



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.58 OF 2006**

JOSIAH KIMUTAI TONUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence awarded by the Senior Resident Magistrate at Kericho (A.G.Kibiru) in Kericho Chief Magistrate's Court Criminal Case No.2367 of 2006)*

**JUDGMENT**

**JOSIAH KIMUTAI TONUI**, the appellant herein, pleaded guilty to a charge of defilement of a girl under the age of 16 years contrary to **Section 145(1)** of the **Penal Code**. He was thereafter convicted and sentenced to life imprisonment. The appellant was aggrieved hence he preferred this appeal.

On appeal, the appellant put forward the following grounds in the petition:

1. **That I pleaded guilty to the charge expecting leniency from the trial court.**
2. **That I am 22 years old, married with one child who are solely depending on my little resources of income for their living.**
3. **That your lordship, I hail from a very poor family with four others brothers who are jobless and (2) two sisters who are married off hence my continued stay in prison is a threat to my single parent's health since she has been depending on me as a last born for the necessary love and care.**
4. **That I am so remorseful though I did not commit the alleged crime and I just admitted because I was serverly beaten up by members of the public who were acting on hearsay information.**
5. **I beg your lordship that the conviction be quashed and the sentence set aside.**
6. **That I beg your lordship that this case be referred back to the law court for re-trial.**

When the appeal came up for substantive hearing, the appellant stated that he was entirely relying on his grounds of appeal. Mr. Mutai, Learned Senior Prosecution counsel, conceded the appeal on the ground that the appellant was convicted on a charge premised on a repealed Act hence the case was a nullity ab initio.

I have considered the grounds relied upon by the Appellant and the oral submissions made by Mr. Mutai on behalf of the office of the Director of Public Prosecutions. The record shows that the appellant pleaded guilty to a charge of defilement of a girl under the age of 16 years contrary to **Section 145(1)** of the **Penal Code**. The particulars of the offence are that on 22nd November 2006 at [Particulars Withheld] in Kericho District within Rift Valley province the appellant is alleged to have had unlawful carnal knowledge of V.C a girl under the age of 16 years. It is the submission of the appellant that the plea was

equivocal because he was tricked by a police officer who investigated the case to plead guilty to the charge since he would be set free thereafter. The appellant further complained that he was not given prior warning of the consequences of pleading guilty to such a charge. The appellant beseeched this court to find that his plea was equivocal. Perhaps the most significant ground which determines this appeal is the ground raised by Mr. Mutai, which is to the effect that the appellant's trial was based on a non-existent provision of the law. I have carefully examined **Section 49** of the **Sexual Offences Act** and it is clear in the Second Schedule that Section 145 *inter-alia* of the penal code was repealed upon the coming into effect of the Sexual Offences Act, 2006 on 21st July 2006. By the time the charge was being framed, Section 145 of the penal code had been repealed, hence the offence was non-existent. It is not open to this court to speculate on the intention of the framers of the charge. In my view the defect is fundamental and is not curable under **Section 382** of the **Criminal Procedure Code**. On the other hand, the appellant has argued that he was induced to plead guilty to the charge by a police officer who was investigating the case. The record shows that upon conviction, the appellant was given a chance to mitigate and he pleaded for leniency. It is possible that inducement was made. If it was made, then it cannot be said that the plea was free and voluntary. With respect, I am convinced that Mr. Mutai rightly conceded the appeal.

In the end and on the basis of the above reasons I find the plea to be equivocal. Consequently, the appeal is allowed. The conviction is quashed and the life sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

***Dated, signed and delivered this 4th day of October 2013.***

**J.K.SERGON**

**JUDGE**

**In open court in the presence of**

Miss. Muthee for the State

Appellant in person

Mr. Koech- court clerk