REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 89 OF 2016

(Appeal originating from the conviction and sentence by Hon. B.M.EKHUBI SRM in Othaya S.O CASE NO. 6 of 2016)

DANIEL MURITHI NJAGI..APPELLANT

=VERSUS=

REPUBLIC...RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act no.3 of 2006. The particulars were that on 13th day of November 2016 at around 10.00pm at Gathumbi in othaya Sub County within Nyeri county the appellant intentionally and unlawfully caused his penis to penetrate the anus of B.W.M without his consent

The trial court convicted the appellant on plea of guilty and sentenced him to serve life imprisonment. The grounds of appeal are;

1. That the trial magistrate convicted the appellant without enquiring into his mental status

2. The charge was defective

3. That the judgment date is not indicated

The appellant submitted that the trial magistrate failed to warn the appellant on the consequences of pleading guilty. He also submitted that he was not sent for mental examination. He further submitted the section under which he was charged read 8(1) (4) of the sexual offences Act instead of section 8(1) as read with section 8 (4) of the sexual offences Act. That the phrase as read with was left out. He said he did not understand the charges and the defect embarrassed his defence. Finally he submitted that the judgment is not dated.

The respondent supported the conviction and sentence. The learned state counsel Ms. Mwaniki submitted that the appellant was convicted on his own plea of guilty and that by pleading guilty to the charge he waived his right to appeal on conviction and can only appeal on sentence. She submitted that the proceedings were conducted in a language understood by the accused kikuyu language and that the appellant was warned of the consequences of pleading guilty and the severity of the sentence but he still

pleaded guilty. She submitted that the plea was unequivocal and that the appellant understood the entire process. She further submitted that the fact that the appellant mitigated show that he knew the charges he was facing.

As concern the appellant's state of mind the respondent submitted that the state/prosecution was not made aware of any mental challenge and that the ground is an afterthought.

On sentence the respondent submitted that it was legal and that it was clear that the child was 15 years and the charge was to be section 8(3) which provide a minimum sentence of 20 years. She urged court to peruse original proceedings to ascertain the section under which the appellant was convicted. She submitted that the error on record can be cured by section 382 of the criminal procedure code. She prayed that the appeal be dismissed.

I have perused the court record and note that on 18th November 2016 the charge was explained to the appellant in kikuyu language and that he responded "it is true". On 21/11/2016 the charge was amended and read again to the appellant. It is recorded that the court explained the heftiness of the sentence to the appellant thereafter the charge was again read and explained to him and he again said "it is true". Facts were read to him and he said "facts are true" then the court proceeded to convict him on his own plea of guilty. In mitigation he said he has a family who relied on him solely. The record show that the appellant was sentenced on 28/11/2016.I have perused the hand written proceeding and note that the provision of the law under which he was charged was 8(1) (4). He was sentence under 8(4).The birth certificate produced show that the minor was born on 11th April 2001.The offence was committed on 13th November 2016;the minor was therefore 15 years old and the correct penalty section should have been 8(3) which provide minimum sentence of 20 years.. **Section 382** of the Criminal procedure code provide as follows:-

> **…"no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."**

The record show Facts were read to appellant; the facts indicate defilement of a minor aged 15 years; the birth certificate produced confirmed that. The appellant admitted the facts read to him in kikuyu language; there is no doubt that he understood the charges he was facing. He was convicted under the correct provision of the law. The error on the charge does not render conviction improper as injustice has been occasioned to the appellant

On mental assessment, there is no indication on record that the appellant exhibited any behavior which would have prompted the court to subject him to mental assessment. The appellant also never raised any issue on his mental status. The fact that he was even able to mitigate show that he was sound mentally. The record clearly show that the plea was unequivocal. I therefore uphold the conviction.

On sentence, record show that the appellant was a first offender. Minimum sentence for defilement of a child aged15 years is 20 years. No maximum sentence is provided under section 8(3) of the sexual offences Act. Sentenced imposed is not therefore illegal but On account of appellant being a first offender I find it fair and just to reduce from sentence life imprisonment to 20 years imprisonment. Sentence is therefore reduced to 20 years imprisonment.

Dated, signed and delivered at Nyeri this…19TH ……..day of……JULY…………2017.

RACHEL NGETICH

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HIGH COURT JUDGE