



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL APPEAL NO. 29 OF 2007.**

**JOEL MUKOLWE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T.**

1. **Joel Mukolwe**, the appellant here in was charged with the offence of defilement of a girl contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act, 2006. The particulars of the offence stated that on 24<sup>th</sup> May, 2007 and 31<sup>st</sup> May, 2007 in Trans Nzoia District within the Rift Valley Province by use of his genital organ caused penetration into the genital organs of **F.J**, a girl aged 15 years. The appellant also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, 2006. The particulars of the alternative charge stated that on 24<sup>th</sup> May, 2007 and 31<sup>st</sup> May, 2007 in Trans Nzoia District within Rift Valley Province, the appellant unlawfully and indecently assaulted **F.J** by touching her private parts.

2. The appellant pleaded guilty and was convicted on his own plea of guilt and was sentenced to 30 years imprisonment. The appellant has now appealed against the conviction and sentence. By his petition of appeal, the appellant has faulted the proceedings before the trial court on the grounds that he was not given adequate time to reflect on the plea. The sentence imposed by court was excessive, the trial court

failed to factor in, the mitigation. On the part of the State, the Learned State Counsel **Ms. Bartoo** conceded to this appeal on the grounds that the sentence provided under the Sexual Offences Act is 20 years thus the learned trial magistrate erred by sentencing the appellant to 30 years.

3. This being a first appeal this court has a duty to evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction and sentence. In so doing the court should bear in mind that it never saw or heard the witnesses and give due allowance for that. I have gone through the record of proceedings, the charge was read to the appellant and indeed the plea taking was deferred. When plea was taken, the appellant pleaded guilty. The alternative count was also read to the appellant and upon being asked to plead he stated that he defiled the complainant.

4. The facts of the case were read to the appellant and he confirmed they were true. Those facts are fairly detailed and they covered every aspect of the case. As far as the proceedings are concerned, I do not see any error on the part of the court. The only issue is the sentencing which the State Counsel concedes its an illegal sentence.

5. The appellant was charged with the offence of defilement contrary to the provisions of section 8 (1) and 8 (3) of the Sexual Offences Act. The minimum sentence provided is 20 years, the sentence of 30 years an illegal sentence? The appellant having pleaded guilty and in mitigation sought for forgiveness, not to repeat the offence again, that mitigation, if it was taken into consideration with the fact that the appellant was a first offender, there is no justification for a sentence of 30 years imprisonment. Moreover, the learned trial Magistrate did not give reasons such as the aggravating factors that made her impose a higher sentence than the minimum. I will allow the appeal in respect of the sentence which I hereby set aside and substitute it with the sentence prescribed under section 8 (3), that is twenty (20) years. The appellant will serve the sentence of 20 years.

**Judgment read and signed this 4<sup>th</sup> day of March, 2011.**

**M. K.KOOME.**

**JUDGE.**