



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 43 OF 2012**

WESLEY KIPLANGAT TAPSOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence made by the learned Senior Resident magistrate at Sotik court (Hon. M.Okuche) in Sotik Principal Magistrate's court criminal (S.O) case No.1697 of 2012)*

**JUDGMENT**

**WESLEY KIPLANGAT TAPSOI**, the appellant herein, was convicted on his own plea of guilty for the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act no.3 of 2006**. The particulars of the offence were that on diverse dates between 7th and 9th day of July 2012 at [particulars withheld] Sotik District of Bomet County, intentionally caused his penis to penetrate the vagina of **F C T**, a child aged 13 years. He was sentenced to 20 years imprisonment. Being dissatisfied the appellant put forward the following grounds of appeal:

- 1. That your lordship the learned trial magistrate erred both in law and fact by not making a finding that I overstayed in police custody i.e from 10/07/2012-16/07/2012 before I was arraigned in court thus violating my rights guaranteed by the new constitution of Kenya.**
- 2. Your lordship the learned trial magistrate erred in law and fact when she convicted me on my own plea of guilty without giving me a warning as the law recommend since it was my 1st time to appear in court for the plea.**
- 3. I pleaded guilty since I was totally confused from the torture of the police and from the people who arrested me.**
- 4. Your lordships the learned trial magistrate erred in law and fact by convicting me without making a finding that the police had threatened me to plead guilty and failure to do so I was to face the consequences that I had undergone during my long stay in police custody.**

When the appeal came up for hearing, Miss. Magoma, learned prosecution counsel conceded the appeal but urged this court to order for a retrial. The appellant argued that he was forced to plead guilty to the charge after being subjected to torture. He also claimed that he was aged 16 years when the offence was committed.

After a careful consideration of the rival submissions, I have come to the conclusion the appeal was rightly conceded hence it is meritorious. To start with the charge is premised on non-existent provisions of the **Sexual Offences Act**. There is also an allegation that the appellant is aged 16 years. The appellant was not medically examined. He was not subjected to age assessment. Had he been subjected to age assessment and found to be 16 years old, then he could only be dealt with under **Section 8(7)** of the **Sexual Offences Act No. 3 of 2006**. On the basis of the above reasons I allow the appeal. The conviction is quashed and the sentence is set aside. Having examined the evidence presented before the trial court, I am convinced the same can sustain a conviction. For this reason, I order that the appellant be retried. Consequently, he should be held pending his retrial before another magistrate of competent jurisdiction sitting at Sotik other than Hon. Okuche. The matter to be mentioned before the aforesaid

court on 11th November 2013 for further orders and directions in regard to the retrial which in any case should be given priority.

**Dated, signed and delivered this 8th day of November, 2013.**

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**J.K.SERGON**

**JUDGE**

**In open court in the presence of**

Miss. Muthee- for Director of Public Prosecution

The Appellant in person

Mr. Koech- court clerk