



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 27 OF 2013

BETWEEN

C M K APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence of Hon. B.O. Ochieng SPM Ag.

dated 21st March 2013 in the original Kilgoris Criminal Case No.969 of 2011).

JUDGMENT

1. The appellant C M K was charged with the offence of defilement contrary to Section 8(1) (4) of the sexual offences Act No. 3 of 2006 the particulars of which were that on the 9th day of November 2011 at [Particulars withheld] village of Trans Mara district within Narok County intentionally caused his penis to penetrate the vagina of V P a girl aged 16 year.
2. He faced on alternative charge of indecent Act with a child contrary to Section 11(1) of the sexual offences Act No. 3 of 2006 the particulars of which were that on the 9th day of November 2011 at [Particulars withheld] village of Trans Mara District within Narok County did intentionally and unlawfully caused his penis to come into contact with the vagina of V P T.
3. He pleaded not guilty, was tried convicted and sentenced to 15 years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds:-
 - (a) His rights to fair trial were violated.
 - (b) The sentence ordered out was excessive.
4. When the appeal came up for hearing before me, the appellant who was not represented filed written submission in which he stated the following grounds:-
 - (a) his rights as a child under Article 53(1) (f) (I) (ii) and Section 27(1) (2), 25(c) of the Constitution of Kenya 2010 were violated.
 - (b) the complaints age was not proved.
 - (c) the prosecution case was not proved beyond reasonable doubt.

5. It was the appellants submission that at the time of the alleged commission of the offence the appellant was aged 17 years and therefore the trial court did not take into account his rights under Article 53 of the Constitution. It was further submitted that both the appellant and the victim were minors and therefore none amongst them would have undue influence over another. It was stated that since ladies mature faster than their male counter parts, it is the complainant who had influence over the appellant which fact ought to have been taken into account by the court.

6. It was submitted that the court did not take into account the complainants past conduct and that the age of the complaint was not proved and further that there was no proof of penetration as per the evidence of Pw4.

7. Miss Osoro for the state conceded to the appeal on the ground that the appellant being a minor at the time of trial his rights were violated since he was not sentenced as a child. She further submitted that the appellant was convicted on the evidence of the complaint who was in the habit of not telling the truth.

8. The court is not under obligations to allow the appeal on the basis that the state has conceded to it and must reassess the evidence tendered at the trial and come to its own conclusion on the same while give allowance to the fact that it did not have the advantage of seeing and hearing witnesses.

9. The prosecution case was that Pw1 V P aged 17, born in April 1995 stated that as she was going to school on the material day the appellant took her to his house where they had sex till morning when he told her that he would marry her after he had finished his examination. Since they were in the same school he left her at the house while he proceeded to school. The appellant was thereafter arrested at the school while the complainant was arrested at 4.00p.m at the appellants house and taken to Manga remand home. It was her evidence that the appellant had been her boyfriend since January 2011.

10. Pw2 the complainant's mother testified that on 28.11.2011 the complainant never came home from school and they did not know her whereabouts. They thereafter found a letter which had been dropped at her elder sister's indicating that she had been killed with her body left at the hill. Upon report to the chief she was found at the hills and brought home unconscious. The next day she disappeared again and when they reported to the chief they were told that she had been seen at the appellants home where she was found. Upon cross examination she stated that the complainant had given birth at the age of 14.

11. Pw3 John Tialal corroborated the evidence of pw2 and under cross examination stated that the complainant got a child while she was aged 14 and the father of the said child was also a young underage.

12. Pw4 Patricia Ong'uti a medical officer's evidence was that upon examination of the complainant she found her genitals normal. Hymen was not intact with a fungal infection which was treated. She concluded that there was penetration but could not confirm when it had happened. Pw5 PC James Ngungiri confirmed taking statement from the witnesses herein following a compliant by Pw2.

13. When put on his defence the appellant stated that on the November 2011 he was going to school for his examinations so he did not lock his house as he was going back soon. Upon reaching the road the complainant went to his house. When he reached school he was told by the teachers that he had a school girl in his house. He was subsequently arrested and charged with the offence. He stated that he was 17 years old.

14. In convicting the appellant the trial court had this to say:

“Pw1 gave an account how the accused lured her to go to her house where he could marry her after he was done with his examinations. She gave account how they had sex severally and eventually they were arrested in his home after the parents came for her. This was not the first time this happened....”

The girl gave account how they had sex severally this was fortified by the fact that she was found in the accused's house. The doctor examined the subject and found that she had no

hymen intact but it could not have established when this occurred.

This fact added to reinforce the subjects case. The accused denied the charges, he denied having slept with her but there was overwhelming evidence that he had taken the girl as a wife without consent for parents and not once defiled her.”

15. The following issues have been identified for determination:-

- (a) whether the accused rights as a child were violated.
- (b) if so which order should the court make.
- (c) whether the prosecution's case was proved beyond reasonable doubt.

16. On the issue of the rights of the appellant, there is evidence on record that at the time of his trial he was aged 17 years old and thereafter a child within the definition of a child under Children Act Section 17(3) of the Children Act stated that a child offender shall be separated from adults in custody. Section 73 of the Act provides for the establishment of Children's court and Section 73 (b) gives the court jurisdiction to hear a charge against a child rather than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of 18 years.

17. Section 184(c) of the Children Act provides that children court may try a child of any offence save for the exceptions provided for under Section 73(b) and under Section 185 requires a court trying a matter to remit the same to children court. Section 186(b) provides for legal assistance, (c) thereof to have the matter determined without delay while Section 189 provides that words “conviction” and “sentence” shall not be used in relation to a child dealt with by the children court.

18. Section 190(c) provides that no child shall be ordered to imprisonment or to be placed in a detention camp while Section 190 provides for how to deal with a child offender.

19. This rights have now been given constitutional basis under Article 53(1) (f) which states that every child has a right not to be detained except as a measurer of last resort and when detained for the shortest appropriate period of time.

20. It is therefore clear that the appellants rights aforesaid were violated. There is no indication that the same was tried by children court and further the sentence mated to the appellant was unlawfull and therefore null and void which I hereby quash as the court used words which are statutory out lawed. It should also be pointed out that the appellant rights under Article 53(2) were violated as the court did not take into account his best interest.

21. The appellant has raised an issue which is very fundermental that is to say that both the subject and the appellant were minors and therefore when an act has been outlawed by an operation of the law and has been engaged into consensually by the parties who ought to be punished for the same?

22. From the evidence of Pw1 it is clear that she considered the appellant her boyfriend and that before the material day she had gone to the appellant house twice and had sex but she used to go back home. She further testified that on the material day they slept on one bed and had sex upto morning.

23. The question which the trial court failed to answer is as to who between the two minors penetrated the sexual organ of the other? The appellant in his submissions has stated that the subject was much mature than him and therefore influenced him into the act and that both should have been subjected to the same punishment. It was his submission that having been tried and convicted alone this amounted to selective judgment and therefore violated Article 27 of the Constitution equality and freedom from discrimination.

24. This matter confronted Justice Fred Ochieng in petition No. 6 of 2013 Eldoret CKW V The AG &

others where the judge had this to say:

“103 although he was unsuccessful I find that he has brought to therefore the need to consider whether or not there are other measurements which were more appropriate and desirable for dealing with children without having to resort to criminal proceedings.

104 to this end I send out a challenge to professionals in matter of children psychology and in the overall wellness of children to conduct to appropriate studies in Kenya with a view to ascertaining if there were measures and procedures which could be put in place to offer protection to children whilst simultaneously being proportional to both the circumstances of the child and the offence.”

25. To my mind there is a need from the legislators to look at the definition of the word penetration under the sexual offences Act which is defined to mean:

“the partial or complete in insertion of the genital organs of a person into the genital organs of another.”

Whereas section 3(1) (a) talks of her or she causes penetration with his or her genital organs the said definition of penetration seems to be against the male gender.

26. Whereas the law outlaws sexual act with minors, where the offence involves the minors themselves it would be in the best interests of justice for the courts to look at the conduct of the parties including how the complaint is filed so as to protect the boy child too from discrimination. There is also need as stated by Justice Ochieng to take stock of the effectiveness of Sexual Offences Act since its enactment and the effect thereof.

27. Having said much on the constitutional issue, from the judgment herein it is clear that the trial magistrate look into account issues which were not proved by the prosecutions, the issue before the court was whether the appellant had defiled the subject on 9th November 2011 and not whether he had taken the girl as a wife without consent from the parent. There was no evidence tendered to support the charge of defilement on 9/11/2011 as the doctor was unable to reach a conclusion on how far the penetration had occurred.

28. Whereas there is no need for corroboration in sexual offences, the subject turned out not to be a truthful witnesses and therefore her evidence ought to had been treated with caution being somebody who could fake her kidnap and death. It therefore follows that the prosecution case against the appellant was not proved beyond reasonable doubt.

29. I therefore find that the conviction of the appellant was not safe and would therefore allow the appeal set aside the same and having quashed the sentence order that the appellant be released forthwith from custody unless otherwise lawfully held.

Delivered, signed and dated at Kisii this 18th day of June 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Appellant in person.

Mr. Majale for Respondent.