



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 109 OF 2015

(CORAM: J. A. MAKAU – J.)

F O JAPPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence Dated 19.11.2015 in Criminal Case No. 295 of 2015 in Ukwala Law Court before Hon C.N. Wanyama – R.M.)

JUDGMENT

1. The Appellant F O J 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 on the 13th day of April 2015 in Ugunja District within Siaya County intentionally caused his penis to penetrate the vagina of MA, a child aged 12 years. The Appellant 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 offence are that on the 13th day of April 2015 in Ugunja District within Siaya County, intentionally touched the vagina of MA a child aged 12 years with his penis.

2. After full trial the Appellant was found guilty on the main charge, convicted and sentenced to imprisonment for 20 years.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal setting out three (3) main grounds of appeal being as follows:-

a) The learned Principal Magistrate erred and misdirected himself in shifting the burden of proof to the Appellant, when he convicted him on the “undisputed evidence of the prosecution witnesses” that such evidence was not “challenged by his defence in cross-examination” and that “the accused could not be heard to deny knowing anything about the allegations therein” and dismissing his defence as “mere denial which failed to discredit the prosecution evidence.”

b) The conviction meted on the Appellant was as the result of an irregular trial, evidence of doubtful and discredited characters, a bad judgment and a bad conviction and therefore very unsafe.

c) The learned trial Magistrate's judgment did not conform to the relevant laws.

4. The State was represented by M/s. M. Odumba, Learned prosecution counsel whereas the Appellant appeared in person. At the hearing the Appellant abandoned his appeal against the conviction and argued

his appeal against the sentence only. M/s. M. Odumba conceded the appeal against sentence on the grounds that at the time of commission of the offence the Appellant was shy of 18 years by three months, hence he was a minor and ought not to have been given custodial sentence, that he should have been dealt with as provided by the provisions of the children Act, urging the court to substitute the sentence accordingly.

5. I have carefully considered the Appellant's appeal, his oral submissions and submissions by the learned State Counsel.

6. I am the first appellate court and as such I 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 of **Kiilu & Another V. R (2005) 1 KLR 174** where the Appeal 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.”

7. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same but shall briefly summarize the prosecutions case and the defence herein below.

8. The complainant PW1, MA on 13.4.2015 left home to gather mushrooms, at around 3.00 p.m. That as she was plucking mushrooms near the family shamba, she was hit by someone, she fell down, the attacker blocked her eyes from behind, he removed her skirt, her panty, removed his penis and defiled her. That after he was finished with her, he let her go and as she was running home screaming she was able to see her assailant. PW1 MA on arrival at home she informed her parents who went after the Appellant but found he had left his home. PW2, father to PW1 MA, took her to Ambira hospital, then to Police Station. P.3. form was issued to PW1, filled at Ambira Hospital and reported the matter to Police Station. PW2 testified that PW1, was born on 4.1.2003 and at the time of the incident she was 12 years old. PW3, No. 100843 PC Lucia Warui, received report of defilement of PW1 from F O J, issued P3 form and obtained Birth Certificate of PW1 exhibit 2. The Appellant who was a student was traced at [particulars withheld] High School on 7.7.2015. The parents availed the Appellant to Police on 7.7.2015, he was arrested and arraigned before court PW4, clinical officer who examined PW1, MA testified she was aged 12 years. He testified on expatriation of PW1 he found that she had a reddened vaginal wall with non-intact hymen with mucus vaginal discharge, with numerous cells. He concluded that there was penetration. He produced P3 form dated 14.4.2015 as exhibit P1.

9. The Appellant gave unsworn defence and stated that on 13.4.2015 he was at his home when PW1, MA came seeking to be assisted with some mathematics. That they stayed at his home upto 5.00 p.m. when the Appellant heard some noises from PW1's home and PW1's parents accusing the Appellant of having slept with PW1. The Appellant then got scared and ran away. That PW1's parents took the Appellant's phone and locked the door. The Appellant stated that he got shocked because of the accusation.

10. The Appellant at the hearing of the appeal, he abandoned his appeal against the conviction and urged his appeal against the sentence. He submitted that at the time of the commission of the offence he was a minor as he was 17 years old, that he is an orphan and was a school going student, that he regretted having committed the offence, that he is a first offender, that he has reformed and he won't repeat the same offence and that the sentence was harsh and excessive.

11. Section 8(7) of the Sexual Offences Act provides as follows:-

“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 (Cap. 92) and the Children’s Act, 2001 (No. 8 of 2001).”

12. Article 53 (1) (d) and (f) and (2) of the Constitution of Kenya 2010 provides:-

53. (1) Every child has the right—

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(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 interests are of paramount importance in every matter concerning the child.

13. The methods of dealing with a minor upon court being satisfied as to his or her guilt is well, set out under **Section 191 of the Children Act**. The ways of dealing with a minor found guilty are many and any of them depending on the age of the minor and the seriousness of the matter is acceptable **Section 191 (1) (a) – (l) provides** as follows:-

“191. (1) In spite of the provisions of any other law and subject to Methods of dealing this Act, where a child is tried for an offence, and the court is satisfied with offenders. 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

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l) in any other lawful manner.”

14. In the instant case PW3, No. 1003 PC Lucia Warui confirmed that the Appellant was as of the time of commission of the offence a secondary school going student at [particulars withheld] High School, that pre-bail Report filed with court in respect of FJ O dated 5.10.2015 indicated that the Appellant was born on 10.7.1997 and to which Birth Certificate D/No.[particulars withheld] was attached confirming the date of Birth of the appellant as 10.7.1997. The Appellant stated in his unsworn defence that he was in form 2 and aged 17 years. From the above and taking into account the Appellant's Birth Certificate showing that he was born on 10.7.1997, it follows that as of the time of the commission of the offence he was 17 years 9 months.

15. The Learned trial Magistrate in her judgment held that the Children's Officers Report filed on 9.11.2015 and attached Birth Certificate of the Appellant showed his date of Birth as of 10.7.1997, thus making him 18 years in November, 2015 and based her judgment on the age of the Appellant as of the time of judgment instead of considering the appellant's age as of the time of the commission of the offence. That at the time of commission of the offence, thus 13th April 2015 the Appellant was a child within the meaning of **Section 2 of the Children Act** which provides “*child*” means any human being under the age of eighteen years. **Section 8(7) of the Sexual offences Act** is clear that where a person charged with an offence under **the Sexual offences Act** is below the age of eighteen years, the court upon conviction it should sentence the accused person in accordance with the provisions of the **Borstal Institution Act** and the **Children's Act**. There is no provision for such a minor to be sentenced to serve custodial sentence. I find the trial court erred in the calculation of the age of the Appellant when it found the Appellant at the time of the commission of offence was 18 years which finding resulted into an illegal sentence.

16. The upshot is that the conviction is upheld, the appeal against sentence is allowed, the sentence of imprisonment for 20 years is set aside and substituted with probation, the appellant is placed under probation for a period of 2 years under supervision and direction of the Probation Office Siaya County.

DATED SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

for Appellant. M/s. Mourine for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE