



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 42 OF 2019

DESMOND ROTICH KURGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and Conviction of Hon. G. Kimanga (SRM) in Kericho CMCC No.98 of 2019 delivered on 20/12/2019)

JUDGMENT

1. The Appellant was convicted on his own plea of guilty with Defilement contrary to section 8 (1) as read of section 8 (3) of the Sexual Offences Act (SOA) Act No. 3 of 2006 and sentenced to 15 years imprisonment on 20/12/201
2. The particulars of the charge were that on diverse dates between 5/9/2019 and 18/12/2019 at MADDO sub location in Kericho East Sub County within Kericho County, the Appellant intentionally caused his penis to penetrate the vagina of MC, a girl aged 13 years
3. The facts as given by the prosecuting counsel were that the complainant was lured by the Appellant with promises to marry her. The complainant was a pupil in class 8.
4. The Appellant took the complainant to his home and introduced her as his wife and they lived together from 3/9/2019 to 18/12/2019 during which period they engaged in sexual intercourse on several occasions.
5. The Appellant was arrested thereafter and the complainant was taken to Hospital. Her birth certificate was produced as an Exhibit and show her date of birth as 28/9/2006 and therefore she was 13 years old at the time of the purported marriage.
6. I find that the Appellant pleaded guilty to the charge and he therefore does not have a right of appeal except against sentence.
7. **Section 348** of the Criminal Procedure Code CAP 75 Laws of Kenya bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. The said section provides as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.”
8. In the case of **OLEL -VS- REPUBLIC [1989] KLR 444** the court held that:-

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”
9. The Appellant herein is therefore barred from challenging the conviction and his only recourse would therefore be to challenge the extent or legality of the sentence imposed on him by the trial court.
10. The Appellant has stated in his submissions that police told him to plead guilty and he should therefore be set free.
11. However, the issue of the age of the Appellant was raised before the trial court and the Appellant confirmed that he was aged 18 years old with a valid identity card.
12. The Appellant submitted through his Advocate that he was a minor at the time of the commission of the offence.

13. The Appellant attached a birth certificate showing he was born on 12/12/2003 and therefore he was 16 years old at the time of the commission of the offence.

14. The power to allow an appellant to adduce additional evidence on appeal is discretionary and is stipulated under the provisions of section **358 (1)** of the Criminal Procedure Code CAP 75 Laws of Kenya. The said provision stipulates that: "In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."

15. In **SAMUEL KUNGU KAMAU -VS- REPUBLIC [2015] eKLR** the Court of Appeal observed that "*the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.*"

16. I find that this is an attempt to adduce evidence at appeal stage when the record is clear that before plea was taken, it confirmed that the Appellant was over 18 years of age.

17. The said birth certificate has been obtained for the purpose of defeating the ends of justice and the same is an afterthought.

18. I find that the plea herein was taken in accordance with the procedure laid down in **ADAN -VS- REPUBLIC (1973) EA 446**.

19. The complainant was a minor at the time the Appellant purported to marry her and her consent to sexual intercourse was immaterial.

20. I find that the appeal herein lacks in merit and I accordingly dismiss it and uphold both the conviction and the sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 9TH DAY OF JULY 2021.

A. N. ONGERI

JUDGE