



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CORAM: F. AZANGALALA J.
CRIMINAL APPEAL NO. 78 OF 2009

BETWEEN

SIMON KIPRUTO SIMATEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of the Senior Resident Magistrate -

N. Shiundu dated 12th May, 2005 at the Chief Magistrate's Court at Eldoret in Criminal Case No. 2933 of 2009]

JUDGMENT

The appellant, **Simon Kipruto Simatei**, was charged with two counts of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. There were two alternative counts of Indecent Act contrary to section 11 (1) of the same Act.

The 1st count carried the following particulars: That the appellant on 8th April, 2009, in Uasin Gishu District within the Rift Valley Province, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of **M.J.**, (hereinafter "**the 1st complainant**"), a girl aged 8 years. The alternative count alleged that on the same date, at the same place, the appellant indecently touched the private parts namely, vagina of the same 1st complainant.

It was alleged in the second count that the appellant, on the same date and at the same place, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of **J.J** (hereinafter "**the 2nd complainant**"), a girl aged 9 years. The alternative count carried the following particulars: that the appellant, on the same date, same place, indecently touched the private parts namely vagina of the said 2nd complainant.

The appellant appeared before **N. Shiundu**, Senior Resident Magistrate, on 12th May, 2009 and pleaded guilty to the principal counts. The prosecutor narrated the facts of the offence and when the

appellant was invited to react to those facts, he admitted the truth of the same. He was then convicted on his own plea of guilty on the said principal counts.

The prosecutor then stated that the appellant was a first offender. In mitigation, the appellant asked for forgiveness.

The Learned Senior Resident Magistrate, after considering the prosecutor's comments relevant to sentence and the appellant's mitigation sentenced the appellant to serve 50 years imprisonment on each count, the same to run concurrently.

The appellant was dissatisfied and has appealed to this court against both conviction and sentence. He now alleges that the charge was not fully explained to him in the language he understood and that the police threatened to kill him if he refused to admit the offence. He further contends that the said sentence is very harsh.

Mr. Chirchir, Learned Senior State Counsel, opposed the appeal. In his view, the appellant's plea was unequivocal and was taken in the language he understood and that the allegation that he was threatened by the police is an afterthought. Counsel further submitted that if the appellant was threatened by the police, he would have informed the court at the time of plea.

With regard to sentence, **Mr. Chirchir** submitted that the Learned Senior Resident Magistrate had no discretion under the section the appellant was charged, which section provides for a Life Sentence.

I have considered the record of the Senior Resident Magistrate and the grounds of appeal. I have also given due consideration to the submissions made before me. Having done so, I take the following view of the matter. The record of the Learned Senior Resident Magistrate indicates that the proceedings before him were conducted in English and translated into Kiswahili. It is significant that the appellant does not specifically state that he does not understand Kiswahili. The record indeed shows that the appellant fully participated in the proceedings before the Learned Senior Resident Magistrate. In the premises, I agree with the Learned Senior State Counsel that the allegation that the appellant did not understand the proceedings in the Lower Court is an afterthought. I therefore find that there is no valid ground of appeal against conviction. His plea was clearly unequivocal.

With regard to sentence, I can only interfere with discretion of the Learned Senior Resident Magistrate as to the appropriateness of the sentence, if it appears that the Learned Senior Resident Magistrate acted on wrong principles in assessing the sentence or that he imposed a sentence which was excessive.

The offence of defilement of a girl aged below 11 years carries Life Imprisonment. The Learned Senior Resident Magistrate therefore had no discretion with regard to sentence. It may be argued that the sentence of 50 years imposed upon the appellant is in reality a Life Sentence. However, that would suggest that the Learned Senior Resident Magistrate had the discretion to impose any number of years as long as the effect was to keep the appellant away for a long time. Unfortunately, that discretion is not provided for under the section the appellant had been convicted. In the premises, I find and hold that the sentence of 50 years imposed upon the appellant was illegal. I hereby set it aside and substitute the same with Life Imprisonment. The appellant shall therefore serve imprisonment for Life as provided under section 8 (2) of the Sexual Offences Act No. 3 of 2006.

So, save for the correction of the sentence, there is no valid ground of appeal. The appeal is without merit and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF AUGUST 2011.

F. AZANGALALA

JUDGE.

Read in the presence of:-

F. AZANGALALA

JUDGE

4/8/2011