



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 41 OF 2018**

**SOG ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an appeal against both sentence and conviction in Siaya PMCRC No. 22 of 2017 dated 22.8.2018 Before Hon. J. O. Ongondo – P.M.)***

**JUDGMENT**

1. The Appellant herein SOG was convicted of the offence of **defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act**, on 30.7.2018 by Hon. J. O. Ongondo, P.M. Siaya vide Siaya P.M's Court (S.O.) Case No. 8 of 2017.2. This was after a full trial. He was sentenced to serve a mandatory minimum sentence of fifteen years imprisonment.
2. He appealed against conviction and sentence but on 16.7.2019 he withdrew his appeal against conviction and urged the Court to consider reducing his sentence. In his address to the Court, he admitted that on the material night, the Complainant went to his house and they had sex but that she had never been his girlfriend. He asked the Court to assist him.
3. In the trial Court, the Prosecution stated that the Appellant had no previous records. In his mitigation, the Appellant simply stated that he did not commit the offence.
4. Upon withdrawal of his appeal against conviction, I ordered for a social inquiry report to be filed by Siaya County Probation Officer and the file was noted on 17.7.2019 and a social inquiry report filed this morning, signed and dated 4.10.2019 by Ochieng Ogolla, Probation Officer, Siaya.
5. In the said report, the Appellant/Convict is stated to be 23 years old, reported to be well behaved in prison and in the community. He is married with one child, a son but that his wife took off upon the conviction and incarceration of the Appellant.
6. The Victim was aged 16 years old. She could not be traced. Her parents were traced and said they were looking for her as she is at large all the time. They left the matter in the hands of the Court.
7. The community's attitude towards the Appellant/Offender is positive. The Offender also alleges to be on ARVs medication because he is HIV positive but this is not supported by medical documents.
8. The Community fears that because the victim habitually moves around with different boyfriends. She may cause many young men to end up in prison. However, as she was 16 years in 2017, she may now be an adult.
9. The Appellant is said to be remorseful. He has been in prison for 13 months now. He is a young man aged 23 years and was about 21 years when he committed the offence which he owns upto committing saying the girl went to his house on the material night and that they had sex. Sexual offences are considered to be heinous offences in our society because they are traumatizing to the victims of the offence. These offences are also prevalent and despite harsh "deterrent" sentences, there seems to be no end to the offences.
10. If the offender is confessing to be HIV positive then it is clear that the victim who was found to be HIV positive at the time of examination could have contracted the virus from the Appellant.
11. The evidence on record shows that the victim aged 16 years old was found living with her boyfriend, the Appellant. In her testimony, the Victim stated that the Appellant was her friend so when they met at 7 p.m. and he asked her to go to his rental house, she went and it became late so he asked her for sex and she refused and told him she was still going to school. She stayed with him for 2 months. She said "He did not do anything to me." Later after she was stood down and returned to Court to testify, she stated that she had unprotected sex with the

Appellant between 8.a.m. and 9.00 p.m. That he was her boyfriend, they had had sex previously and that she could not resist having sex with him as he had sodas and peanuts and touched her breasts.

12. In cross-examination, the victim stated that she had carried her clothes in a paper bag and that they had previously gone to the Appellant's house. She said she had gone to see Allan, another friend.

13. PW2's evidence is that the Victim had been send away for school fees, she was given fees and instead of returning to school, she went to live with the Appellant PW3 the Clinical Officer who examined the Victim carried out tests and among them, the Victim was HIV positive.

14. She had lived with the offender for 2 months. This is very unfortunate.

15. The Appellant though not charged with the offence of intentionally infecting his Victim with HIV/AIDs virus, should have known that as an HIV positive person, he risked infecting his sex partners, if he did not use any protection.

16. In my humble view, persons who know their HIV Status and proceed to infect others especially children who have no capacity to consent to sex and neither do they know the risks involved, should be kept away from the society so that the children and other persons who are likely to be his victims are secured.

17. That being the case, I find no mitigating factors which can persuade me to reduce his sentence of 15 years imprisonment noting that the Victim who is said to be at large and that she allegedly likes moving around with different boyfriends might just be busy unleashing the HIV/AIDS virus to many unsuspecting families and thereby destroying the whole community with the AIDs scourge and tormentor, having regard to the stigma associated with HIV/AIDS.

18. Accordingly, albeit the Appellant was given minimum sentence, I find no compelling reason to reduce that sentence which is lawful.

19. I accordingly decline to interfere with sentence imposed on the Appellant and dismiss the appeal against sentence.

20. In the end, the entire appeal against conviction having been withdrawn, the appeal against sentence is found devoid of merit the same is hereby dismissed. The Appellant to serve full sentence in prison.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 7<sup>TH</sup> DAY OF OCTOBER, 2019.**

**R.E. ABURILI**

**JUDGE**