



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 30A OF 2016

P MAPPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an appeal from the original conviction and sentence dated 26/7/2016 in Criminal Case No. 1315 of 2014 in the Chief Magistrate's Court at Narok, R. v. P M]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of ten years imprisonment in respect of the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported the conviction but has conceded sentence on the basis that the appellant was a minor, who should not have been sentenced to imprisonment.
3. In this court the appellant has raised five grounds of appeal in his petition of appeal.
4. In ground 1, the appellant has faulted the trial court both in law and fact for convicting him, [being a minor] without establishing his age. In this regard, I find that the trial court ordered the appellant to undergo age assessment on 14/8/2014. The order was complied with. As a result, the appellant was examined on 26/8/2014 and found to be 17 years old.
5. Counsel for the appellant has submitted that the provisions of section 18 of the Children's Act were violated. The provisions of section 18 require a child offender to be separated from adults in custody. There are similar provisions in article 53(1) (d) and (f) of the 2010 Constitution of Kenya. The provisions of article 53(1)(f) direct that a child should "*not be detained except as a measure of last resort, and when detained to be held for the shortest appropriate period of time, and should be separated from adults*"
6. Counsel for the appellant cited *CMZ v. R (2016) eKLR*, in which the court was faced with a similar legal challenge. In that case the court proceeded to revise the magisterial orders made therein for being irregular. As a result, the court proceeded to set aside the proceedings and sentence.
7. Furthermore, counsel also cited *G.O. v. R (2017) eKLR*, in which the court found both the appellant and the complainant to be minors and ruled that blame should have been apportioned equally on account of their minority age, as both minors were in need of protection against harmful sexual activities and none should have been sent to prison. Similar sentiments were echoed by the court in *POO (a minor) v. DPP & Another (2017) eKLR*.
8. I have considered the submissions of counsel for the appellant in the light of the provisions of section 18 of the Children's Act and article 53 (1) (f) of the 2010 Constitution of Kenya and the cases cited, I find the trial court fell in error in failing to make a specific finding that the appellant was a minor, when the offence was committed.
9. In this regard, it is important to point out that the trial court on 14/8/2014 ordered the appellant to be examined in respect of his age. Following that order, the appellant was examined at Narok Referral hospital and found to be 17 years old, when the offence was committed as per the medical report dated 26/8/2014.
10. The trial court was duty bound to consider the said medical report and either accept or reject it. Instead of doing so, the court proceeded to treat the appellant as an adult with the result that the appellant was convicted.
11. In the light of the medical evidence that the appellant was aged 17 years, which I hereby find to be his age at the time the offence was committed, the appellant should only have been found guilty of the offence charged. The term "conviction" should not have been used. This

has been and is the judicial practice according to Maina v. R. (1970) EA 370.

It is only to that extent that ground 1 of the petition succeeds.

12. In ground 2, the appellant has faulted the trial court for violating his constitutional rights in respect of his arrest, conviction and sentence. In ground 3, the appellant has faulted the trial court in law by contravening the mandatory provisions of the section 200 (3) of the Criminal Procedure Code. In this regard, the proceedings of 8/10/2015 show that:

“Court section 200(3) of the Criminal Procedure Code complied with Accused – case to proceed from where it had reached Court – case to proceed from where it had reached.”

The first trial magistrate had taken the evidence of three witnesses [PW 1, PW 2 and PW 3], while the second succeeding trial magistrate took the evidence PW 4, the unsworn statement of the appellant, DW 2 and DW 3. In the circumstances, I find that the provisions of section 200 (3) of the Criminal Procedure Code were complied with. It therefore follows that ground 3 is hereby dismissed for lacking in merit.

13. In ground 4, the appellant has faulted the trial court in law by convicting him on fabricated and contradictory evidence. The evidence of the complainant, PW 1 M.N. (initials), made an unsworn statement following *a voire dire* examination, after being found unable to appreciate the consequences of taking an oath. Additionally, the court found that M. N. understood the value of telling the truth.

14. M.N. testified that she slept in the same house with the appellant. The appellant tried to remove his trousers. She raised an alarm and as a result, her mother arrived at the scene. As a result, the appellant ran away. The father of the appellant also arrived at the scene.

15. The evidence of M. N. is corroborated by that of her mother, M M (PW 2), who found the appellant lying on M. N. PW 2 also testified that the appellant had removed his pair of trousers. PW 2 also called the mother of the appellant, who did not come.

16. The appellant was arrested after three days and was taken to Ntulele police station. He was then charged with this offence.

17. The appellant made an unsworn statement. He testified that the mother of M. N. was employed by his mother Grace Njeri (DW 2). The mother of M. N. wanted Shs.10,000/= from his mother. His mother refused to give her the money. As a result, the mother of M. N. went to the police station and fabricated this offence of defilement against him.

18. Grace Njeri (DW 2), the mother of the appellant testified in support of her son. DW 2 testified that the mother of M. N. did not have a house. She allowed her to share the house with the appellant. She testified that “*One day she said she feared when the appellant who is my son had held her daughter.*” Many people gathered and one lady checked M. N. and found that she had not been defiled. The mother of M. N. wanted Shs.10,000/= to drop the charge, but DW 2 refused to give her the money. As a result, the case was reported to the police.

19. The evidence of Jackson Kihumbu (DW 3) supports that of DW 2.

20. I have reassessed the entire evidence of the prosecution and the defence. Having done so, I find that the case was not fabricated against the appellant. I therefore find that the defence evidence was considered and rightly rejected.

21. The order of “conviction” is hereby quashed and in its place I substitute a finding of guilty as charged.

22. Furthermore, since the appellant was a minor aged 17 years, he should not have been sentenced to imprisonment. The sentence of ten years imprisonment is hereby set aside. The appellant is hereby placed on probation for one year.

Judgement delivered on this 18th day of April, 2018 in the presence of the appellant in person and Mr. Mukofu for the state.

J. M. Bwonwonga

Judge

18/4/2018