



LUKUNGA KALUMU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in Criminal Case No. 201 of 2011 of the Senior Resident Magistrate's Court at Kilifi before A. Obura – SRM)*

### **JUDGMENT**

1. The appellant herein was charged before the Principal Magistrate's Court in Kilifi with Defilement contrary to Section 8(1) (4) of the Sexual Offences Act (sic). (should ideally be preferred as being contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act).

Particulars of the charge are that on diverse dates between the year 2006 to the year 2010 at [particulars withheld] in Kilifi District within the Coast Province, intentionally caused his penis to penetrate the vagina of A.K., a child aged 17 years.

2. When the charge was read out to him, he pleaded guilty, was convicted and eventually sentenced to 15 years imprisonment. He has appealed to this court against conviction and sentence. In his memorandum of appeal, he has raised four grounds namely:

- 1. *“That I was not given adequate time to reflect to the plea I was about to make by article 50(2) (b) (c) and (h) of the new Constitution.***
- 2. *That the plea was unconditional and equivocal.***
- 3. *That I was coached by police to plea guilty to the charges in a promise that I will be acquitted.***
- 4. *That the sentence was harsh and excessive.”***

The appellant canvassed his appeal by way of written submission. Through Mr. Kemo, the State opposed the appeal stating that the appellant pleaded guilty to the charges.

3. Under section 348 of the Criminal Procedure Code no appeal is allowed in respect of an an accused person who has pleaded guilty to a charge in the subordinate court, except with respect to legality of or extent of sentence. However, this court is obligated to satisfy itself that the plea of guilty in the Lower Court was unequivocal. The correct procedure for taking pleas was outlined in the celebrated case of **Adan v R [1973]EA 445** as follows:

- (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
- (ii) The accused's own words should be recorded and if they are an admission and plea of guilty***

*should be recorded.*

*(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.*

*(iv) If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and change of plea entered.*

*(v) If there is no change of plea, a convictions should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.*

4. The record of the Lower Court shows that the above procedure was followed. The appellant now complains that he was not given “adequate time reflect” on the plea and that he was “coached” by police to enter a plea of guilty. It is apparent from the record that several mentions took place before the court after he entered the plea of guilty. This was necessitated by the court's call for a probation report and ascertainment of the appellant's age. This process took about one month during which the appellant was held in the Juvenile Remand Home. It cannot therefore be true that the appellant had no time to reflect on the plea or was laboring under the instructions of police officers. His appeal on conviction therefore has no merit.

5. With regard to the sentence, it is legal. And while it was confirmed that the appellant was an adult, he was a very young adult. Considering the circumstances of the offence and the age of both the appellant and the victim, I think there is room to interfere with the sentence in the interest of justice. I would therefore call for a probation report to be prepared by a probation officer based in Malindi (not Kilifi) on the circumstances of the appellant. Such report should be presented to this court on 8th October, 2012.

Delivered and signed at Malindi this 20th day of September, 2012 in the presence of: Ms. Mathangani for the State, appellant present.

Court clerk - Evans

**C. W. Meoli**  
**MEOLI**