



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 49 OF 2016

BETWEEN

VICTOR KARANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma, delivered by (A. Omollo, J.)

in

HCCRA NO. 199 OF 2011)

JUDGMENT OF THE COURT

[1] The appellant Victor Karani was convicted by the Senior Resident Magistrate at Bungoma of the offence of defilement contrary to section 8(1) as read with **section 8(2)** of the **Sexual Offences Act No.3 of 2006**. He was sentenced to serve 30 years imprisonment.

[2] He appealed to the High Court against the conviction and sentence. The appeal was heard by A. Omollo J on 15th October, 2013. The learned judge delivered an undated judgment in which she dismissed the appellants appeal against conviction and sentence. The learned judge having warned the appellant, set aside the sentence of 30 years imprisonment imposed upon him, and substituted a sentence of life imprisonment as provided under section 8(2) of the Sexual Offences Act.

[3] The appellant is aggrieved and has lodged this appeal against both conviction and sentence. Mr. Mushindi, Learned Counsel for the appellant, has filed a supplementary memorandum of appeal raising 8 grounds. He has also filed written submissions and list of authorities. However, during the hearing of this appeal both Mr. Mushindi and Mrs. Oduor Prosecuting Counsel were agreed that the proceedings in the High Court were a nullity. This is because A. Omollo J who heard the appeal was appointed as a judge of the Environment and Land Court and not as a judge of the High Court. Gazette Notice No. 14346 of 5th October, 2012 appointing the judge has been produced. It is conceded that under **section 359** of the **Criminal Procedure Code** appeals from subordinate courts are required to be heard by two judges of the High Court.

[4] Mr. Mushindi has also relied on the decision of the Supreme Court in **Republic vs Karisa Chengo & 2 Others [2017] eKLR** (*Karisa Chengo*), where the Supreme Court held in essence that the jurisdiction of the judges appointed to the Environment and Land Court is limited to the matters provided in the Environment and Land Court Act and hence they have no jurisdiction to determine criminal appeals. He asked the court to quash the conviction, set aside the sentence and set the appellant free.

[5] Mrs. Oduor, the Prosecuting Counsel, agrees with submissions of the appellant's counsel but requested that the appeal be remitted to the High Court for re-hearing.

[6] We find that in accordance with the Judgment of the Supreme Court in the Karisa Chengo case, the learned judge who heard and determined the appeal in the High Court that gave rise to the decision subject of the appeal now before us was not competent. And thus the proceedings and the judgment now under appeal were a nullity.

[7] The appellant was tried and convicted of defiling a minor aged 5 years. The circumstances of the alleged offence were serious and resulted in serious injury to the child. Although the offence was committed almost 10 years ago, the circumstances of this case are such that justice will be served by remitting the appeal to the High Court for re-hearing.

[8] Accordingly, the appeal is allowed, the undated judgment of the High Court set aside, and the appeal is remitted back to the High Court for re-hearing by a court constituted by competent Judges of the High Court as provided under section 359 of the Criminal Procedure Code.

Dated and delivered at Eldoret this 15th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.