



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 10 OF 2013

WESLEY KIPKORIR LANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Resident magistrate at Sotik court (Hon. N.Barasa) in Sotik Principal Magistrate's court criminal (S.O) case No.11 of 2013 on 16/07/2012)

JUDGMENT

The appellant herein, namely: **WESLEY KIPKORIR LANGAT**, was convicted on his own plea of guilty for the offence defilement contrary to **Section 8 (1) (4) of the Sexual Offences Act No.3 of 2006**. The particulars of the offence are that on diverse dates between December 2012 and 19th February 2013 at [particulars withheld] Sotik District within Bomet County the appellant intentionally caused his penis to penetrate the vagina of **F C K**, a child aged 17 years. He was thereafter sentenced to seventeen (17) years imprisonment. Through the law firm of Motanya & Co. Advocates, the appellant put forward the following grounds on appeal:

- 1.The learned Magistrate erred in law and in fact in that she failed to ascertain that the facts were well stated to the appellant and the appellant given an opportunity to dispute, explain or add any relevant facts. If the appellant agreed to the facts she should have raised questions for his guilt and his reply ought to have recorded.**
- 2.The learned magistrate erred in law and in fact by failing to satisfy that the plea was totally unequivocal and that the appellant understood the elements of the offence and its penalty.**
- 3.The learned magistrate erred in law and in fact in that she failed to give a chance to the appellant to defend himself and give an explanation as to what happened.**
- 4.That the learned magistrate erred in law and in fact in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the age of the complainant.**
- 5.That the learned magistrate erred in law and in fact in that she failed to consider the fact that the prosecution failed to establish the actual age of the complainant by either producing a birth certificate or sending the complainant for age assessment.**
- 6.That the learned magistrate erred in law and in fact in that she failed to consider the fact that the appellant was never taken for medical examination to rule out the possibility of a third party**

having committed the offence in question.

7. That the appellant did not have the benefit of legal representative.

8. The learned Magistrate erred in law and in fact she imposed a sentence which is manifestly excessive without considering circumstances of the case and it was in cotravention of the Sexual Offences Act for failure to ascertain the age of the complainant.

Mr. Motanya, learned advocate for the appellant, urged this court to find that the plea was equivocal. It is his submission that the particulars of the offence and the consequent penalty was not explained to the appellant prior to taking plea. Miss Magoma, learned prosecuting counsel, opposed the appellant arguing that the appellant understood the consequences of the offence. She however, conceded that this is a case which merits to go for retrial. This court requested the appellant to state his age and he informed this court that he was aged 17 years.

After a careful consideration of the rival submissions, I am convinced that the appeal should be allowed on the basis that the charge was defective. The offence the appellant was convicted for is premised on **Section 8(1) (4)** of the **Sexual Offences Act No. 3 of 2006**. Perhaps the drafters of the charge meant to charge the appellant under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. It is obvious that this defect prejudiced the appellant's case. Unfortunately, this court is not permitted to make inferences on appeal because it relies on the recorded proceedings. I am satisfied the appeal has merit. I allow the appeal by quashing the conviction and set aside the sentence. I am further convinced that the evidence presented before the trial court *prima facie* is sufficient to sustain a conviction.

Consequently, I order that the appellant be retried afresh before another Magistrate of competent jurisdiction other than Hon. N. Barasa sitting at Sotik. I order that the appellant be held in custody pending his retrial. I direct that the case be mentioned on 11th November 2013 before the Sotik Court for further orders and directions in respect of the schedule of the appellant's retrial which in any case should be given priority.

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

.....

J.K.SERGON

JUDGE

In open court in the presence of

The Appellant in person

Miss. Muthee- for the Office of the Director of Public Prosecution

Mr. Koech- court clerk