



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Appeal 3 of 2012**

**ISAAC KIPLANGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the original conviction and sentence of Principal Magistrate's Court**

**at Kilgoris Hon. B. Ochieng in Kilgoris PMCRC Case no.1081 of 2011 dated 5<sup>th</sup> January 2012)**

**JUDGMENT**

1. the appellant herein, Isaack Kiplangat pleaded guilty to a charge of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on the 28<sup>th</sup> day of December 2011 at [particulars withheld] in Transmara District of the Narok County, he intentionally caused his penis to penetrate the vagina of S.K., a child aged 11 years. He had been charged in the alternative with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act, No.3 of 2006**. The offence was alleged to have been committed on the same day and in the same place when the appellant caused his penis to come into contact with the vagina of S.K. a child aged 11 years.

Having pleaded guilty to the main count, the appellant was sentenced to 30 years imprisonment.

2. Being dissatisfied with the sentence, the appellant has come before this court on appeal, on the ground that the sentence of 30 years imprisonment is harsh and excessive considering the age and health status of the appellant. He says that if he were to serve the whole of the said sentence, his life would be totally ruined and his family for whom he has been the bread winner will be put to great prejudice. The appellant prays that the sentence be reduced.

3. The facts of the case to which the appellant pleaded guilty are that on the 28<sup>th</sup> day of December 2011 at [particulars withheld] in Transmara District the complainant who was by then aged 11 years and a standard 6 pupil at [particulars withheld] was asleep in the house with her younger siblings. At about 11.00 p.m., she felt somebody lying on her stomach. She tried to enquire who it was. The appellant who was already on top of her and having sexual intercourse with her warned the complainant not to scream. Because the complainant felt pain in her vagina she screamed and when she screamed, the appellant went away to the room where he used to stay in the same homestead. The complainant got up and went to her father's house and reported what had happened to her. The complainant's father got up and went out with the complainant to the room where the appellant used to sleep. They found him there.

4 The appellant was immediately arrested. The complainant was taken to [particulars withheld] Dispensary where she was treated. The complainant was also taken to the police station where she was issued with a P3 form before being taken to Transmara District Hospital for further treatment. At the hospital, the age of the complainant was said to be between 11-13 years.

5. On examination of the complainant, it was established that her hymen was torn and that there was hyperemia and white discharge. The P3 form was produced in evidence as **P. Exhibit 1**. The age assessment form on the complainant was produced as **P. Exhibit 2**. The complainant's black under pant which had been torn by the appellant before he defiled her was produced as **P. Exhibit 3**. According to the age assessment form, the appellant was said to be over 18 years old. According to the age assessment age of the complainant, her age was said to be between 11-13 years. The actual age of the complainant was subject to her mother producing a birth certificate.

6. At the hearing of the appeal, I heard submissions by both the appellant and learned counsel for the respondent. The appellant told the court that he was only appealing against sentence.

7. Learned counsel for the respondent opposed the appeal on sentence, contending that since the appellant pleaded guilty to defiling an 11 year old, he should have been sentenced to life imprisonment and not 30 years. Counsel submitted that **section 8 (2)** of the **Sexual Offences Act** was couched in mandatory terms and that the trial court had no discretion as to the actual sentence to mete out to the appellant. Counsel urged the court to enhance the sentence to one of life imprisonment.

8. On hearing the respondent's plea to have the sentence of 30 years imprisonment enhanced to a life in prison, the appellant changed his mind and pleaded with the court to let him withdraw the appeal so as to continue serving the 30 years in prison.

9. Counsel opposed the appellant's plea to withdraw the appeal after submissions had been made by both parties to this appeal. The court declined to grant the appellant's request to withdraw the appeal.

10. This is a first appeal. On a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching

its own conclusions in the matter. See **Pandya –vs- R [1957] EA 336** and **Okeno –vs- Republic [1972] EA 32**.

11. I have reconsidered the record in this case since the appellant was convicted on his own plea. Having carefully considered the record, I am satisfied that the plea in this case was unequivocal, and no issue, in my humble view, arises on the same. The thorny issue here is whether the appellant was convicted under the right section of the Sexual Offences Act.

12. It is not in dispute that sexual offences involving girls under the age of 18 years must be strictly proved including proof of age. In other words, the age of the victim is what determines the kind of punishment to be meted out to an accused person found guilty under the Act. The punishment prescribed under **section 8 (2)** of the **Sexual Offences Act** applies where the victim is 11 years of age and below. The duty of the prosecution in this case was to prove that the complainant herein was 11 years and below. The duty of the prosecution in this case was to prove that the complainant herein was 11 years and below. The medical evidence adduced by the prosecution showed that the complainant herein was aged between 11-13 years. That age assessment was to be confirmed on production of the complainant's birth certificate by her mother. There is no evidence on record of the birth certificate in respect of the complainant to confirm her exact age. The failure by the prosecution to give the exact age of the complainant means that the appellant could not have been and ought not to be convicted under **section 8 (2)** of the **Sexual Offences Act**. In this regard, I do not think that the respondent's contention that the sentence against the appellant should be increased has any basis.

13. The issue that arises for determination is: what is the proper sentence to which the appellant, who unequivocally pleaded guilty to defiling the complainant, should be sentenced? **Section 8 (2)** provides

that a person who commits an offence of defilement with a child aged eleven years or less shall, upon conviction be sentenced to imprisonment for life. In the instant case, the complainant was said to be aged between 11-13 years. So, the charge against the appellant ought to have been brought under **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act** which provides:-

**“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

14. It is my considered view that since the complainant was said to be aged between 11-13 years, her age falls in the bracket provided by **section 8 (3)** of the **Sexual Offences Act**. In the circumstances and for the reasons above given, and by the powers conferred upon me by the provisions of **section 364** of the **Criminal Procedure Code**, the appellant is entitled to a revision of the sentence in this case since he was sentenced under the wrong section of the Sexual Offences Act. Accordingly, I allow the appeal on sentence by setting aside the term of 30 years imprisonment and substituting the same with a sentence of 20 years imprisonment to run from 5<sup>th</sup> January 2012. R/A within 14 days.

15. It is so ordered.

**Dated and delivered at Kisii this 25<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Present in person for Appellant

Mr. Mutua (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**