



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.108 OF 2015

(An Appeal arising out of the conviction and sentence of D. Mochache – P

M delivered on 8th May 2015 in Kiambu CM. CR. Case No.1090 of 2015)

JAMES MBURU GITHUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Mburu Githua was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 3rd May 2015 at *[particulars withheld]* Village Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of one G N M (complainant), a child aged 16 years without her consent. The Appellant was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of one G N M with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded guilty to the main charge. He was convicted on his own plea of guilty. From the facts of the case, it was apparent that the complainant was the girlfriend of the Appellant. The complainant had accused her mother of mistreating her hence her decision to relocate to the Appellant's house. In mitigation, the Appellant stated that it was the complainant who had voluntarily gone to live in his house. The Appellant was sentenced to serve 15 years imprisonment.

Before the trial court sentenced the Appellant, the said court made the following observations:

“According to the doctor there is no evidence of force. They both consented (to) sex. I do believe the Accused person that indeed they had consented sex. But the law is very clear. Any person who has sex with a child between 16 – 18 years must serve a jail term. Even though the sex was consented, it is the duty of every Kenyan man to protect our children even if they exhibit heat related symptoms. All children be they boys and girls go through a pubescent stage between the age of 12 – 18 years. The law and nature would not forgive any man who takes advantage of a child even if she is on heat. The law expects that an adult to take such a child back home. I also note that children of 16 years are sexually active and have thrown themselves at the men who take advantage of them. As much as I note that the girl took herself and offered herself to the Accused person, my hands are tied by the law. I therefore sentence the Accused person to 15 years imprisonment.”

The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In essence, the Appellant was aggrieved that he had been convicted on the basis of a plea of guilty that was not unequivocal. He stated that the trial court had not explained to him the consequence of pleading guilty to the charge before the plea of guilty was recorded. He faulted the trial magistrate for entering the plea of guilty without first making an inquiry why the Appellant was pleading guilty to the charge knowing that he faced a long period in prison. The Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence and order that he be retried.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. Ms. Atina for the State opposed the appeal. She submitted that the Appellant, having pleaded guilty to the charge, had no right of appeal against conviction. His own recourse was to mitigate on the severity of the sentence. This court has carefully considered the said submission. It has also considered the entire circumstances of this case. This case demonstrates the challenge courts face when confronted with the circumstances that led to the charge and conviction of the Appellant. The preamble of the **Sexual Offences Act** states thus:

“An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.”

In the present appeal, it was clear from the facts of the case that it was the complainant (though a child within the meaning ascribed to a child under the **Children Act**) who, on her own volition, went to the house of the Appellant. She was 16 years old at the time of the incident. There is no evidence to suggest that it was the Appellant who enticed her to go to his house. While this court concedes that the trial court correctly made the observation that the Appellant, being an adult, ought to have acted with prudence and not engaged in sexual intercourse with the complainant, this court notes that criminal culpability attaches to commission or omission of an Accused. In the present appeal, it was clear that although defilement, strictly defined, means that a girl who is less than 18 years old cannot consent to sex, the circumstances of this case however points to a situation where the complainant for all intent and purpose may have appeared to the Appellant to be a girl of an apparent age of over 18 years.

It was with this in mind that the court directed the probation officer to do a social report in regard to the circumstances that the incident occurred. Both the parents of the complainant and the Appellant were interviewed. The complainant was also interviewed. All parties agreed that the incident was unfortunate and should not have resulted in the incarceration of the Appellant. In her report, the probation officer had this to say in regard to the victim:

“The victim was interview(ed) and from our inquiry the victim said that the inmate was her boyfriend, they met at a youth church function a relationship that lasted for 8 months. During the interview, she was emotional and talked passionately about the inmate whom she confesses to be in love with and regrets his incarcerations. The victim’s parents were also interviewed they confirmed the victim is back in school and fairing on well with studies. They said that they were disappointed by the inmate, whom they had accused of taking advantage of their young daughter, but also acknowledge that their daughter loves him, but should be in school.”

As regard the Appellant, the probation officer stated as follows:

“He expresses remorse, and is ready to abide by court’s order. His stay in custody is a lesson to him, he only realized his mistake after he was arrested, according to him he had been visited by the victim whom they had an a affair with for 8 months. He has promised to keep off the victim. His parents were also interviewed, they too plead with the court for leniency, they realize the magnitude of the offence. They are ready to vouch for him and have promised to ensure their son keeps off the victim. Home reports from the neighbours describe him as a humble young man, who would definitely change for the better if given a chance. Your Lordship, considering the Accused’s attitude, his being a first offender, his remorsefulness and the fact that he has family support who are willing to assist him, we recommend that he be granted the change on

probation.”

Taking into consideration the totality of the facts of this case, this court is inclined to agree with the recommendation made by the probation officer. In the premises therefore, the custodial sentence of the Appellant is set aside and substituted by a sentence of this court sentencing the Appellant to serve two years' probation. During this period, the Appellant shall not see the victim of the offence. He shall abide by every direction that shall be issued by the probation officer and shall not commit any criminal offence. If he fails to abide by the conditions of his release on probation, he shall be returned to the court and shall serve the remainder of the term that he was sentenced to serve by the trial court. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JANUARY 2016

L. KIMARU

JUDGE