



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 68 OF 2016**

**PHILIP LOSIKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in original Lodwar criminal case No.170/2016 delivered on 13/3/2016 by M K MWANGI Principal Magistrate)**

**JUDGMENT**

The appellant **Philiph Losike** was charged in the lower court 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. The particulars of the offence are that on unspecified date during the month of October 2015 in Turkana Central sub-county within Turkana County intentionally caused his penis to penetrate the Vagina of JAE a child of 17 years of age.

He pleaded guilty to the charge and convicted on his own plea of guilty and sentenced to serve 15 years imprisonment. Aggrieved by the conviction and sentence, he filed this appeal premised on the grounds that

- 1. The learned erred in law by not allowing the appellant understand the charges before the court on the language known to the appellant.**
- 2. The proper procedures were not followed by the honourable learned magistrate by not indicating the language which he responded to the charges.**
- 3. The trial magistrate erred in law and facts by not considering age assessment report of the complainant alleged age of birth was 1998 and mathematics calculation from 1998 to 2016 is year old and therefore the alleged charges do not stand for defilement.**
- 4. The facts of the case were not read to the appellant properly and hence I see there was no justice done to me as the accused.**
- 5. The medical report on the appellants age assessment was not correct since the appellant is currently 17 years old and requests the honourable court to reconsider a retrial in this case.**

The appellant filed written submission in support of the appeal. He submitted that he was tortured upon arrest and forced by the police officers to admit the charge or else they will deal with him which forced him to plead guilty. He submitted that he was also forced by the parents of the complainant to marry her to acquire dowry. He urges the court to order a retrial.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant pleaded guilty, the facts were read while he admitted. He was thus convicted and sentenced. Learned counsel submitted that the plea was unequivocal and under section 248 of the criminal procedure code, no appeal lies except to the extent or legality of sentence. He submits that the sentence imposed is the minimum sentence allowed.

The appellant was charged in court on 31/3/2016. When the charge was read and every element was explained to him and asked whether he admits or denies the charge replied

**Accused – it is true**

**Court prosecutor – the complainant and the accused herein have been lovers since the year 2015 without the parents of accused knowing. Before they first thought accused and complainant to be first .....later complainant's mother noticed that complainant belly was big. On medical examination being taken, it was noted that complainant was pregnant.**

Complainant confirmed that she was impregnated by accused who she was been having sex for about a year a fact accused also conceded which he has confirmed.

Accused .....of complainant who was aggrieved by the situation reported the matter to the police at Lodwar police station. Complainant was then taken to Lodwar district hospital and on examination it was found that complainant's hymen was broken and that she was pregnant.

The P3 was completed in the said hospital and in part D it confirmed that complainant was pregnant. Later accused was arrested and charged with the charges facing the accused herein. P3 – P exhibit 1. It confirms the degree of injury to be known.

An age assessment report was also prepared upon examination of complainant by a dentist. I wish to produce the age assessment report (undated) P exhibit 2.

Accused – the facts are correct.

Court – convicted on own plea.

Court prosecutor – no previous records this is a serious offence and rampant.

Accused – we started our relationship since we were kids and were lovers. I am an orphan. I pray for leniency.

The procedure and legal principles to be applied while taking plea in criminal cases are as set out in *Adan –vs– Republic 1973 E.A 445* where the court stated

- (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
- (ii) The accused own words in response to the charge should be recorded and if they are an admission a plea of guilty
- (iii) The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to 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 the change of plea entered.

I have reproduced the proceedings of 31/3/2016 to demonstrate that the procedure followed by the trial magistrate was in accord with the procedure and principle set out in *Adan –vs- Republic* on plea taking. The charges were read to the appellant and interpretation was by Christine Court clerk who was interpreting English/ Kiswahili and Turkana. The appellant actively participated and infact in mitigation explained that they started the relationship when they were kids.

As the first appellate court, this Court is required to look a fresh at the evidence presented before the trial court, and evaluate the same so as to determine whether or not the appellant was properly convicted (see *Okeno v Republic [1972] EA 32*). In this appeal, the appellant pleaded guilty and was thus convicted of his own plea of guilty. Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. It provides as follows:-

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.”**

In the case of *Olel v Republic [1989] KLR 444*, the court held:-

**“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”**

Having determined that the appellant's plea in the trial court was unequivocal and he was convicted on his own plea of guilty, this appeal against conviction is without merit. This appeal is hereby dismissed.

Dated and signed at Lodwar this 15<sup>th</sup> day of June, 2017.

**S N RIECHI**

JUDGE