



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.23 OF 2018**

**VICTOR KIPNGENO KIRUI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against the conviction and sentence by Hon. S. M. Mokuu (C.M) in Kericho Criminal Case No.13 of 2016 delivered on 29/10/2018)***

**J U D G M E N T**

1. The Appellant was convicted with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. No.3 of 2006 and he was sentenced to 15 years imprisonment.
2. The particulars of the charge were that on diverse dates between 27/12/2015 and 30/1/2016 in Bureti Sub-County within Kericho County, the Appellant unlawfully caused his Penis to penetrate the vagina of R.C., a child aged 16 years old.
3. The Prosecution evidence in summary was that the Complainant disappeared from her home on 27/12/2015 and on 30/1/2016, her mother found her at the home of the Appellant after searching for her for many days.
4. The incident was reported to Litein Police Station and the Appellant was arrested and the Complainant taken to Kapkatet Hospital where she was examined and found to have been defiled. The Birth Certificate of the victim was produced. (D.O.B.21/8/1999).
5. The Complainant confirmed in her testimony that the Applicant was her boyfriend and that she consented to the Sexual Intercourse.
6. The Appellant did not say anything in his defence and the Trial Magistrate said consent is immaterial when the victim is under the age of 18 years.
7. The Appellant has appealed to this Court on the grounds that the Appellant was under the age of 18 years when he was sentenced to 15 years imprisonment and further that the Court contravened Article 53 (1) (d) & (f) (i) & (ii) as read with Article 25 (a) of the Constitution. The Appellant attached his Birth Certificate showing he was born on 15/02/1999.
8. The State conceded to this appeal on the grounds that Section 8 (7) of the Sexual Offences Act was not complied with. The said section states as follows: -

***“Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act.”***

9. I find that it is not in dispute that the Appellant was under the age of 18 years when this offence was committed. Section 190 (1) of The Children Act is explicit that no child shall be imprisoned. The said section states as follows;

***“190 (1) No child shall be ordered to imprisonment or to be placed in a detention camp.”***

10. This appeal is conceded and I accordingly allow it and I quash the conviction and set aside the sentence of 15 years imposed upon the Appellant.

11. I direct that the Appellant be set free forthwith unless lawfully held for any other reason.

**Delivered, Dated and Signed at Kericho this 2<sup>nd</sup> Day of October, 2020**

**A.N. ONGERI**

**JUDGE**