



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 314 of 2008**

**BENSON SONGOI MAEMBE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Benson Songoi Maembe was charged with one count of defilement of a girl contrary to Section 8(1)(3) of the Sexual Offences Act, 2006, and an alternative charge of indecent assault on a female contrary to Section 5(1)(B) of the Sexual Offences Act, 2006 (No. 3 of 2006).

The Appellant was on the evidence, convicted and sentenced to twenty (20) years imprisonment. The Appellant in his original Petition of Appeal set out four (4) grounds of appeal which I do not propose to set out hereunder because the Appellant has in his Amended Grounds of Appeal handed over to the court on 22<sup>nd</sup> February 2010, stated as follows

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*"Your Lordship after having received the trial proceedings and judgment as I had requested in my Petition of Appeal, and after having perused the same, I have now changed my mind and therefore appealing against sentence only, on the grounds that -*

- *he is a first offender,*
- *he is remorseful,*
- *he is young,*
- *he has learnt the hard way,*
- *the sentence is harsh."*

The Appellant did not plead guilty to the offence for which he was found guilty. He was convicted on the evidence of not only the victim, but PW1 (*the mother of the complainant*), PW2 (*the Clinical Officer*) who testified that he examined the complainant and found her hymen was broken and concluded that she had been penetrated. PW2, the complainant testified that she was woken up by a person who had already placed her legs apart - he had already removed her pant. Her attempts to scream and resist were of no avail. *"He had pinned me on the bed, holding my neck - I was*

*lying in bed facing upward. He came on me, facing me and penetrated my vagina with his penis."*

The victim's mother and father intervened. The little sister M , 9 years old, was woken up. She lit a Kerosene lamp. It was then they noticed that the assailant was Songoi. He was in a shirt and below was naked. He escaped when the parents intervened.

The Appellant had gained access to the girls' room by removing part of the mud wall and inserted his hand to open the kitchen door from inside. On his escape the Appellant left his clothes, green trouser with a belt still on, and his Akala sandals. The Appellant was known to the complainant, and never cross-examined the complainant.

The evidence of PW4, on the escape of the Appellant, the clothes and shoes he left corroborated that of PW1. The evidence of PW5 the investigating officer was that the Appellant admitted that the items (*green trouser and akala shoes*) were his.

In his evidence the Appellant touched nothing about the complainant or charge against him. He only referred to his trade, a charcoal burner, and how he was arrested at Rotian and taken to Narok Police Station.

The evidence is thus overwhelming and the court considered that evidence and found the Appellant guilty and convicted him accordingly. The Appellant does not complain about his conviction. His complaint is about sentence. He says he is young, and that being a young man of the remote Maasai land, he was not aware of the seriousness of the crime, *"but I have now learnt through the hard way and through other clever prisoners and will therefore never repeat such a mistake in future."*

There is an expression in Ateso my mother tongue which says *"kajeni de"* which literally means, *"Had I known"*. It is not a defence however. It is an expression of both regret and remorse. But once a deed is done, it cannot be undone. An event or occurrence has consequences, cause and effect. Section 8(1) and (3) of the Sexual Offences Act 2006, provide -

Section 8(1) :

*"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."*

8(2) ...

*8(3) 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.*

Under the Children Act a child is defined as any human being under the age of eighteen years. The complainant herein (PW1) was according to the evidence of PW1 (her mother), 14 years of age on 22<sup>nd</sup> June 2006, the date of the commission of the offence. PW3 the complainant, was 16 years on 3<sup>rd</sup> April 2008 when she testified and described her ordeal under the pressure of the Appellant. She was a child of 14 years, at the commission of the offence, and at 16 years

of age when she testified. Either way she was still a child. The determining factor for purposes of sentencing is her age at the time of commission of the offence. She was fourteen. The punishment for the offence of defilement of a child of between twelve and fifteen years of age is 20 years.

In my view, the court has no discretion in matters of punishment and sentencing in respect of offences committed under the Sexual Offences Act, 2006. This is, as I have argued in the case of JOHN SEJURA PATIM vs. REPUBLIC (Nakuru H.C. Criminal Appeal No. 13 of 2009) because of the clearly segregated and tabulated sentences for punishment of offences of defilement against children 0-11 years (S.8(2) - (life imprisonment), (S. 8(3) 12-15 years 20 years imprisonment), and S. 8(4) - 16-18 years - 15 years imprisonment).

The whole tenor of the Act and Section 8 in particular, is extreme deterrence of sexual offences against children. Whilst appreciating the Appellant's remorsefulness, the court will only encourage the Appellant to in turn continue acknowledging the seriousness of the offence he committed and if the Prison authorities think he has sufficiently reformed, they might think of recommending Presidential Amnesty, and pardon. As for the appeal itself, it has no merit at all in law. I affirm the judgment and orders of the lower court and dismiss the Appellant's appeal dated 22<sup>nd</sup> October, 2008 and as amended per the written submissions handed to court on 22<sup>nd</sup> February 2010.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 26<sup>th</sup> day of February 2010

**M. J. ANYARA EMUKULE**

**JUDGE**