



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.195 OF 2009**

**JAMES KIPTOO SITIENEL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

[An Appeal from original conviction and sentence in Nakuru C.M.A/CR.C.NO.164 of 2008 by Hon C. A. Otieno, Resident Magistrate, dated 25<sup>th</sup> June, 2009]

**JUDGMENT**

1. The appellant was charged with the offence of defilement of a child under the age of fifteen (15) years.
2. The particulars of the offence are that on the 20<sup>th</sup> September, 2008 at about 7.30p.m., the complainant had been watching T.V. at a neighbour's house.
3. On being informed that she was needed back home, she left and upon reaching her home, she found the appellant in the house where he was sheltering from the rain.
4. The appellant then carried the complainant to a nearby maize plantation where he defiled her.
5. The appellant was convicted and sentenced to life imprisonment and being aggrieved by the decision of the Hon. C. A. Otieno, Resident Magistrate delivered on the 25<sup>th</sup> June, 2009 preferred this appeal.
6. In the Petition of Appeal, the appellant listed five (5) grounds of appeal which are as listed hereunder:
  - i. That the learned trial magistrate erred in both law and fact by convicting the appellant without cautioning him on the hazard of relying on a single eye witness's evidence without circumspection.
  - ii. That the learned trial magistrate erred in law and fact by convicting the appellant on the basis of hearing.
  - iii. That the learned trial magistrate erred in both law and fact by convicting the appellant notwithstanding the medical evidence tended to exonerate the appellant from the commission of the offence.
  - iv. That the learned trial magistrate erred in law and fact by convicting the appellant in disregard of the grudge element that was evident according to court proceedings.
  - v. That the appellant requests for the court proceedings to be able to defend himself better and to be availed in court on the hearing day.
7. At the hearing of the appeal, both counsel for the appellant, Mr. Cheche and Prosecuting Counsel for the State made oral submissions.

## ISSUES FOR DETERMINATION:

8. Upon hearing the oral submissions of both parties, the following issues arose for determination:
  - a. whether the charge has an error;
  - b. whether the defect is curable;
  - c. whether to order for a retrial.

## ANALYSIS:

9. Counsel for the appellant submitted that the charge sheet was fatally defective and was beyond use
10. Counsel further submitted that there was no conclusive evidence on record to support the charge of defilement.
11. Reference was made to the report by the Doctor (**P.W.4**) which showed that the minor was examined but bruises or tenderness were not found.
12. From the report, the absence of the hymen was detected by the doctor (**P.W.4**) but the time when hymen was lost could not be established.
13. Counsel submitted that where the charge sheet was found to be defective, a re-trial could be ordered.
14. But in this instance, counsel submitted that a re-trial would be highly prejudicial to the appellant as he had been incarcerated for over a period of six (6) years upon a defective charge.
15. Counsel urged the court to allow the appeal and set the appellant free, forthwith.
16. The appeal was conceded to by Prosecuting Counsel for the State on the ground that the charge sheet was defective.
17. Counsel submitted that there was strong evidence on record and applied for a re-trial. From the evidence on record, it was clear that the complainant had proximity to the appellant during the commission of the offence, she was able to observe the appellant's features, able to commit them to memory and was able to positively identify the appellant.
18. Counsel further submitted that the evidence of **P.W.4**, the Doctor established the age of the child and also established penetration.
19. This court was urged to order for a retrial as there was solid evidence on the court record to support a conviction and that the prosecution witnesses were readily available.
20. The first issue that this court has to address relates to whether the charge is defective.
21. Having had occasion to peruse the charge sheet, this court notes that there is no ambiguity in the wording of the charge.
22. The wording is very clear and it discloses the nature of the offence which is ***“defilement of a child under the age of 15 years.....”***
23. The particulars of the charge are also clear and contain the essential ingredients of the offence.
24. The irregularity that is noted by this court relates to the citing of the wrong sub-section, which reads as **Section 8(2)** instead of **Section 8(3)**.
25. In matter pertaining to sexual offences, under **Section 8** of the **Sexual Offences Act**, the age of the complainant is a crucial factor as it determines the sentence to be imposed upon conviction of the perpetrator.
26. **Section 8(2)** caters for minors under the age of 11 years and carries a life sentence. **Section 8(3)** caters for minors under the age of 15 years and carries a sentence of twenty (20) years.
27. It therefore follows that the wrong section and sub-section cited in this instance cannot support or sustain the conviction and sentence of the appellant as the charge specifically stated that the minor was under 15 years of age.
28. This court therefore finds that the conviction and sentence imposed upon the appellant by the trial court to be invalid.
29. Having stated the above, it now behoves this court to decide whether to cure the defect by amending the charge as it deems fit, which would mean rectifying the statutory provision. The other option is whether to order for a retrial.
30. Before making an order for a retrial, a court has to take into consideration the following factors ***inter alia:***

- a) the availability of the prosecution witnesses;
- b) whether there is sufficient evidence to support a conviction;
- c) whether the appellant will be prejudiced;
- d) whether it would be in the best interest of justice.

- 31. These above mentioned factors were captures in the case of **Elirema & Another V. Republic**, [2003] KLR 537.
- 32. Prosecuting Counsel for State had submitted that the prosecution witnesses were readily available.
- 33. This court having perused the court record finds that there is strong evidence on identification and finds that the complainant (**P.W.1**) positively identified the appellant.
- 34. On the issue of penetration, this court finds that the evidence of the complainant is corroborated by the medical report produced by the Doctor (**P.W.4**) who confirmed that the hymen was torn.
- 35. Therefore, this court is satisfied that there is sufficient evidence on record that can support a conviction.
- 36. When considering whether the appellant would be prejudiced by a retrial, this court is inclined to concur with the submissions of Counsel for the appellant.
- 37. The appellant has been incarcerated for a period of six (6) years and this court is alive to the length of the time it would take to hear and conclude a case and if convicted, the new trial court may not take into consideration the term already served.
- 38. For the reasons stated above, a retrial would be greatly prejudicial to the appellant, this court is therefore satisfied that this is not an appropriate case to order for a retrial.
- 39. Nevertheless, this court finds that after re-evaluating and re-assessing the evidence on record, this court is satisfied and finds that the error or defect on the charge sheet did not occasion any failure of justice upon the appellant.
- 40. This court reiterates that there is no uncertainty in the charge and that the charge sheet sufficiently discloses the true nature of the offence. The appellant understood the nature of the offence and was accorded an opportunity to defend himself and a full and fair trial.
- 41. This court finds that this is an appropriate case to intervene and cure the error which on the face of things appears to be a typographical error. This court therefore invokes the provisions of **Section 382** of the **Criminal Procedure Code**.

## **FINDINGS**

- 42. For the reasons stated above, this court finds:
  - i. There is an error on the charge sheet that is curable and the statutory provision is hereby amended to read **Section 8(3)**.
  - ii. This is not an appropriate case to order for a re-trial.

## **CONCLUSION**

- 43. The appeal is hereby disallowed.
- 44. The conviction is quashed and the sentence is set aside and substituted with a conviction under **Section 8(3)** and sentence of a term of twenty (20) years effective from the 25th day of June, 2009

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 22nd day of January, 2014.**

**A. MSHILA**

**JUDGE**