REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 77 OF 2010

WENDOH, J

BUNDI NCHEGE NCHURI…….....PROSECUTOR

V E R S U S

REPUBLIC…….…..APPELLANT

JUDGMENT

BUNDI NCHEGE NCHURI,the appellant herein, wascharged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 SOA. It was alleged that he defiled a child aged 12 years old. In the alternative he was charged with the offence of indecent act with a child contrary to section 11(1) of SOA.

He also faced a second charge of assault contrary to section 251 of the Penal Code. It was alleged that on the same day, 25/1/2009, at [particulars withheld] Sub Location, he assaulted the minor C.M.

The appellant denied the offence and the case proceeded to full trial and the trial court found him guilty of the two offences and sentenced him to serve count 1 - 20 years imprisonment.

Count II 2 yearsimprisonment. The sentences were ordered to run consecutively.

He filed an appeal on 11.11.2010 challenging both conviction and sentence. At the hearing of the appeal however, he abandoned the appeal on conviction but proceeded with the appeal on sentence. He contends that the sentence of 20 years imprisonment was harsh and excessive.

Mr. Moloch Learned Counsel for the State opposed the appeal for reasons the appellant was charged under section 8(1)(3) of the SOA and that under sub section 8(3) a person was found guilty of defiling a child between the ages of 12 – 16 is liable to imprisonment for not less than 20 years and that the trial court was very lenient.

As regards the charge of assault under section 251 of the Penal Code, counsel said that the minimum sentence is 5 years and the appellant was only handed 2 years. He urged the court to dismiss the appeal.

I have considered both submissions. PW1 C.M. was in the house with smaller children when she was attacked by the appellant, was hit against the wall, strangled on the neck and then defiled. PW2

BilitaKaari, who took PW1 to report observed that she was swollen on the neck with bruises. PW3, the Clinical Officer who examined the complainant also found that she had a bruise on the left side of the head multiple scratch marks on the anterior neck, the nasal bridge was swollen, tender elbow, a broken hymen with minor bruises on the vaginal opening PW4 Collins Mwenda also saw PW1 and the injuries she had sustained. Similarly allthe other witnesses PW5, 6 testified to having seen PW1 with injuries to the neck and face.

It is apparent that these injuries were inflicted on the complainant just before and during the defilement. The assault and defilement were part of the same transaction. The assault was committed in furtheranceof the defilement and in my view to charge the appellant with a second offence of assault was splitting of the charge.Although it was not raised in this appeal, it was improper for the prosecution to charge the appellant with the offence of assault I hereby quash the conviction on the 2nd charge of assaultcontrary to section 251 of the Penal Code and set aside the sentence of 2 years imprisonment.

In respect to the sentence on the first charge of defilement contrary to section 8 (1) as read with section 8(3) of the SOA the complainant was said to be 12 years old. Section 8(3) SOA provides that a person who commits an offence of defilement with a child aged between 12-15 years is liable upon conviction to imprisonment for a term of not less than 20 years. The trial court therefore sentenced the accused to the minimum sentence under that provision and this court has no jurisdiction to reduce the said sentence. In fact the sentence is lenient in the circumstances. The sentence is legal and I hereby confirm it. In the end I find that the appeal against sentence on count 1 cannot succeed and is hereby dismissed. However, I quash the conviction on count II and set aside the sentence of 2 years imprisonment. It means that the appellant will serve only 20 years imprisonment.

It is so ordered.

DATED AT MERU THIS 27th DAY OF FEBRUARY, 2015.

R. P. V. WENDOH

JUDGE.

Appellant in person

M/s Kigira for State

Jane/Kirimi Court Assistant