REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 59 OF 2014

SAMSON KINGAA ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From the conviction, and sentence in Kyuso PM Criminal Case No. 90 of 2011 – B M Mararo – SRM).

JUDGMENT

The appellant was charged in the magistrate's Court at Kyuso with defilement contrary to Section 8(1) as read with (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates of May 2011 at *[particulars withheld]* in Kyuso District of Kitui County committed an act which caused the penetration of his male genital organ penis into the female genital organ vagina of KM who is a girl aged 10 years. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that of the same diverse dates and same place unlawfully and intentionally caused his male genital organ to come into contact with female genital organ of KM a girl aged 10 years.

He was recorded as having pleaded guilty to the alternative count of indecent act. He was convicted and sentenced to serve 21 years imprisonment.

After conviction and sentence, the appellant came to the High Court seeking a revision of the trial court orders under Section 362 of the Criminal Procedure Code. It was Garissa High Court Revision No. 85 of 2012. The court however declined to review the matter relying on Section 364(5) of the Criminal Procedure Code (cap.75) as the court found that since a right of appeal was available to the appellant from the decision of the trial court, the appellant could not ask the court to entertain revision proceedings in the same matter.

Subsequent to that decision, the appellant preferred the present appeal.

The appellant also filed written submissions to the appeal which he relied upon. The learned Prosecuting Counsel Mr. Okemwa submitted that the trial court record did not reflect the language used. Secondly, the facts did not support the charge. Thirdly, the mere fact that someone was in Standard 3 did not mean that he or she was below the age of 18 years.

I have perused the proceedings of the trial court. Indeed the language used by the court and in the proceedings was not indicated. In a case such as the present where conviction is grounded on a of plea of guilty, it cannot be over emphasized that the language used in the proceedings has to be very clear. Where a full trial is held, cross examination can indicate whether an accused person understood the proceedings.

If an accused person extensively cross examines a prosecution witness, then it can be reduced that he or she understood the language used in court, even if the language is not indicated.

Where a plea of guilty is entered however, an appellate court cannot deduce from the record of the proceedings that an accused understood the language used in court. On that account in my view this appeal will succeed as the language used by the court and the appellant in recording the plea of guilty resulting in the conviction is not known. It cannot thus be presumed that the written law and the constitution was complied with in recording the plea of guilty.

The second reason why the appeal will succeed is that the age of the complainant was not established through the facts given in court. In cases where a plea of guilty is entered, the evidence tendered establish show beyond reasonable doubt, that the allegations made against the accused person have been established. This is done through the facts given by the prosecutor.

In my view, a scientific age assessment document should be produced. In its absence, then an official document which contains entries showing or establishing the age of the complainant should be produced in court to support the prosecution facts. Short of that, the plea of guilty will not be unequivocal, as an accused person can only be convicted on facts or evidence that establishes beyond reasonable doubt the charge or allegations levelled against him.

In the present case, the prosecutor merely stated verbally that the complainant was aged 10 years. The prosecutor also produced a P3 form which did not contain an age assessment report but rather an entry by the police in part 1 of the P3 form, that the age was 10 years. That entry merely reflected what was reported at the police station by the reportee of the incident. It did not establish the age of the complainant as it was a mere allegations from the complainant or her parents.

As such, I agree with the Prosecuting Counsel that the facts herein do not establish the charge for which the appellant was convicted which was the alternative charge of committing an indecent act with a child aged 10 years. I will add that the social enquiry report, from the Children's Officer would only assist in sentencing. It was not meant to be part of the evidence to prove the offence against the appellant. It thus did not establish the age of the complainant.

I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 29th day of September 2016.

GEORGE DULU

JUDGE