

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 95 of 2006

JOHN MWENDO KISUIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The Appellant, **John Mwendo Kisui**, was convicted of **defilement of a girl under the age of 14 years** contrary to **section 145 (1)** (since repealed by the **Sexual Offences Act, 2006**) of the **Penal Code** . He was sentenced to serve **30 years imprisonment**. He has appealed against sentence only.

The particulars of offence as set out in the charge were that between 1st January and 2nd October 2002 in Makueni District within Eastern Province, he had unlawful carnal knowledge of one **M.M**, a girl under the age of 14 years.

The provision of the law under which the Appellant was charged, and which was subsequently repealed as already noted, provided at the time the offence was committed, a **maximum sentence of 14 years imprisonment with hard labour together with corporal punishment**. As already seen, the offence was committed between 1st January and 2nd October 2002.

By the **Criminal Law (Amendment) Act, No. 5 of 2003**, section 145(1) aforesaid was amended to increase the age of the girl to 16 years, and to increase the maximum punishment from 14 years imprisonment to **imprisonment for life with hard labour**. This Act came into effect on **25th July, 2003**.

The Appellant was arrested on 27th February 2003 but arraigned in court on 3rd March 2003. This was before Act No. 5 of 2003 came into operation. In any event, it is trite law that an offender must be sentenced in accordance with the law as it existed when he committed the offence.

This means therefore that the sentence imposed upon the Appellant was unlawful. He was liable under the law, as it existed when he committed the offence, only to **imprisonment for a term of 14 years with hard labour together with corporal punishment**. But by the time he was sentenced, corporal punishment had been outlawed in the country. The Appellant was therefore liable to **imprisonment for 14 years together with hard labour**.

I will in the event set aside the sentence of 30 years imprisonment imposed upon the Appellant. I have noted in his petition of appeal that he is now contrite and remorseful, no doubt after reflecting upon the matter while in prison. But I note that the girl he defiled was aged only 13 years and was his niece. In defiling her he used a knife to threaten her. He deserved the maximum sentence provided by the law.

I will therefore substitute a term of imprisonment of **fourteen (14) years together with hard labour**. The sentence will

ofcourse run from the date of conviction and sentence, which was 27th July 2006. To that limited extent only is the Appellant's appeal allowed. Orders accordingly.

DATED AT MACHAKOS THIS 6TH DAY OF MAY 2010

**H.P.G WAWERU
JUDGE**

DELIVERED THIS 7TH DAY OF MAY 2010