



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL CASE NO. 3 OF 2015

(CORAM: J. A. MAKAU – J.)

I P A APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 347 of 2014 in Ukwala Law Court before Hon. R. M. OANDA – AG.P.M.)

JUDGMENT

1.The appellant **I P A** was charged with an offence of defilement contrary to **Section 8(1) (3) of The Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that between 14th and 23rd day of June 2014, at [particulars withheld] sub-location in Ugenya District within Siaya County, intentionally caused his penis to penetrate the vagina of **M A O** a child aged 14 years. The appellant 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 are that on the same time and place the appellant intentionally touched the vagina of **M A O** a child aged 14 years.

2.The brief facts of the prosecution's case are that PW1 **M A O** on 14.6.2014 went to a disco where she met the appellant who invited her into the hall. That after disco appellant invited PW1 to his house whereby they had sex and stayed together, later on they went to a place at Mumias where the appellant left her. That after sometime the appellant, PW1's mother and Police went for PW1 and took her to Ugunja police Station. PW1 stated that she was 14 years. Having been born in 2000. She identified P.3 form as MFI P1 and stated the appellant was her boyfriend. PW2 **M J O**, mother to PW1, testified that PW1 disappeared on the night of 14.6.2014. That she later learned that the appellant had taken her daughter to Mumias. The appellant was arrested and led them to where the complainant was. She stated PW1 was born on 22.7.2000 and identified Child Health Card as exhibits P2. PW3 No. 72631 CPL Isacc Kimugor testified that O.C.S. instructed him to go to Mumias on 23.6.2014 with P.C. Masika and confirm the allegation that the appellant had taken a school girl. The appellant led them to [particulars withheld] village where they found PW1. PW1 was arrested and brought to Ugunja Police Station. PW4 Howard Okeya, a Clinical Officer, [particulars withheld] Sub-District Hospital, examined PW1, a child aged 14 years on 25.6.2014. He found that she had a tender vaginal wall, hymen not intact, with whitish discharge, with numerous pus cells. Clinical findings showed earlier vaginal penetration with a venereal disease. He produced P.3. form as exhibit P.1. PW5 No. 98076 P.C. Grace Wanjiru received a report of a missing girl on 23.6.2014. PW5 circulated the report of the missing girl. That on 23.6.2014 the complainant and Assistant Chief escorted the appellant to the Station. The Appellant admitted having

eloped with PW1. Cpl. Kimugor and P.C. Musita and appellant left for Mumias whereby PW1 was found at the appellant's home. PW7 charged the appellant with this offence.

3. The appellant on being put on his defence he opted to give sworn statement and stated PW1 was his wife as the two had agreed to stay together as PW1 did not want to continue with education. The appellant stated, PW1 told him she was 17 years old and that he was also 17 years. That after 2 weeks of their stay PW1 and the appellant were arrested.

4. After trial the learned trial Magistrate convicted the appellant and sentenced him to serve 20 years imprisonment.

5. Aggrieved by the conviction and sentence the appellant preferred this appeal raising the following grounds of appeal:-

a) That the trial Court erred in law and fact by convicting and sentencing me based on a charge sheet that was defaulted.

b) That crucial evidence required to prove the age of the complainant i.e. age assessment report was not produced in Court to ascertain age.

c) That the Learned trial Magistrate erred in law and fact by allowing an incompetent officer to prosecute the case.

d) That the Learned trial Magistrate erred in law and fact by convicting me to serve 20 years imprisonment without considering that by the time of the alleged offence, we were both below the age of 18 years

e) That there was material irregularity on the prosecution's side for they failed to furnish me with the evidence that was in their hand.

6. At the hearing the appellant made written submissions and added that he was not pursuing his appeal against conviction. He therefore abanded the appeal against conviction but challenged the sentence. He submitted that when the offence was committed both PW1 and himself were children which matter he had raised before the trial Court but his plea was not considered. That the trial Court was misled by the arresting officer who had indicated in the charge sheet that the appellant was an adult and the Court failed to order for an age assessment of the appellant. The appellant urged sentencing him to serve 20 years imprisonment in the main prison was a violation of his constitutional rights and fundamental freedom in The Bill of Rights as enshrined under **Article 53 (1) (4) of the Constitution of Kenya 2010**. He urged the Court to consider his defence.

7. M/s. M. Odumba learned State Counsel opposed the appeal on both the conviction and sentence urging the sentence was proper and the Court granted the minimum sentence under **Section 8 (1) (3) of The Sexual Offences Act** urging she believed the appellants was 18 years.

8. That before the hearing of the appeal, when the appellant appeared before the Court on 15.10.2015 he informed the Court that he was 17 years when the offence took place. I then directed that he be taken to Siaya District Referral Hospital for age assessment and the report to be filed by or before 12th December, 2015. The report was filed though showing the appellant was as of 7.12.2015 aged 18 years, that means as of June 2014 the appellant was 17 years old.

9. The Lower Court proceedings on the part of the appellant's defence show that he maintained that both the complainant and him were aged 17 years. The Learned trial Magistrate, strange enough, did not see the need to make an order for the age assessment of the appellant. I have to state that in Criminal cases of this nature and/or any criminal case before a trial Court, it is an obligation of the Court to peruse the charge sheet as regards apparent age of the accused and also look at the accused and ask him to confirm his age if Court is in doubt of the indicated age and if he states is a minor make an order for age

assessment rather than relying on the information in the charge sheet which is always an estimated age.

10. The appellant testified on oath that his age was 17 years. The trial Court did not bother to consider the issue of the appellant's age which is very important in Sexual Offences as regards the sentencing. The age assessment for I P A from age assessment report from Siaya District Referral Hospital of 7.12.2015 state as follows:- ***“Above named was brought to the hospital for age assessment upon examination he is 18 years.”***

11. It is therefore clear that in 2014 when the offence was committed as of 14th June 2014 the appellant was 17 years old, therefore a minor and not an adult as stated in the charge sheet.

12. **Section 189 of the Children Act** Provides:-

“The word “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.”

13. **Section 190 (1) of the Children Act** provides:-

“No child shall be ordered to imprisonment or to be placed in a detention camp.”

14. **Article 53 (1) (f) (i) (ii) and (2) of the Constitution of Kenya 2010** provides:-

“53(1) Every child has the right-

(f) not to be detained, except as a measure of last resort, and when detained, to be held -

(i) for the shortest appropriate period of time; and

ii. separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interest are of paramount importance in every matter concerning the child.”

15. The learned Magistrate convicted the appellant, a minor and sentenced him to serve 20 years imprisonment. The learned trial Magistrate having found the appellant guilty, should have made an order that did not contravene **Section 8(7) of The Sexual Offences Act, Article 53 (1) (f) (I) (ii) and (2) of the Constitution of Kenya 2010 and Section 191 (1) (a) – (b) of the Children Act.**

16. **Section 8(7) of the Sexual Offences Act** Provides:-

“Where the person charged with an offence under this Act is below the age of eighteen years, the Court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.”

17. **Section 191 (1) (a) – (b) of the Children Act** provides:-

“191(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the Court is satisfied as to his guilt, the Court may deal with the case in one or more of the following ways:-

(a) by discharging the offender under section 35 (1) of the Penal Code;

(b) by discharging the offender on his entering into a recognizance, with or without sureties:”

18. In view of the appellant being a minor as of the time of the commission of the offence, the Learned trial Magistrate fell into an error by imposing a custodial sentence against the appellant, being a minor. The Learned trial Court should in sentencing the appellant have sought guidance from the **Children Act, the Constitution of Kenya or the Sexual Offences Act and Borstal Institution Act**. The said Acts bars Courts from making an order of imprisonment or detention for a child. The supreme Law, thus the **Constitution under Article 53** is clear that the children 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 separate from the adults and in a condition that take into the account of the Child's Sex and age.

19. **I think I have said much on how to deal with a minor offender. I therefore find and hold the learned trial Court erred in imprisoning the appellant to serve 20 years imprisonment and sentencing him to be detained in the same place with the adults. The appellant abandoned his appeal against being found guilty, consequently the finding of the appellant guilt is upheld. The appellant's appeal against sentence succeeds to the extend that the order of imprisonment for 20 years is substituted with Community Service Order. The appellant is placed under Community Service Order for 1 year and shall be under supervision of the probation office Siaya. The appellant be released forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 14TH DAY OF JANUARY, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 14TH DAY OF JANUARY, 2016.

In the presence of:

M/s. Odumba for State

Appellant - Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE