



**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 109 OF 2018**

**BETWEEN**

**TOM ONTONYI OMOKE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. D. Ogola, SPM*

*dated 19<sup>th</sup> February 2013 in Criminal Case No. 175 of 2013*

*at Senior Principal Magistrate's Court at Ogembo)*

**JUDGMENT**

1. The appellant **TOM OTONYI OMOKE alias JAMAA** was charged defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. It was alleged that 12<sup>th</sup> February 2013 within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of JKO, a child aged 6 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts. He was convicted on the principal count on his own plea of guilty and sentenced to serve life imprisonment.
2. The appellant has now appealed against the conviction and sentence on the grounds he was not warned that of the consequences of pleading guilty and that he was not given time to prepare for his defence. He also stated that the sentence of imprisonment was harsh, inhuman, disproportionate, arbitrary and contravened his fundamental rights and freedoms.
3. Counsel for the respondent, Mr Otieno, opposed the appeal on the ground that the plea of guilty was unequivocal. He pointed out that the charge was read to the appellant in a language he understood twice and which he accepted as true. He submitted that the facts read to the appellant disclosed an offence and he accepted them as true.
4. This court is called upon to determine whether the plea was unequivocal. **Section 281** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** provides that an accused person may plead not guilty, guilty or guilty subject to a plea bargain. The requirements for recording a guilty plea provided for under **section 207** of the ***Criminal Procedure Code*** were elucidated in ***Adan v Republic [1973] EA 445*** as follows: -
  - i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
  - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
  - iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.
  - iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
  - v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the

accused's reply should be recorded.

5. I have read the proceedings, I find that the charges against him were read to the appellant in Kiswahili which is the language he stated that he understood and he responded in Kiswahili, "*It is true*". Thereafter, the trial magistrate recorded that, "*The charge sheet has been read out to accused person 2 times in both Kiswahili and Ekegusii language. He has maintained and stated – It is true.*"

6. After the conviction was entered, the matter was adjourned to the next day for presentation of the facts. The facts read by the prosecutor were that on 12<sup>th</sup> February 2013 at about 9.00am, the complainant was at home alone when the appellant, who was a neighbour knocked the door, entered the house and gave her mandazis. After she had eaten and he lured the child to his home. He locked her in his bedroom, undressed her and proceeded to sexually assault her. Although she had been threatened, she was able to scream and this attracted good Samaritans who found the appellant in the act of defiling the child. The appellant escaped through the window and was caught later. According to the P3 form and the Post Rape Care (PRC) form filled on 14<sup>th</sup> February 2013, the child was 6 years the child had bruises on the left cheek and there was a laceration on the left labia minora consistent with the act of penetration.

7. The appellant accepted the facts narrated by the prosecutor as correct. I am satisfied that the fact outlined clearly in disclose the offence of defilement. In mitigation, the appellant did not say anything that would indicate a change of plea. He stated, "*I am asking for leniency. I admit I made a mistake. I shall not repeat.*"

8. I find and hold that the guilty plea entered by the trial court was free and unequivocal and the resulting conviction is therefore affirmed.

9. The appellant challenged the sentence of life imprisonment. The sentence under **section 8(2)** of the **Act** is a mandatory life sentence where the child victim is below the age of 11 years. The age of the child was part of the facts read to the appellant and evidenced by the P3 and PRC forms produced. Since the child was below the applicable age, the sentence of life imprisonment was within the law and properly imposed after mitigation.

10. The appeal is dismissed.

**DATED and DELIVERED at KISII this 17<sup>th</sup> day of DECEMBER 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno , Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.