



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 120 OF 2017**

**ONSESMUS MWADIME .....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(An appeal from the conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 504 of 2017 delivered on 28th March, 2017 by Hon. E. Kagoni, Senior Resident Magistrate).

**JUDGMENT**

1. The appellant herein, Onesmus Mwadime, was on the 28<sup>th</sup> of March, 2017 arraigned in court and charged with the offence of defilement of a person with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 11<sup>th</sup> day of March, 2017 in Likoni Sub-County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of BW [name withheld] a girl aged 13 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 11<sup>th</sup> day of March, 2017 in Likoni Sub-County within Mombasa County unlawfully and intentionally caused his penis to touch the vagina of BW [name withheld] a girl aged 13 years.
3. The record shows that on 28<sup>th</sup> March, 2017 the charge was read over and explained to the appellant in Kiswahili language which he understands. He replied that the charge was true. The court warned him that the offence he was charged with and to which he had pleaded, carried a severe sentence.
4. The Hon. Magistrate once again read the charge to the appellant and he responded by stating that the charge was true. A plea of guilty was then entered.
5. The facts were read out to the appellant who stated that they were true. The Hon. Magistrate convicted the appellant on his own plea of guilty. He once again reminded the appellant that the charge facing him was serious. The appellant responded by saying that the facts were correct.
6. The appellant was given a chance to mitigate. He informed the court that he was remorseful for his actions and that he was 63 years old. He pleaded for leniency. The Hon. Magistrate considered the mitigation and sentenced the appellant to 30 years imprisonment.
7. The appellant being dissatisfied with the said sentence filed a petition of appeal and his grounds of appeal. I have perused the said grounds of appeal which I find irrelevant. The appellant later filed supplementary grounds of appeal. His supplementary grounds of appeal are to the effect that:-
  - (i) The purported admission of the charge by the appellant was not obtained voluntarily contrary to Article 50(4) of the Constitution;
  - (ii) The age of the complainant from the data of birth was inconsistent to that in the particulars of the charge;
  - (iii) That there was no medical report evidenced in court to prove that the complainant was mentally unstable as alleged in the charge sheet; and
  - (iv) That the whole matter was a frame-up intended to unfairly incarcerate him.

8. In his written submissions, the appellant alleged that he was beaten to admit that he defiled a neighbour's granddaughter and he was framed for the offence.

9. The appellant stated that the facts adduced in support of the charge indicate that the victim was born on 20th November, 2001 and was therefore 16 years old when the offence was allegedly committed and not 13 years of age as reflected on the charge sheet. He urged the court to consider the foregoing as the age of a victim in a sexual offence determines the sentence that is imposed against an offender.

10. The appellant argued that no medical or psychiatrist's report was produced to show that the victim was mentally disabled.

11. The respondent filed its written submissions on 5th October, 2018 through Ms Marindah, Prosecution Counsel. She submitted that the provisions of Section 348 of the Criminal Procedure Code state that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except to the extent or legality of the sentence.

12. Ms Marindah sought a retrial on the grounds that the original trial was illegal and defective. She however failed to elaborate on the reasons why she thought that the trial in the lower court was illegal.

13. The appellant filed a reply to the respondent's submissions and objected to a retrial on the grounds that he has been in custody for almost 2 years and a new trial may take up to 3 years to be completed. He cited the provisions of Article 50(2)(q) of the Constitution of Kenya which entitle him to the right to a fair trial. He relied on the case of **Namasafu vs Republic**, Eldoret High Court Criminal Appeal No. 5 of 2004, where Ibrahim J (as he then was) held that the appellant therein having endured a period of 5 years and 8 months facing the law and having served 2 ½ years when he was convicted, a new trial would aggravate the situation.

14. The appellant further argued that the respondent knows the appellant's defence and weakness and would thus beef up its case and cover its shortcomings if a retrial was ordered.

15. It is the prosecution that charged the appellant and relied on the particulars in support of the charge and thereby stated that the victim was 13 years old. When the facts were read out to the appellant, the date of birth of the victim was given as 20th November, 2011. That puts the age of the victim as 16 years of age as the offence was committed on 11<sup>th</sup> March, 2017.

16. The foregoing shows that the particulars of the charge with regard to the age of the victim were at variance with the facts read out to the court. The appellant was charged under the provisions of Section 7 of the Sexual Offences Act. It provides as follows:-

***“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child, or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than 10 years.”*** (emphasis added).

17. The facts that were read to the appellant reveal that the offence of defilement was not committed in the presence of a family member, a child or a person with mental disabilities. The charge that the appellant faced was that of defilement of a child with mental disability. It is therefore clear that the facts that were read out to the appellant did not support the charge.

18. The Court of Appeal in the case of **Samuel Wahini Ngugi vs Republic** [2012] eKLR had the following to say with regard to retrials:-

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of **Ahmed Sumar vs Republic** [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

***“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should not be ordered .....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”***

19. The prosecution blundered in the case in the lower court. As the appellant has submitted, if this court was to order a retrial, it would give the prosecution an opportunity to fill the shortcomings that this court has outlined in the Judgment. In addition to that, the Prosecutor did not produce the P3 form to support the charge of defilement. The Post Rape Care Report Form (PRC) shows that the victim had a broken old scar on her hymen as at the time she was examined on 14<sup>th</sup> of March, 2017.

20. It is worth noting that the examination was done 3 days after the offence was allegedly committed on 11<sup>th</sup> March, 2017. A P3 form would have shed light on the age of the broken old scar on her hymen but that evidence was not availed to the lower court.

21. The factors that I have highlighted in this Judgment must go to the benefit of the appellant. For the said reason, I allow this appeal in its entirety. The appellant shall be released forthwith unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MOMBASA on this 20th day of December, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

Ms Ogweno for the respondent

Mr Beja - Court Assistant