



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO. 209 OF 2015

W K N..... APPELLANT

VERSUS

REPUBLIC PROSECUTOR

(From original conviction and sentence in Sirisia criminal case no. 1145 of 2015 by Hon. F. Kyambia [P.M] on 3rd November, 2015)

JUDGMENT

1. The appellant herein **W K N** was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars were that between the 27th and 28th of October, 2015 in Cheptais District within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **S C K** a child aged 17 years.

2. The appellant pleaded guilty. The facts of the case read out to the appellant were as follows;

On the 27.10.15 within Cheptais Sub-county at around noon the victim **S C** a child aged 17 years was on her way home from school. On reaching [particulars withheld] junction she met with the accused her boyfriend since 2012, it started raining, they took shelter at a hotel until 5.00 p.m when they took supper together in the said hotel.

The accused then convinced the victim to accompany him to his home. They went to bed at around 9.00 p.m. and during the night they had sexual intercourse. On 28th of October the two were found together, arrested and escorted to Kipsigon police station. The girl was taken to Kapsiro Health Centre; she was examined, there were no lacerations but the hymen was broken. A P3 form was filled.

The girl 17 years was in form III and the appellant 18 years was in class 8.

3. The appellant was sentenced to 10 years imprisonment. Being aggrieved by the sentence he appealed to this court on grounds that;

- ***He was deceived by the police into pleading guilty.***
- ***The trial Magistrate erred did not warn him of the dire consequences of pleading guilty to the charge.***
- ***The trial court erred by not considering that he was a first offender.***
- ***The trial court erred in law by not giving adequate consideration before passing the sentence.***

4. The State did not oppose the appeal on reduction of sentence. Mr. Kamau for the State was of the

view that the decision to charge the appellant was not well founded in the Law. He did not oppose the appeal.

5. This being the first appellate court, it must re-consider the case afresh, examine and evaluate the same in order to arrive at an independent conclusion see Okeno vs. Republic [1973] E.A.

6. The facts of the above case as enumerated above no doubt informs the court that two teenagers the appellant and the ‘complainant’ had a relationship for two years. Both were in school. The appellant in class 8 and the girl in form III. They had spent the night together and when accosted and both were arrested. The appellant was charged. The girl was taken to hospital and all agencies including the police, probation officer, probation after care services department considered the girl a victim and all reports prepared vilified the appellant.

7. I will now turn to the grounds of appeal and consider each of the 3 substantive grounds.

Did the court err in not warning the appellant of consequences of pleading guilty.

The court is under no such obligation under the law to warn the accused as pleaded and the trial court did not err in this regard.

Did the court err in not considering that the appellant was a first offender and for not giving adequate consideration before passing the sentence?

The appellant did not mitigate however before arriving at the sentence the court sought for a probation report and a victim impact assessment all in a bid, I believe to met out an “appropriate sentence”. Both reports in my view were completely biased against the appellant. The reports considered him the villian and the girl a victim hence, informing the decision of the trial court.

The said reports are merely persuasive and not binding to court in the circumstances of this case I do fault the trial court in failing to take into account the age of the appellant and the facts of the case into consideration while sentencing the appellant

8. The views of this court were enumerated at length in criminal appeal case No. 205 of 2012 Geoffrey Wanjala Barasa vs. R. in the said case this court was of the view that the Sexual Offences Act was meant to punish perpetrators who are preying adults and not two teenagers engaged in sexual activities and that since there is a lacuna in instances involving two teenagers, the male child is usually punished. This court went further to state that such an instance is discriminatory as both the female and male child caught up in such a situation both in need of special care and attention and not punishment.

Both are victims of the broken moral and socio fibric in the society today and punishing anyone of them would go against the Constitution and the Children’s Act. (The appellant just first turned 18 at the time of the commission of the offence).

In progressive jurisdictions in similar situations both offenders are punished as though they had committed a misdemeanor; age gap is considered as a mitigating factor or a defence as the courts do consider the level of culpability where the victim and offender are almost of the same age; as this is significantly different and with situations where an adult exploits the vulnerability of a much younger victim.

9. In the circumstance of this case I do find merit in the last 2 grounds. The appellant is a first offender, court must consider his age at the time of the commission and that of the victim in passing sentence.

Sex between the two was consensual which, as it may be said to morally and legally unacceptable; nonetheless several factors as laid above should have been considered. I fault the sentence and set it aside. The appellant was convicted on 31st October 2015, 7 months age. I will release him forthwith for the various reasons stated above, the 7 months is in my view adequate punishment he is about 18 ½ years.

I refer him to the probation after care services for counselling for a period to be determined by the relevant officer.

Dated at Bungoma this 9th day of June, 2016.

ALI-ARONI

JUDGE.