



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 42 OF 2017 AND 43 OF 2017

(CORAM: R. E. ABURILI - J.)

POMA GODFREY OUMA.....1ST APPELLANT

OUMA WALUKWE ISAAK.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellants in these twin appeals are **POMA GODFREY OUMA** and **OUMA WALUKWE ISAAK**. They appeal against sentence imposed on them by Hon. G. Adhiambo SRM at Ukwala in **Ukwala SRM Cr. Case No. 639 of 2016**.
2. The Appellants were jointly convicted of the offence of committing an indecent act with a child aged 15 years. The main charge was defilement of a child MAO aged 15 years. They were acquitted of the main charge and convicted on the alternative charge, Count II and sentenced to serve 10 years imprisonment on 13.4.2017.
3. They were both dissatisfied with the sentences imposed on them and they filed separate appeals. The Appellant in this Cr. Appeal No. 42/2017 filed his appeal on 20/4/2017 stating: -

“(a) That I was a minor at the committal of the alleged offence;

(b) That I was a student and prays that the Honourable Court does find so and allow me go back and complete my education;

(c) That I wish to be present at the hearing of this appeal.

Reasons whereof: may these mitigating factors succeed in its entirety.”

4. On the part of **Ouma Walukwe Isaac**, he appealed in HCRA 43/2017 and in his appeal he equally claims that he was a minor at the time of the alleged offence. The rest of the grounds of appeal in his Petition of Appeal filed on 20/4/2017 are a replica of what the appellant in HCRA 42/2017 filed.
5. At the hearing of this appeal, the Court consolidated the two appeals into one. In the arguments and submissions, the appellant in HCRA 42 of 2017, **Poma Godfrey Ouma** argued his grounds of appeal as filed, maintaining and clarifying that he was not challenging his conviction but appealing to the court to consider giving him a non-custodial sentence as he was a minor when he committed the offence and that he wished to be allowed to return to school.
6. On the other hand, the 2nd Appellant in HCRA 43/2017 **Ouma Walukwe Isaac** filed hand written submissions and made oral submissions claiming that he was framed and that there were no eye witnesses to support the complainant’s case. That the complainant is his relative and hence she could say anything against him even if he did not do anything to her; that the complainant used to miss coming to court during the trial and her parents used to say that they did not know where she was; that he was about to sit for his examination in Form 4 hence he wanted to be assisted to continue with school.
7. The Prosecution Counsel Mr. Okachi submitted in HCRA 42/2017 that the appellants’ age was settled. That he was 18 years old as at the time he committed the offence and that he even stated so in his defence. That the appeal was framed like a sentence review and not an appeal hence it was upon the court to determine the issues raised.

8. In HCRA 43/2017, Mr. Okachi submitted in response to the appellant's submission that he concurred with the Lower Court's decision. That the appeal lacks merit and that it should be dismissed.
9. I however, must make some observations that the law does not permit an appellant to deviate from his grounds of appeal, except with leave of court, to amend the Petition of Appeal. A Petition of Appeal is a pleading and the appellant is bound by his pleadings as that is what was served upon the prosecution on what the appellant intended to challenge and should the appellant wish to amend the Petition to add other grounds of appeal, he can do so with permission of the court.
10. In this case the appellant in Cr. Appeal No 43 of 2017 never filed any amended petition of appeal to challenge his conviction. It follows that an Appellant cannot file submissions or argue grounds of appeal which are not listed in his Petition of Appeal.
11. In this case, the appellants herein filed separate appeals but the grounds in their petitions of appeal are the same. The said grounds of appeal do not challenge their conviction. They only challenge sentence. The Appellants also alleged that they were minors at the time of the alleged commission of the offence and that they were about to sit for their Form 4 examinations and prayed to this court to allow them to go back to school and sit for their examinations. There was no single ground of appeal challenging their conviction by the trial court.
12. However, whereas the Appellant in HCRA 42/2017 stuck to this grounds of appeal urging the court to give him lenient sentence, the appellant in HCRA 43/2017 substantially deviated from his grounds of appeal and filed detailed submissions challenging his conviction and sentence. That is not permitted in law and therefore this court hereby rejects the submissions that challenge the conviction of the appellant in Cr. Appeal No 43 of 2017. I shall however consider submissions that claim that the appellants were minors at the time of commission of the offence and that they were students in Form 4 hence they should be assisted to go back to school and complete their examinations.
13. Commencing with the questions of age, on the date when the appellants were convicted and sentenced, on being asked by the trial magistrate about their age, the appellant in HCRA 43/2017 stated as follows: **"I am 21 years old."** The appellant in HCRA 42/2017 stated, **"I am 18 years."**
14. The trial court then went further to note that. **"The age assessment report of the 2nd accused confirms that as at 01.11.2016 he was already 18 years old."**
15. She then considered the Appellants' mitigations and the provision of **Section 11(1) of the Sexual Offences Act No. 3 of 2006** which gives minimum sentence to be meted on a person who commits an offence of indecent act with a child. She sympathized with the appellants as young citizens of this nation but stated that her hands were tied as she had to comply with the law. She sentenced each of the appellants to serve 10 years imprisonment
16. This court also notes that on **1/11/2016**, age assessment was carried out on **Poma Godfrey Ouma**, the appellant in HCRA 42 of 2017 and the report filed in court signed by Cyprian Onegi, the Oral Health Officer at Siaya County Referral Hospital shows that the Appellant/patient was 18 years old.
17. The Appellants were charged in court on 21/10/2016 after being arrested on 19/10/2016. They took plea on 24/10/2016 and the Court did grant them bail on the same day and ordered that **Poma Godfrey Ouma** be taken for age assessment and be remanded at Ukwala Children's Cells. This order in my view was necessitated by the physical appearance of the 1st appellant who looked and still appears younger than his age as assessed by the Doctor as per the report dated 1/11/2016, just one week of taking of the plea. On 27/10/2016 the trial court also ordered, on application by the 1st accused to be remanded at Sigomere Police Station to enable him contact his parents on time to stand surety for him so that he could sit for his KCSE examination.
18. Both appellants were released on bond to sit for their examinations and were even exempted from attending court proceedings before the trial begun to enable them sit for their examinations and on 7/11/2016 the age assessment report for **Poma Geoffrey Ouma** was filed in court confirming that he was aged 18 years old.
19. With the above evidence on record that the trial court on suspicion that the appellant in Cr Appeal No 42 of 2017 could have been underage and therefore ensuring that his age was fully determined by way of age assessment, if the appellant was not satisfied with the age assessment report, it was his duty to avail to court his birth certificate or any other document that could prove the contrary so as to be sentenced as a minor or child as stipulated in section 8(7) of the Sexual Offences Act. He did not.
20. On the part of the 2nd Appellant herein **Ouma Walukwe Isaac**, he stated from the date of Plea that he was 21 years old hence there was no doubt as to his apparent age. The charge sheet also states that he was 21 years old whereas the age of **Poma Godfrey Ouma** was stated as 18 years which is the adult borderline age. The father to **Poma Godfrey Ouma** testified as DW3 for the said appellant and stated that he said appellant was born in 1996. He never mentioned that the appellant was underage. For the above reasons, I have no doubt in my mind that the appellant was an adult at the time of trial and he was aged about 20 years. Therefore, this Court does not understand why the appellants in their grounds of appeal claim that they were minors.
21. Accordingly, the ground of appeal that the appellants were minors is found to be devoid of merit and the same is dismissed.
22. Onto the Plea that the court allows the appellants to go back and complete their education, this court, like the trial court, sympathizes with the appellants herein who were young adults but who knowingly engaged in criminal activity which is traumatizing to the victim of the offence. The offence with which the appellants were charged is very prevalent in this part of the country and the law provides for minimum and not maximum sentence, on conviction.
23. Accordingly, I find and hold that the trial court had no discretion to mete out any other lesser sentence than the minimum provided for in

law. The trial court could as well have sentenced them to a longer prison sentence but she exercised her discretion to mete out the minimum sentence set by the law which is 10 years imprisonment, after considering their age and the age of the complainant who even added herself one more year to be older than her age as stated by her birth certificate that she was born 2.1.2002 but she insisted that she was born 2.1.2001 which makes her 16 years as at the time of hearing of the case. Her mother too testified that she was born on 2.1.2001 and that there was an error on her birth certificate, which was never corrected.

24. In the premise, I find no fault in the sentence meted out on the appellant's who will have to learn while in prison that crime does not pay. The sentence meted out on the appellants is lawful and appropriate in the circumstances.

25. Accordingly, the appellants' respective appeals are found to be devoid of merit. This court upholds the conviction and sentence of 10 years meted out on the appellants. The Appeals No. HCRA 42/2017 and 43/2017 are hereby dismissed.

Dated, Signed and Delivered in open court at Siaya this 17th Day of December 2018.

R.E. ABURILI

JUDGE

In the presence of

Both Appellants in person

Mr Ngetich Prosecution Counsel

CA: Brenda and Modestar