REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 242 of 2011

(From original conviction and sentence in Criminal Case No. 105 of 2011 of the Resident Magistrate's Court at Narok– C.A. Nyakundi)

NKINI NKOINGONI ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

This is an appeal from the decision of C.A Nyakundi, Resident Magistrate, Narok, in Criminal Case No. 105 of 2011. The charge sheet reads that the appellant was charged with the offence of defilement of a child contrary to **Section 8 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars being that between 1st December 2010 and 25th January 2011, at Kajiado North District of the Rift Valley Province, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of K.S., a girl aged 10 years. The appellant also faced an alternative charge of indecent act contrary to Section 11 (1) of the **Sexual Offences Act No. 3 of 2006.** The particulars given were that between 18th January 2011 and 25th January 2011 at Mosiro Location in Kajiado North District, of the Rift Valley Province, did commit an indecent act to K.S. a girl aged 10 years by rubbing his male genital organs against the said K.S. female organ.

An age assessment of K.S was conducted on 27/1/2011, a medical superintendent examined her and established her age to be 12 years old. **Section 8 (1)** of the **Sexual Offences Act** defines the offence of defilement as causing penetration with a child. It does not prescribe the age of the child or the subsequent sentence upon conviction. It is the other subsections which determine what the sentence will be meted based on the age. The appellant therefore should have been charged with the offence of defilement contrary to **Section 8 (1)** and **(3)** of the **Sexual Offences Act** which provides that:

“8 (3). A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

Although the prosecution did not cite the current provisions of the **Sexual Offences Act** that omission did not occasion the appellant any prejudice as the particulars of the offence are clear.

The appellant was convicted and sentenced to a term of 20 years imprisonment on the main count and a term of 10 years imprisonment on the alternative charge. The terms were to run concurrently. The appellant was aggrieved by the conviction and sentence. He consequently lodged this appeal. He advanced two main grounds in his petition and written submissions:

1. That the trial magistrate erred in law by sentencing the appellant on the main count and its alternative;

2. **That the appellant was remorseful for his actions which were as a result of his cultural customs.**

Mr. Marete, Learned Counsel for the State conceded to the appeal on sentence. He submitted that this was a case where culture competes with the law. He submitted that the sentence was harsh and the court can exercise its discretion and reduce the sentence on both counts.

The K.S. (PW1) is a child aged 12 years, she testified that she was a pupil at Naningoi primary school. She however had stopped going to school after her father married her off to the accused. They had been living together for about a week. TM (PW4) the head teacher of N primary school realized the K.S. and another girl had not reported to school after the holiday break. She reported the matter to the local assistant chief, Jacob Salau Ole Poroko (PW2). The assistant chief accompanied by William Otieno (PW3) a police officer based at Mosiro Administration post went to a manyatta where they arrested the accused and his brother.

In his defence, the accused gave unsworn statement. He denied marrying K.S. or defiling her. He testified that the local chief had fixed him after a land dispute between his deceased father and the chief. He denied knowing K.S before his arrest.

The appellant submitted that he was illiterate and committed the offence due to ignorance of the law. However ignorance of the law is not a defence known in our law. The complainant was aged 12 years at the time of the incident. Under **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006,** the minimum sentence for the offence of defilement is **20 years.** The magistrate therefore exercised his discretion within the law and the sentence is not overly harsh or excessive.

Matters of sentence are really discretionary and must be exercised within the law or the particular statute, unless it can be shown that in exercising its discretion, the court took into account extraneous matters or failed to take into account material factors, the appellate court would rarely interfere with the sentence imposed. The other consideration is of course if it can be shown that the sentence imposed was unlawful, then the Appellate Court can interfere. Thirdly, if the sentence imposed is manifestly excessive in view of the circumstances of the case as to amount to a miscarriage of justice, the Appellate Court would readily interfere. (see **Ogalo S/O Owuora vs Republic (1954) 21 EACA 270** and **James vs Republic (1950) 18 EACA 147.** The **Sexual Offences Act** is a statute of strict application just like the **Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.** It is applied strictly and so discretion must be exercised within the **Sexual Offences Act**. Under **Section 8(3)** of the **Sexual Offences Act** the minimum sentence is 20 years.

The magistrate sentenced the appellant on both counts of defilement and indecent act with a child. The trial court erred by convicting the appellant on both counts. Alternative means conviction should be on either charge, not both. It is only just that if a court of law convicts on the main count in a criminal charge, it does not proceed to make a finding on an alternative charge. To that extent, both the conviction and the sentence on the alternative were illegal. I hereby quash the conviction on the alternative count and set aside the sentence.

The appeal was only in respect of the sentence. I have found no reason to interfere with the sentence on the main charge and I uphold it. To that extent the appeal is hereby dismissed.

DATED and DELIVERED this 19th day of April, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

The appellant in person

Ms Karoki for the State

Kennedy – Court Clerk