



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 1 OF 2015

(CORAM: J. A. MAKAU – J.)

E O N APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 02.10.2014 in Criminal Case No. 208 of 2014 in UKWALA Law Court before Hon R. M. Oanda – AG. P.M.)

JUDGMENT

1. The Appellant E O N 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 charge are that on the 23rd day of November 2013 at [Particulars withheld] Sub-location in Ugunja District within Siaya County intentionally caused his penis to penetrate the vagina of **E A A**, a child aged 17 years. The Appellant also faced an alternative charge of committing an indecent Act with a child contrary to **Section II(I) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the 23rd day of November 2013 at [Particulars withheld] Sub-location in Ugunja District of Nyanza Province intentionally touched the vagina of EAA a child aged 17 years with his penis.

2. After full trial the Appellant was found guilty, convicted and sentenced to serve 10 years imprisonment.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal setting out several grounds of appeal which can be summarized as follows:-

(a) That the prosecution did not adduce sufficient evidence to prove the case beyond any reasonable doubt.

(b) That the trial Magistrate erred in law in failing to consider the Appellants defence..

(c) That the trial Magistrate erred in law in failing to evaluate and analyse the evidence before coming into his conclusion.

(d) That the sentence of 10 years imprisonment was inordinately high.

4. The Appellant appeared in person at the hearing of the appeal whereas M/s. M. Odumba :earned State Counsel appeared for the state.

5. The Appellant in support of the appeal relied on his written submissions in which he raised various grounds of mitigation such as that he is a first offender and is remorseful, that he is spiritually transformed, and he is currently of poor health in that he is suffering from an acute ulcers. The Appellant urged that he had sex with the complainant and pleaded with court to release him so that he can go and take care of the child born out of the encounter with PW1.

6. M/s. M. Odumba Learned State Counsel conceded the appeal on the grounds that the appellant proved that to his knowledge the victim was 19 years old, that the appellant's defence was not considered and which defence was not disapproved by the prosecution. On the sentence the learned State Counsel conceded that the trial court erred in imposing sentence contrary to the provisions of the law and submitted the sentence was illegal.

7. I have very carefully considered the Appellant's appeal, the written submissions, the proceedings and judgment by the learned trial Magistrate.

8. I am the first appellate court and as such, have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision in the case of **Kiilu & Another V. R (2005) 1 KLR 174** where the court held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

9. The facts of the prosecution case form part of the record of appeal and I won't proceed to reproduce the same as it is easily available from the court record, however I shall very briefly state the facts of the prosecution case and defence.

10. PW1, EAA testified that on 23.11.2013 she went to her boyfriend's house the appellant and they had sex, however in December, 2013 EAA missed her periods and found out that she was pregnant and informed the Appellant, who advised her they were to go for pregnancy test. PW1's parents were informed by her brother, of her status, upon which PW1 was taken to Ambira Hospital for pregnancy test and she was confirmed pregnant. The matter was reported to Ugunja Police Station.

11. PW1 was issued with P3 form. PW1 testified she was 17 years and was born on 17.7.1997. PW1 testified she had no other lover except the Appellant. PW4, a clinical officer Ambira sub-district Hospital produced P3 as exhibit P 1A , a copy of mother-child Health exhibit P.1B showing PW1 was 20 weeks pregnant.

12. The Appellant denied having defiled the complainant , PW1 and stated during the time he met her she told him she was 19 years old and they dating until when she came and stayed with him for a short time. That she had told him she was over 18 years and the incident took long time before the Appellant was arrested.

13. At the hearing of the Appeal, the Appellant did not deny having been a boyfriend of PW1 and having had sex with her as charged, however he denied having defiled her as of the time of meeting her she told him she was over 18 years old.

14. Section 8 (5) (a) (b) of the Sexual Offences provides:

8 (5) It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

15. The Appellant in the instant case raised a defence that the Appellant told him she was 19 years old, thus over 18 years, that he was deceived by the victim into believing that she was over the age of 18 years at the time of the alleged commission of the offence and he reasonably believed she was over 18 years. That was before the two started dating and before she visited the Appellant for a short time. PW1 EAA from her evidence she claimed she was 17 years old, averring that she was born on 17.7.1997 but did not produce her Birth Certificate or any document to prove her age. Her evidence is contradicted by PW2 Michael Bungu Oloro who testified that Pw1 was 17 years old and was born on 10.2.1997 as per P exhibit 2. This contradiction in my view supports the Appellant's case in his submission that PW1 deceived him to believe that she was aged over 18 years. The complainant in my view did not disclose her date of birth and as such I find no reason why the Appellant could not reasonably believe that PW1 was over the age of 18 years. The trial Court did not consider the Appellant's defence that the victim had deceived him to believing that she was over the age of 18 (eighteen) years and fell into error in failing to note that defence is avail to an accused persons and in considering the evidence of the complainant the trial court further failed to consider the fact that the Appellant's defence was not controverted nor challenged by the prosecution at all. I find that failure on part of the trial court resulted into the trial court convicting the Appellant notwithstanding that the appellant had put forward an acceptable defence which exonerated him from the offence of defilement as the complainant in her evidence had clearly stated she is the one who had taken herself to the Appellant's home.

16. Having considered the Appellant's defence which the trial court failed to consider, I am satisfied that he is not guilty of defilement as he has proved that PW1, EAA deceived him into believing that she was over the age of 18 years at the time of the alleged commission of the offence which the Appellant reasonably as per his unchallenged defence believed to be true. The state Counsel conceded the appeal on that ground which I have found to be properly founded in view of the defence and evidence on record.

17. On the sentence meted of 10 years for an offence under **Section 8 (1) (4) of the Sexual Offence Act**, I find that the trial court made an error as sentence provided for under the said section is a minimum period of 15 years. The court cannot where a mandatory minimum sentence is provided substitute the sentence with any other, as such an act is not only contrary to the law but illegal. I therefore find the sentence of 10 years ordered by the trial court to be illegal and had I confirmed the conviction I would have substituted the sentence of ten (10) years with the minimum provided sentence of 15 years imprisonment.

18. The upshot is that the appeal succeeds. The conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 21ST DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Appellant in person present

M/s. Mourine for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE