



NGONA MASHA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **NGONA MASHA** has filed this appeal against his conviction and sentence by **HON. W.F. ANDAYI**, the learned Senior Resident Magistrate sitting at Kaloleni Law Courts. The Appellant was arraigned in court on 5th June 2008 and charged with the offence of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“Between 1st January 2008 and 29th February 2008, in Kaloleni district within Coast Province, unlawfully and intentionally committed an act which caused penetration of his genital organ into the female genital organ namely vagina of F.K. a girl aged 13 years”

When the charges were read out to him the Appellant entered a plea of guilty. As required by S. 207 of the Criminal. The prosecutor **INSPECTOR NGOMO** read out the facts to the Appellant. He maintained his plea of guilty by stating in his own word

“The facts are correct”

The learned trial magistrate did follow the laid down procedure in recording the Appellant’s guilty plea. It is evident that the trial magistrate did take time to warn the Appellant of the seriousness of the crime as well as the consequences of a guilty plea. At page 1 line 16 the trial magistrate stated

“Court – I have properly and clearly explained to accused each and every ingredient of this charge and informed him of the severe punishment”

to which the appellant responded

“I cannot deny I slept with the girl”

This was a clear and unequivocal plea of guilty if there ever was one. I have no doubt that the Appellant clearly understood the charges which he faced and he was fully aware of the consequences of a plea of guilty. Undeterred he maintained his plea of guilty at each stage. I am satisfied that the plea was properly taken in full compliance with S. 207 of the Criminal Procedure Code. Indeed I note that the Appellant has not challenged his conviction at all. I find the conviction to be sound and I do hereby uphold the same.

The Appellant appeals against his 20 year sentence citing the same to be harsh and excessive. He also offers up mitigation saying that he married the complainant in accordance with Giriama cultural norms. Firstly the Appellant was accorded an opportunity to mitigate and

the record indeed confirms that he did state in mitigation at page 3 line

“I had agreed with that girl that I marry her after school. That is what happened. I agree that I made an offence. I am an old man. The old and young all commit offences. I pray for courts assistance”

The Appellant, reiterated his guilty plea in his mitigation. He further confirmed that he knew the girl was under age as he knew she was still in school. He cannot now purport to mitigate at the appeal stage. Secondly the excuse that Giriama customs allow the marriage of underage girls is totally without merit. Cultural norms cannot be used to excuse criminal offences. A child of 13 years is too young to give any informed consent to sexual intercourse much less to marriage. The court will not allow young girls to be abused using the pretext of culture. The Appellant impregnated a 13 year old girl, thus making her a mother way before she was physically or emotionally ready and interrupting her education. S. 8(3) of the Sexual Offences Act clearly provides a minimum sentence for this offence which is twenty (20) years in prison. The learned trial magistrate did consider the Appellant’s mitigation and imposed this minimum sentence. This is a very serious offence and a deterrent sentence was called for. I find the sentence imposed by the trial court to have been both lawful and appropriate given the circumstances. As such I do hereby confirm the twenty (20) year sentence imposed upon the Appellant. In short the present appeal fails and is dismissed in its entirety.

Dated and Delivered at Mombasa this 26th day of May 2010

M. ODERO
JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO
JUDGE
26/05/2010