REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.106 OF 2011

KELVIN OMONDI ….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

{Appeal from original conviction and sentence from

Ukwala SRM's Court in Criminal Case No.66 pf 2011 by E. K. MWAITA – SRM.]

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J U D G E M E N T

1. The appellant was charged and convicted of the offence of Defilement of a girl contrary to Section 8(1)(4) of the Sexual Offences Act No.3/2006. The particulars of the offence were that on diverse dates between 9th January 2011 and 11th January 2011 at [particulars withheld] village in Ugenya District within Nyanza Province intentionally caused his penis to penetrate the vagina of B A A a girl aged 16 years.

2. The alternative charge was committing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act No.5/2006.

3. The particulars were that on diverse dates between 9th January 2011 and 16th January 2011 at particulars withheld] village [particulars withheld] sub location in Ugenya District within Nyanza Province intentionally touched the vagina of B A A a girl aged 16 years with his penis.

4. On his own plea of guilty the appellant was convicted and sentenced to 20 years imprisonment. He has filed this appeal citing several grounds and of great significance is the fact that the plea was unequivocal and that the trial court failed to appreciate his mitigation.

5. The state opposed the appeal solely on the ground that vide Section 348 of the Criminal Procedure Code the appellant was precluded from appealing except for the sentence.

6. I have perused the proceedings herein and I am inclined to allow this appeal on the ground that the plea was not unequivocal. This finding is buttressed by the appellant's response when the facts were read in which he said:

“the facts are true but we were three.”

The moment he said that they were three, then that plea could not be termed unequivocal as it had been

qualified. Any plea that is qualified by an accused person cannot be termed unequivocal. The response by the appellant or the accused for that matter must be very clear and unambiguous.

7. Even at mitigation level the appellant's response left a lot to be desired. He said"

> **" I request to be forgiven. I didn't know that she**
>
> **was a school going child. 21 years."**

8. In my opinion the appellant was already qualifying the mitigation by alleging the he thought the complainant was a major.

9. Worse still nothing was produced to ascertain the age of the complainant. In sexual offences unless otherwise it is always imperative for the age of the victim to be ascertained as it goes into the root of the sentencing interalia.

10. For the foregoing reason I find this appeal meritorious. But for the nature of the case and appreciating the circumstances, I do allow the appeal and order a retrial before another magistrate.

Orders accordingly.

Dated and delivered this 6th day of July, 2015.

H. K. CHEMITEI

J U D G E