



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.23 OF 2016**

**JOSHUA KIBET KOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. J. Ndururi (PM) in Kericho CM Criminal Case No.53 of 2014 delivered on 23/9/2016)*

**JUDGEMENT**

1. The Appellant was convicted with the offence of Defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence Act No.3 of 2006 and he was sentenced to life imprisonment.
2. The particulars of the charge were that on 20/7/2014 at [particulars withheld], Kericho West District within Kericho County, the Appellant caused his penis to penetrate the vagina of NC, a girl aged 7 years old.
3. The Appellant was charged with an alternative count of committing indecent act with a child in that on the same material particulars as in count 1 above, the Appellant caused his penis to come into contact with the anus of NC.
4. The prosecution evidence in summary was that PW1, the mother of the minor left the minor with other children at her house and went to a neighbour's house.
5. PW1, said it rained heavily and upon return to her house she found the door closed. Upon pushing the door open, she found the Appellant in bed with the minor. The minor started crying and when PW1 pulled the blanket, she found the Appellant naked.
6. The minor was taken to Tagabi Dispensary where she was referred to Kericho Central Hospital and then to Kericho District Hospital where she was admitted.
7. PW2 and PW4 arrested the Appellant and took him to Jamji police post and he was subsequently charged in court.
8. PW6 who examined the child on 21/07/2014 noted that the hymen was torn though it was an old scar. He found the vaginal walls hyperemic ( had redness on the vagina/walls) and also redness in the anal ring. PW6 concluded that the child had been defiled and sodomized as well.
9. The birth certificate of the minor was produced and it showed that the minor was born on 17/12/2006 and the court found that on 20/07/2014 she was slightly over 7 years.
10. The Appellant did not adduce evidence during the trial and the court found that the prosecution proved the guilt of the accused person on the main count of Defilement.
11. The trial court sentenced the Appellant to life imprisonment and he has appealed against both conviction and sentence on the following grounds:

**i) THAT the Appellant was not accorded legal representation during the trial.**

**ii) THAT the trial court failed to evaluate the Appellant's mental psychiatric acuity.**

**iii) THAT the mitigation by the Appellant was not considered.**

iv) **THAT the sentence was manifestly excessive.**

12. The Appellant's counsel submitted that Article 50(2) (g) requires that the Appellant be represented by a lawyer of his own choice and further that he must be informed about his right to representation and the trial court must put the same on record.
13. The Appellant's counsel further submitted that the Appellant did not give his defence and that he was condemned unheard and for that reason the appeal should be allowed and a retrial ordered.
14. The respondent opposed the appeal and submitted that it was the Appellant who choose not to be represented by an Advocate of his choice and further that he participated actively in the trial.
15. On the issue of failure to evaluate the Appellant's mental/psychiatric Acuity, the respondent submitted that section 11 of the Penal Code provides that **"every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved"**.
16. On the issue of mitigation and sentence, the respondent submitted that the Appellant gave his mitigation and further that the sentence is lawful as the minor was below the age of eleven years and the life imprisonment is mandatory.
17. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.
18. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:
- "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**
19. The issues for determination are as follows:
- i) Whether there was penetration.
  - ii) Whether the Appellant was properly identified.
  - iii) Whether the age of the complainant was proved.
  - iv) Whether the Appellant rights to representation were violated.
20. The Appellant was found red handed defiling the minor. There is medical evidence that there was penetration. The age of the complainant was proved by production of the birth certificate.
21. I also find that there is no evidence that the Appellant's rights to representation were violated. There is no indication that he was denied an opportunity to engage a lawyer.
22. The record is clear that the Appellant participated in the trial and even asked for adjournment to call witnesses.
23. The Appellant opted not to testify and it transpired that the witnesses he wanted to call had testified for the prosecution. There is no indication that the Appellant was not of sound mind.
24. This is a case where the Appellant was found on the act defiling a minor.
25. The sentence the trial court imposed upon the Appellant is lawful since it depends on the age of the child.
26. The appeal lacks in merit and the same is dismissed.
27. Conviction and sentence are accordingly upheld.

**Delivered, signed and dated at Kericho this 2<sup>nd</sup> day of October 2020.**

**A. N. ONGERI**

**JUDGE**