

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 197 OF 2009

F.O.O..... APPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

(Being original conviction and sentence in the Senior Resident’s Magistrate’s Court at Rongo Criminal Case No. 54 of 2009, by D. Kemei – Senior Resident Magistrate)

The appellant was arraigned before the Senior Resident Magistrate’s Court at Rongo on two counts; firstly, abduction of a girl under the age of 16 years contrary to section 143 of the **Penal Code** and secondly, defilement of a girl contrary to Section 8(3) of the **Sexual Offences Act**. He pleaded guilty to both counts and was accordingly convicted on his own plea of guilty. However, after the facts were led the learned magistrate realized that the first count could not hold as it had been repealed by the time the appellant was charged. Accordingly and correctly so in my view, he discharged the appellant under section 89(5) of the **Criminal Procedure Code**.

With regard to the 2nd count, the trial magistrate directed the age of the appellant to be assessed before sentence. The assessment was subsequently done. According to the report filed, the age of the appellant was put between 17-18 years. Since the report was not categorical as to the age of the appellant, the benefit of doubt should have gone to the appellant meaning therefore that he should have been tried as a minor in the children’s court as correctly submitted by the learned senior state counsel. Upon conviction too, he should have been punished under the Children’s Act.

It is apparent therefore that the appellant was tried in a wrong court to his prejudice. This court has jurisdiction to interfere with the sentence meted out of if it is convinced or persuaded that it was illegal. The appellant having been tried in court without jurisdiction, IPSO facto, the sentence meted out must be illegal.

Accordingly I will interfere with the sentence to the extent that I will mete out the appropriate sentence as provided for under the Children’s Act. In the result, I allow the appeal on sentence. I will set aside the sentence of imprisonment of 15 years imposed on the appellant and in substitution therefore make an order of discharge of the appellant on his entering into recognizance without surety for a period of one year. It is so ordered .

Dated, and **signed** in court, this 22nd June, 2010.

ASIKE-MAKHANDIA
JUDGE