but ashamed of what he did. He undertook not to repeat such an act again in future. That for the short stay in prison, he had learnt that crime does not pay and those lessons will always remain etched in his mind for as long as he remains of sound mind.

Essentially, the appellant is pleading with the court to review the sentence. He is not challenging the conviction. Thus the appeal is basically on sentence.

When the appeal came before me for hearing on 30th April, 2012, **Mr. Mukofu**, learned State counsel conceded to the same on the grounds that though the appellant had been charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, he was nonetheless sentenced under section 8(4) of the same Act. This was a grave error and on that ground alone, the appeal ought to be allowed. **Mr. Mukofu** though did not seek a retrial.

On his part, the appellant welcomed the state's gesture. He associated himself fully with the sentiments expressed by the State counsel.

It is not in doubt that the appellant was charged under section 8(1) as read with section 8(3) of the Sexual Offences Act. Section 8(1) creates the offence, whereas 8(3) is the penalty section. The appellant pleaded guilty. Under section 8(3) of the Sexual Offences Act, he should have been sentenced to imprisonment for a term exceeding not less than 20 years. However, it would appear that following the conviction, the learned Magistrate unilaterally and without warning the appellant proceeded to sentence the appellant under section 8(4) of the Sexual Offences which attracts a minimum sentence of 15 years. Nowhere in the record of the proceedings does the learned magistrate justify this action

In its wisdom, parliament chose to categorize the gravity of the offences under Sexual Offences Act on the basis of the victims' age and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1). In this case, I have no doubt at all that the age of the victim was proved beyond reasonable doubt. There was the age assessment report dated 6th October, 2011, prepared by the medical superintendent, Mwingi District hospital, which put her age at 17 years.

However, what is of concern to me is the failure by the magistrate to justify his actions of sentencing the appellant under section 8(4) of the **Sexual Offences Act** as opposed to section 8(3) under which he was charged and convicted. At least the appellant deserved an explanation. In a related matter I had this to say concerning such omissions.

"One may argue that this omission was not fatal and is actually amenable to the provisions of section 382 of Criminal Procedure Code. I do not subscribe to that view. To my mind, such omission is fatal to the prosecution case since in my view it occasioned failure of justice. The appellant was called upon to plead to an unknown and/or non-existent offence. Secondly, parliament in its wisdom or lack of it, chose to make offences under the Sexual Offences Act of strict liability. The sentence upon conviction is strict. There is no room for discretion by the court. That being the case, it behoves those in charge to be extremely careful in the manner they frame and prefer charges under the said Act, knowing that an omission of whatever kind whether inadvertently or not may have dire consequences. Take the case of the appellant in this case. He was upon conviction sentenced to 40 years imprisonment. Should he be allowed to languish in the gallows for that period of time when it is self evident that there was a fundamental and fatal omission in the way the charges against him were framed? I do not think so. As the offences under the Sexual Offences Act are strict, so is the duty of those charged with framing charges to be extremely careful in what they do. Any misstep whether intentional or inadvertent will automatically see the accused or appellant extricate himself from the consequences of conviction. Section 382 of the Criminal Procedure Code will not come in aid in those circumstances".

I would reiterate the foregoing in the circumstances of this case with a few changes here and there.

The appeal is allowed, conviction quashed and the sentence imposed set aside. The appellant should forthwith be set at liberty unless otherwise lawfully held.

JUDGMENT DATED, **SIGNED** and **DELIVERED** at **MACHAKOS,** this **15TH** day of **JUNE**, 20**12**.

ASIKE-MAKHANDIA
JUDGE