



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

Criminal Appeal 20 of 2007

DONALD OPEMI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant was charged with the offence of defilement contrary to Section 145 (1) of the Penal Code. It was alleged that on diverse dates between 1st and 30th October, 2004 at Kampi Miwa Estate in Uasin Gishu District within the Rift Valley Province, unlawfully had carnal knowledge of D. A. a girl under the age of 14 years.

The Appellant was found guilty after trial and conviction. He was sentenced to seven (7) years imprisonment on 7th February, 2007.

On this appeal, the Respondent the Attorney General conceded to the appeal on the ground that the language the Complainant testified in was not indicated. Also that when the charge was substituted he was not informed his rights to recall witnesses.

The Attorney General applied for retrial of the case. He submitted that the offence was serious.

The Appellant opposed retrial since he would be prejudiced. That he has been in custody for fourteen (14) months.

From the record, the prosecution applied for amendment of the Charge Sheet under Section 214 of the Criminal Procedure Code by adding the alternative charge of indecent act. It was not substitution.

The appellant was charged on 6th June, 2005. By the Sexual Offences Act No. 3 of 2006 Sections 145 Penal Code was repealed. However, by virtue of Section 48 and the First Schedule, of the said Act the proceedings continued.

I have carefully considered the Petition of Appeal and the Submissions.

While the Charge Sheet was amended to add an alternative charge of indecent act, the Court found that the Appellant defiled the minor as charged in Count 1.

The Appellant claims that the trial Court failed to indicate the language used when the Complainant

and other witnesses were giving their evidence.

The Accused does not complain that the plea and charges were read to him in a language he does not understand. The record shows that the charges were read in both English and Kiswahili. He does not alleged that he does not understand English and Kiswahili. In fact he made his plea in one or the other language.

It is true that the record does not expressly indicate in which language the Complainant and witnesses testified. But the Accused understood both English and Kiswahili which are the only languages of record. There is no record that an interpreter in another language other than the two was in Court. The Petition is vague as it does not state what language the Complainants and witnesses actually spoke in or which language he did not understand.

The Respondent should not concede on appeals easily particularly when it involves the rights of minors and very serious offences like defilement and rape.

The Appellant was convicted of the first Count. The failure to recall any witnesses in respect of the second Count was not prejudiced as he was not convicted on the alternative charge.

This Court rejects the concession by the Attorney General and application for retrial.

The conviction was proper and sound. The sentence was not excessive but in fact too lenient since the maximum sentence under the repealed Section was life imprisonment while the minimum sentence under the Sexual Offences Act is twenty (20) years.

I hereby order enhancement of the sentence to ten (10) years imprisonment.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF JULY, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Kimani for the Appellant

Mr. Chirchir for the Respondent