



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT BUNGOMA

Criminal Case 1 of 2009

DANIEL THIONG'O ..... APPELLANT

~VRS~

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant Daniel Thiong'o was convicted of the offence of defilement contrary to section 8 (1) of the Sexual Offences Act and sentenced to twenty (20) years imprisonment. In his amended petition of appeal dated 7<sup>th</sup> January, 2009, he states that the plea was equivocal, that the language used was not indicated and that there was no age assessment of the victim. Finally that the sentence was harsh and excessive.

The state did not oppose this appeal. Mr. Onderi conceded to it in regard to both conviction and sentence for the reason that the birth certificate to prove age was not produced. He asked the court to order a retrial. Mr. Areba opposed the idea of a retrial on grounds that it is an established principle that where the prosecution is to blame, the court should not order a retrial.

He referred the court to the case of LENARD LOLIMO EKIMAT -VS- REPUBLIC CRIMINAL APPEAL NO.151 OF 2004 AT ELDORET where the court declined to order a retrial on grounds that it would not serve the interests of justice. Mr. Areba also urged the court to consider the period the accused has stayed in custody.

On the issue of failure to establish age, I concur with the State Counsel that his was not done. The accused pleaded guilty to the charge. The facts were read to him and he admitted them as correct. A birth certificate or a medical report to prove the age of the complainant was not produced. Only a P.3 form which gave an approximate age that was tendered in the evidence. Under section 8 of the Sexual Offences Act, it is mandatory that, the age of the victim be determined. It is on establishing the age that the court will be guided on the sentence to impose as provided by section 8(2) and (3). I find that the failure to determine the age also makes the sentence illegal because it has no foundation in law. In effect, therefore, I quash the conviction and set aside the sentence.

The Appellant was sentenced on 24/12/2008 and has now served about seven months which is a very short stint of the sentence provided by the law. I am in

agreement with the decision relied on by the Appellant's counsel on retrial. The failure to establish age is blamed on both the prosecution and the court, the prosecution for failure to produce the relevant evidence and the court's failure to demand for it. I am convinced that in this case, given on the short lapse of time, the prosecution will be able to trace the witnesses. The seriousness of the offence must be taken into consideration.

I find this a good case for retrial and I hereby order that a retrial be done by another magistrate other than the one who convicted the accused. Plea to be taken within seven (7) days.

**F. N. MUCHEMI**

**JUDGE**

*Dated, Delivered and Signed at Bungoma*

*This 23rd day of July 2009 in the presence of the appellant his counsel and the state counsel Mr. Onderi.*