



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 171 OF 2013

CYRUS KIPKORIR CHEPKONGOR.....APPELLANT

=VERSUS=

REPUBLIC.....PROSECUTOR

(An Appeal arising from the original conviction and sentence in Criminal Case No. 3428 of 2012 in the Chief Magistrates Court at Eldoret –Hon. B.J Bartoo(Resident Magistrate)

JUDGEMENT

1. The appellant *Cyrus Kikorir Chepkangor* had been charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8(2)** of the **Sexual offences Act** with an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual offences Act** (hereinafter referred to as the **Act**).

The particulars of the offence charged in the alternative count alleged that on diverse dates between 12th May 2012 and 13th August, 2012 in Eldoret East District within the Rift Valley Province, the appellant indecently caused his genitals (penis) to come into contact with the organ (anus) of **A K** a child aged 9 years.

2. After full trial, the appellant was convicted of the alternative count and was sentenced to ten years imprisonment. He was aggrieved by the conviction and sentence hence this appeal.

In his petition of appeal filed on 5th September, 2013, though the appellant indicated that he was appealing against both his conviction and sentence, his grounds of appeal depicted a different picture. The grounds of appeal did not challenge his conviction but sought a reduction of the sentence meted out against him by the learned trial magistrate.

3. When the appeal came up for hearing before me on 29th October, 2014, the appellant chose to rely entirely on his written submissions which he presented to the court. In his written submissions, the appellant once again did not challenge his conviction. His written submissions, in the main urged the court to favourably consider his appeal against sentence and either reduce the sentence or substitute it with a non-custodial sentence on grounds that he was a first offender; that he had reformed during the time he had been in prison; that he has acquired several skills which would help him earn a living and become a useful and responsible citizen in the event that his appeal against sentence was successful.

4. The state through learned prosecuting counsel **Mr. Mulati** opposed the appeal. Counsel noted that the appellant had not challenged his conviction on the alternative count but sought reduction of his sentence. He however pointed out that as the appellant was sentenced to ten (10) years imprisonment which is the minimum penalty prescribed by the law for the offence for which he was convicted, the appeal against sentence had no merit and ought to be dismissed.
5. Having considered the petition of appeal, the appellants written submissions as well as the oral submissions made by **Mr. Mulati** on behalf of the state, I agree with **Mr. Mulati** that the appellant's grounds of appeal and his written submissions leave no doubt that he had abandoned his appeal against conviction and was only pursuing his appeal against sentence.
6. Be that as it may, since the appellant's abandonment of his appeal against conviction was not express, I have found it prudent to re-evaluate the evidence on record in order to ascertain for myself the validity or otherwise of his conviction.

I have noted that the victim of the offence, **A K** who testified as PW2, after a brief voir dire examination gave clear and straight forward evidence narrating how the appellant had allegedly sodomised him several times on diverse dates. It was not disputed that the victim used to live together with the appellant and therefore the issue of identification did not arise. Though his evidence was not corroborated by any other evidence, the learned trial magistrate in convicting the appellant relied on his testimony as he was entitled to do under **Section 124** of the **Evidence Act** having believed in its truthfulness. **Section 124** of the **Evidence Act** states as follows:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

7. In view of the foregoing, as this court did not have the advantage of hearing or seeing the victim as he testified, it has no basis of faulting the finding of the learned trial magistrate regarding the credibility of the victim whose testimony, as I have noted earlier, formed the basis of the appellant's conviction. That testimony, which was not discounted by the appellant during cross-examination established the essential ingredients of the offence of committing an indecent act on a child. In the circumstances, I am satisfied that the appellant was properly convicted.
8. On sentence, I agree with **Mr. Mulati** that **Section 11 (1)** of the **Act** which creates the offence in respect of which the appellant was convicted prescribes a minimum penalty of ten years imprisonment on conviction. This is the sentence that was imposed upon the appellant by the learned trial magistrate. The sentence was therefore lawful. As a matter of fact, the learned trial magistrate did not have discretion to impose any other sentence. Consequently, the appellant's appeal against sentence cannot also succeed.
9. In the end, this court is satisfied that the appellants appeal against both conviction and sentence is not merited and it is hereby dismissed.

Orders accordingly.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25th DAY OF NOVEMBER 2014.

In the presence of:

The Appellant

Mr. Mulati for the state

Ruth Mwendu- Court Clerk