



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL CASE NO. 34 OF 2018

(CORAM: R.E. ABURILI – J.)

ERICK OKOTH ODUOR....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and sentence dated 23.7.2018 in Ukwala SRM Cr. Case No 50 of 2018, Hon. G. Adhiambo - SRM)

JUDGMENT

1. The Appellant herein **Erick Okoth Oduor** was charged with the offence of **Defilement contrary to Section 8 (1) as read with Section 8 (4) of the Penal Code**.
2. It was alleged that on 19.7.2018 in Ugunja Sub-County within Siaya County he intentionally caused his penis to penetrate the vagina of **(LA)** a child aged 17 years.
3. When the plea was taken on 23.7.2018, the Appellant who stated that he understood Luo took a plea in Luo language as explained to him by **Maureen Achieng Court Clerk** and he stated as follows:

“It is true I had sex with that girl aged 17 years old.”
4. The Court then entered a plea of guilty. Facts of the case were read to him and a P3 form for the Complainant filed on 20.7.2018 at Ambira Sub-County Hospital was produced as an exhibit No. 2. A Birth Certificate was also produced, exhibit 1, It is **No.[xxxx]** showing that the victim was born on **2.9.2001**.
5. A P.3 form for the Appellant filed on 20.7.2018 was also produced as exhibit 3.
6. On being asked whether the facts as presented by the Prosecutor were true. He stated:

“Those facts are true.”
7. The Court then convicted the Appellant on his own plea of guilty in respect of the charge.
8. Prosecution stated that the Appellant was a first offender, and in mitigation, the Appellant stated:

“I did not forcefully have sex, she agreed to have sex. I asked her if she would go to school the following day and she admitted. The following day we were arrested. I request the Court to forgive me. I had sex with her.”
9. The trial Court then made sentencing remarks and considered the nature of the offence, the age of the victim and mitigations and sentenced the Appellant to serve 15 years imprisonment.
10. On 23.7.2018 in his appeal filed in Court on 27.7.2018 the Appellant claims that he pleaded guilty to the charge, that he was not in the right state of mind when the plea was being read to him that not all facts were considered when judgment was being read; that none of the witnesses including the Complainant testified in the case; that he was never given enough time to prepare for case and that he prays for a retrial for full facts to be considered.

11. At the hearing of the appeal he presented to Court amended grounds of appeal and asserts that he was not given ample time to prepare himself during the plea and that the trial Court went ahead to sentence him without a warning, that the trial Court erroneously convicted him without considering that the entire Prosecution case was insufficient and unsatisfactory in law as the Medical evidence produced in Court exonerated him from the alleged offence.

12. The Appellant also filed written submissions claiming that **Article 50(2) of the Constitution** was not complied with; and that the Medical Report exonerated him from the alleged offence.

13. In his oral submissions he submitted that the Complainant was his girlfriend, that he asked her about her age and she stated that she was 17 years old that is why he stated that he never forced her to have sex with him. That he now knows that it was wrong to have sex with a 17 year old girl; but that he prays for a retrial.

14. The Prosecution led by the Senior Principal Prosecution Counsel Mr. Okachi left the matter to Court to decide on the law.

15. I have carefully considered this appeal against a plea of guilty **Section 348 of the Criminal Procedure Code** provides that no appeal shall be allowed in the case of an Accused persons who has pleaded guilty and has been convicted on that plea by a subordinate Court, except to the extent of or legality of the sentence.

16. I have considered **Section 8 (4) of the Sexual Offences Act** and it provides that a person who commits an offence of Defilement with a Child between the age of sixteen and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years.

17. The Appellant herein was sentenced to serve 15 years imprisonment on conviction for defiling a child aged 17 years after he pleaded guilty and I have examined the plea of guilty which was unequivocal. He has not challenged the said plea of guilty on the basis that it was equivocal.

18. In a plea of guilty, witnesses are not expected to testify. The facts must however disclose an offence under the law, the facts disclose an offence. The P.3. for the Complainant dated 20.7.2018 shows that the victim admitted to having had sexual intercourse with her boyfriend on 19.7.2018 night with use of a condom. The facts too disclose that there was Sexual Intercourse. The certificate produced show that she was aged 17 years and the Appellant concedes that fact in his address to this Court.

19. A Child under 18 years cannot consent to Sexual Intercourse and that is why **Section 8 (1) (4) of the Sexual Offences Act** creates an offence called Defilement of a child between age of 16 and 18 years.

20. This Court does not find any merit in this appeal. There are no grounds for a retrial. In my view, the Appellant knew and ought to have known that at his age of 25 years, it was an offence done for him to have sexual intercourse with a child under the age of 18 years.

21. This Court believes that this appeal and the plea for retrial is motivated by the fact that the victim might now be aged over 18 years and may have been accustomed to being a girlfriend which is immaterial in law.

22. For the above reasons and in line with **Section 348 of the Criminal Procedure Code**, I find this appeal not warranted. The same is hereby dismissed. The Appellant to serve full sentence Judgment to be typed.

Dated, Signed and at Siaya this 18th day of February, 2019.

R.E. ABURILI

JUDGE

Delivered in the Open Court in the Presence of:

Mr. Okachi: Senior Prosecution Counsel for Respondent

Appellant present in person.

Court Assistants:

1. Brenda Ochieng

2. Modesta Mutiamani