



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL 62 OF 2016.

BRIAN OMONDI.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[An appeal from Conviction and Sentence in Original Kimilili PM Cri. 14 of 2016 delivered on 2.3.2016 by Hon. D.O. Onyango, Senior Principal Magistrate]

JUDGMENT.

The Appellant Brian Omondi was charged with the **offence of Defilement of a girl Contrary to Section 84(1) (4) of the Sexual Offences Act No. 3 of 2006.** The Particulars of Offence being; **On the 16th day of February 2016 at [Particulars Withheld] Kimilili Sub-County of the Bungoma County, unlawfully and intentionally caused his penis to penetrate the Vagina of FN a child aged 14 years.**

The Charge was read to him on 2.3.2016 to which he pleaded guilty, facts were narrated which he admitted to be correct, he was convicted and after mitigation was sentenced to serve 20 years imprisonment. Appellant thereafter filed this appeal on the following grounds;

- 1. THAT** *the trial Court erroneously relied on a defective Charge Sheet to convict by failing to find that the charge was at variance with the particulars of the offence.*
- 2. THAT** *the trial Court erred in law and in fact to convict me without considering that Article 50(2) j of the Constitution was not complied with hence unfair trial.*
- 3. THAT** *the trial Court erred in its findings by relying on my age assessment report which was clouded with shadows of doubts compared with the birth certificate which clarified that I was 17 years old hence under age.*
- 4. THAT** *the trial court procedure was marred with irregularities which infringed my rights to a fair trial as enshrined under Article 25(c) of the Constitution hence the preceding trial was a nullity.*

The appellant filed written submission in support of the grounds of appeal. He submitted that he was not served with Charge Sheet, Witness Statements, P3 Form and all evidence the prosecution intended to rely on; which was in violation of Article 50(2) j of the Constitution. Appellant further submitted that at time of Commission of the offence he was 17 years old and annexed certificate of birth and that he was therefore a child. He submits that the age assessment report produced was not a valid document for age assessment. Finally the appellant submits that the trial was unfair since he was taken to court 13 days after arrest, and no explanation for the delay was provided.

M/s Njeru for state opposed the appeal on the grounds that the appellant pleaded guilty and conviction and sentence was proper. However, on being shown the copy of certificate of birth she conceded that the court erred in sentencing him to imprisonment term. The appellant was charged with the offence of defilement Contrary to Section 8(1) 4 of Sexual Offences Act. The charges were read to him to which he pleaded guilty; facts were stated by prosecution which facts he admitted; he was convicted of the offence; the prosecution informed the court that he is a first offender and the appellant in mitigation stated;

“I pray for leniency. She was a student but I thought she was 16 years old.”

The court then sentenced him to 20 years imprisonment. Upon perusal of the proceedings, I am satisfied that the plea was taken in accordance with the principles laid down in Adan -Vs- Republic [1973] EA 455 I therefore find the plea of guilty was unequivocal.

The other issue raised by the appellant is that at the time of commission of the offence on 16th day of February, 2016 he was still a child and therefore could not be sentenced to imprisonment which is contrary to Section 191 of the Childrens Act. He annexed to his submission a copy of certificate of birth No. [xxxx] as proof that he was born on 10.10.1999.

The trial Magistrate on 29.2.2016 ordered the appellant age to be assessed. An age assessment report dated 1.3.2016 signed by Joshua Wanjala a dental Technologist using the dental formula assessed the appellant's age as 18 years old. Relying on this age assessment the trial magistrate sentenced the appellant.

The appellant has urged this court to find that the certificate of birth annexed is the proper proof of age and not the age assessment report. The court has perused the copy of birth certificate annexed. It clearly shows that it was issued on 25.9.2017. The appellant was convicted and sentenced on 2.3.2016. It therefore means that the annexed certificate of birth was obtained when the appellant was already in prison serving this sentence.

There was no notification of birth issued at time of birth of the appellant who annexed; infact the information was given by the parent of the appellant. It is my finding that the birth certificate was sought for and information given for the purpose of this appeal. A court will treat with suspicion a document prepared after conviction which is intended to mislead the court. I find the birth certificate produced as intended to mislead the court and is therefore rejected. The age assessment report relied on by the trial Court was a genuine document on age of the appellant.

In the result, I find no merit in this appeal which is hereby dismissed.

Dated and Signed at Bungoma this 23rd day of July, 2019.

S.N. RIECHI

JUDGE