



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 10 OF 2018

DICKSON MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki

CM Sexual Offence Case No 41 of 2016 – L Mutai, CM)

J U D G M E N T

1. The Appellant herein, **DICKSON MAINA MWANGI**, was convicted after trial of *defilement* contrary to **section 8(1) & (3)** of the *Sexual Offences Act, No 3 of 2006*. It was alleged that on 27/09/2016 at [Particulars Withheld] Village in Nyeri County, he intentionally and unlawfully caused his penis to penetrate the vagina of one CW, a child aged 16 years. On 31/10/2017 the Appellant was sentenced to serve fifteen (15) years imprisonment. He has appealed against both conviction and sentence.

2. Learned counsel for the Respondent supported the conviction; he submitted that all the ingredients of the offence were proved beyond reasonable doubt.

3. When presenting his appeal the Appellant stated that he was more concerned with the sentence. Nevertheless I have read the record of the trial court in order to satisfy myself that the conviction is proper and safe. In doing so I have considered the written submissions of the Appellant and the oral submissions of learned counsel for the Respondent.

4. There was clear evidence from the complainant herself that the Appellant had sexual intercourse with her on at least two occasions. As found by the clinical officer (PW3) there were no injuries to the genitals of the complainant, and all indications were that the sexual intercourse had been consensual. Consent of the complainant was of course immaterial as she was a child aged below 18 years.

5. It had also come to the attention of the authorities as testified by PW4 (the Assistant Chief of the area) that the Appellant was not only having an affair with the complainant but also with her younger sister.

6. The trial court believed the testimony of the complainant, who was not a child of tender years as she was over 16 years old. That testimony was clear, and was not shaken in any way in cross-examination. The Appellant's allegation that the charge was false and that it was an attempt by the mother of the complainant (PW2) to get back at him for rejecting her love advances to him, raised only at defence stage, was clearly false and was properly rejected by the trial court.

7. Upon my own evaluation of the evidence, the Appellant was convicted upon good and sound evidence. The conviction is safe.

8. Regarding sentence, although the Appellant was charged under section 8(1) and (3) of the Sexual Offences Act, the complainant's birth certificate (Exhibit P5) showed that she was born on 01/05/2000. As the offence was committed on 27th September 2016, the complainant was thus aged 16 years and nearly 4 months at commission of the offence. The Appellant should thus have been charged under section 8(1) & (4) of the Act. Nonetheless, subsections (2), (3) and (4) of section 8 of the Act are important only in determining the punishment to be meted out to the accused once he is convicted of the offence of defilement as defined under subsection (1) of section 8. The Appellant was properly sentenced under subsection (4) aforesaid, and fifteen (15) years imprisonment was the minimum term of imprisonment prescribed, once the trial court decided that he deserved a custodial sentence; and he clearly deserved a custodial sentence, given the circumstances of the case.

9. The upshot is that I find no merit in the appeal in its entirety. It is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 9TH DAY OF MARCH 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 31ST DAY OF MARCH, 2022