



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJ.A)**

**CRIMINAL APPEAL NO. 321 OF 2010**

**BETWEEN**

**MWANZIA MWANIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J) dated 18<sup>th</sup> September, 2009***

**In**

**H.C. CR. A. NO. 107B OF 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The charge brought against Mwanzia Mwanja in the court of the Principal Magistrate at Makindu was one of defilement, contrary to **section 8 (1) and (3)** of the Sexual Offences Act, No.3 of 2006. The particulars contained in the said charge were that on the 20<sup>th</sup> day of May, 2008 at K Village, K Location in Kibwezi District of Eastern Province, Mwanzia committed an act which caused penetration with K K, a child aged 15 years. When the Magistrate read out the charge and its particulars to Mwanzia, he told the Magistrate in Kikamba:-

***“It is true. I defiled the complainant who is aged under 16 years.”***

The Magistrate accepted that as a plea of guilty to the charge and called upon the Prosecutor to state the facts on which they relied in support of the charge. The Prosecutor told the Magistrate that on the 20<sup>th</sup> May, 2008, at 6.30 p.m., the young girl from K Primary School met Mwanzia on the way and Mwanzia grabbed her and pulled her into the bush. He defiled her there but in the process, she raised an alarm and passers-by came to her rescue. Mwanzia fled. The girl was taken to the hospital and was examined. The P3 Form produced by the Prosecutor showed that the girl’s estimated age at the time of examination was thirteen years and the examination revealed that she had a perforated hymen with a whitish discharge on the vulva. Mwanzia was thereafter arrested and charged. The Magistrate then asked Mwanzia to comment on those allegations by the Prosecutor. Mwanzia said the facts stated were true. The Magistrate did not infact record a conviction but proceeded to ask the Prosecutor about Mwanzia’s antecedents, and the Prosecutor said that Mwanzia was a first offender. When asked to say something in mitigation of the sentence, Mwanzia said he had nothing to say. The Magistrate then sentenced him to twenty (20) years imprisonment but without formally recording a conviction against him.

Mwanzia then appealed to the High Court at Machakos and in his petition of appeal, he complained:-

- “1. That I did not understand the language in which the charge was read in the trial court.***
- 2. That the facts of the matter read by the prosecution side in a language I could not understand.***
- 3. The police officer convinced me to plead guilty that the case was simple.***
- 4. That the complainant and the witness in this case is (sic) my enemy that we have been disputing over a piece of land.”***

These complaints were clearly baseless. On the first two grounds about the language of communication with Mwanzia, the record clearly shows he spoke to the trial court in Kikamba. Mwanzia is himself a Kikamba and the Magistrate’s record shows there was a court clerk called Mulwa. On the third and fourth grounds, it was really irrelevant why Mwanzia chose to plead guilty and the issue of a land dispute between him and the complainant never arose in the proceedings. When he appeared before the High Court on his first appeal, the only thing he asked the Judge (Lenaola, J) was that the sentence of twenty years imprisonment ought to be reduced. The Judge rejected that plea holding that the minimum sentence provided under **section 8 (1) and (3)** of the Sexual Offences Act was one of twenty (20) years imprisonment.

Mwanzia now comes before this Court with the same plea that the sentence ought to be reduced. **Section 8 (3)** of the Sexual Offences Act provides:-

***“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”***

The particulars in the charge stated that the complainant was aged fifteen years. The medical report (P3 Form) estimated her age as thirteen years. So the only lawful sentence the Magistrate could have imposed on Mwanzia was one of twenty (20) years imprisonment. That is what the Judge told Mwanzia during the first appeal and that must be the same thing we must tell him. In ground one of his *“Grounds of Appeal”* to this Court, he complained that:-

***“.....the learned superior court Judges (sic) erred in law by upholding my conviction without proper considering (sic) that I am a first offender and I was under age when I committed the offence.”***

It is true Mwanzia was a first offender but that issue was really irrelevant when it came to the sentence to be imposed. He could not have been given a sentence less than twenty years. As to his age, Mwanzia told us that he was eighteen years old by 20<sup>th</sup> May, 2008 when the offence was committed and that he is currently twenty years old. Being eighteen years old at the time the crime was committed, he could not escape the sentence of imprisonment because the age of majority in Kenya is eighteen (18) years.

Under **section 361 (1)** of the Criminal Procedure Code:-

***“----- the Court of Appeal shall not hear an appeal under this section:-***

***(a) on a matter of fact, and the severity of a sentence is a matter of fact; or***

***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”***

The trial Magistrate had the power to pass the sentence of twenty years imprisonment; the High Court did not enhance the sentence. That court merely confirmed the sentence imposed by the Magistrate. It was the only lawful sentence which could have been imposed on Mwanzia. Accordingly this Court has no jurisdiction to interfere with the sentence. The only lawful thing the Court can do and which we hereby do

is to formally record a conviction against Mwanzia which both courts below had failed to do, as the law required of them by **section 215** of the Criminal Procedure Code. Save for that correction, Mwanzia's appeal against the sentence fails and we order that it be and is hereby dismissed.

Dated and delivered in Nairobi this 1<sup>st</sup> day of July, 2011.

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**