**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 48 OF 2020**

**(From Original Conviction and Sentence in Butali PMCSO No. 48 of 2020, by Hon. CN Njalale, Senior Resident Magistrate, on 16th November 2010)**

**ROMALD WAMALIKA MUKANGAI....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

1. The appellant was convicted by Hon CN Njalale, Senior Resident Magistrate, on one count of defilement contrary to section 8(1), as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006, and was accordingly sentenced to serve ten years (10) years imprisonment. The particulars of the offence charged were that the appellant, on divers dates between 23rd October and November 2020, at Butali area, [particulars withheld] Location, in Kakamega North Sub-County, within Kakamega County, he unlawfully and intentionally caused his penis to penetrate the vagina of NL, a child aged 14 years.

2. He pleaded guilty to the charge before the trial court on 4th November 2020, a plea of guilty was entered, and he was sentenced the same day to serve the terms stated in paragraph 1 of this judgment.

3. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He avers that the conviction was not based on any documentary proof on the age of the child.

4. As the first appellate court, I have re-evaluated the entire record of the trial court. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant as he testified. I am guided, in that regard, by the decision of the Court of Appeal in of ***Okeno vs. Republic*** **(1972) EA 32( Sir William Duffs P, Lau and Kutta JJA).**

5. The appeal was canvassed by way of both written and oral submissions, by both the advocate for the appellant and the State. The contest was principally whether the plea was unequivocal.

6. I have looked at the record. When the charge was read to him, the appellant responded in Kiswahili, which was one of the languages in which the charge was read, *"Ni kweli."* Which meant that it was true. The charge as read to him. He added, unsolicited, that the complainant was his girlfriend, and he had had sex with her. When the facts were read out, he said in Kiswahili, *"Maelezo in ya kweli."* Which meant that the information in the particulars were correct. He added that he had had sex with the complainant, though she had informed him that she was 16 years old.

7. The plea as recorded was as unequivocal as could be. He admitted the charge on the three occasions that he opened his mouth to address the court. So the court cannot be faulted in any way. He asserted that the complainant was his girlfriend, suggesting that it was a normal cause of things in such relationship for sex to happen.

8. The only issue that could perhaps be addressed is the age of the complainant. The particulars put her age at 14, the appellant said that the complainant had told him that she was 16. His case, therefore, was that he did not think he was dealing with a much younger person. That, of course, does not absolve him, for a 16-year-old is still a minor and any sexual contact with her would still amount to defilement. I agree with the State, the only difference that should make is with the sentence, not the conviction.

9. I note that the appellant himself was just 19 years old. If he believed the complainant was 16 years old, then the age difference between them would be just three years. Although the charge indicates that the complainant was 14, there is no documentary proof of the same in the record before me, although the trial notes suggest that a certificate of birth was placed before the court. I note too that the appellant was in high school, Form 3, at the time of the offence. Both were youngsters in teenage, although one has just entered teenage, while the other is just about to exit teenage. Looked at from another angle, he is just a year old into adulthood, and his mind is still wired like that of a child, in certain respects. I note too that the sexual encounter was consensual, if the appellant is to be believed, that the complainant was his girlfriend. He did not attack her, and assault her with brute force or threats. But then again consent is not a defence in these cases, although it should be taken into account with respect to sentence.

10. I believe that the appellant has learnt his lesson from the trial process and his incarceration so far. He was quick to plead guilty, and he is first offender. I do not believe a lengthy custodial sentence for a person of his age would benefit him. It could in fact be more detrimental to his growth and wellbeing. His brain his still growing. He still requires guidance and counselling. He is still pretty much in his formative years.

11. After weighing everything, I am inclined to place him on probation, for three years, so that he can be guided way from behaviour that brings him into conflict with law. I expect that that could mould him into a better person. I hereby, therefore, substitute the appellant's custodial sentence, and substitute it with a probation order, to be served for three years. He shall be released to the probation office at Kakamega. Should he commit other crimes during the period, or breach the terms of the probation order, during the period he shall be on probation, the probation order shall be cancelled and he shall be liable to be sentenced afresh on the offence for which he had been convicted. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE,2021**

**W MUSYOKA**

**JUDGE**