



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 22 OF 2013

MULWA NGUNDURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE BY THE
PRINCIPAL MAGISTRATE

AT KYUSO (B.M. MARARO, PM) IN CRIMINAL CASE NO.21 OF 2013.

JUDGEMENT

Mulwa Ngunduru, the appellant, was charged before the Principal Magistrate at Kyuso with the offence of defilement contrary to Section 8 (1) as read with 8(4) of the Sexual Offences Act. It was alleged that on 12th January 2013 at [particulars withheld] in Tseikuru District within Kitui County intentionally committed an act which caused penetration of his penis into the vagina of N M a child aged 17 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars are similar to the main charge save for the offence.

The charges were read to him and he pleaded guilty to the charges. The facts were read to him and he stated that the facts were correct. I reproduce the facts here for emphasis:

On 12.1.2013 at [particulars withheld] the accused person Mulwa Ngunduru ran away with a minor named N M a 17 year old pupil at [particulars withheld] in standard five. Accused ran away with the minor from her parental home and took her to his home as a wife. Chief of [particulars withheld] received the information that there was a person living with a minor. He summoned the parents of both parties. He took them to the DO's Office. Advised to report matter to Tseikuru Police Station (sic).

After report was made accused arrested and victim admitted that she had been living with wife (sic). Accused who is aged 20 years (sic). The relation has been going on since June 2011 (sic) but accused ran away with minor on Saturday 12.1.2013.

Treatment notes (N M) 17 years Exhibit 1; P3 form for N.M 31.1.2012 Exhibit 11. The two have been living together as man/wife for 19 days.

Accused: facts are correct

In mitigation the appellant stated as follows:

“I was working. We met with N M. When I returned home she followed me. She said that she was my wife and would not return home. I told her to go to school she refused. I sent word to the parents. I received information he had agreed. I paid dowry. I was called by Assistant Chief. He told me to stay with the child. I was summoned by Chief. I was told to go with her parents. We were sent to the Police.”

The court convicted him on his own plea of guilty and noted that ignorance of the law is no defence. He was sentenced to 18 years in jail. He is aggrieved and has come to this court on appeal raising the following grounds:

- i. He was not given enough time to reflect on the charges and consequences.
- ii. That police told him to admit the charge promising that he would be released under Article 49 (1) (c).
- iii. That the sentence is harsh and excessive in view of section 8(1) and (4) of the Sexual Offences Act.
- iv. That age of the complainant was not ascertained.
- v. That he was not accorded a fair trial because he was charged, tried and sentenced on the same date.
- vi. That his mitigation was not considered.

His submissions are that he did not plea to the charges freely as the prosecution put pressure on him to admit the charges with a promise to release him; that the trial court did not explain to him the consequences of the offence and because he is illiterate he did not know the consequences of the same; the sentence is excessive and the trial court should have given him a lesser sentence; that his mitigation was not considered thereby prejudicing him; the age of the complainant is essential yet in this case the age of the complainant was not ascertained and assessed.

The learned state counsel submitted in opposing the appeal that the appeal has no merit and is an abuse of the court process; that the appellant was convicted on his own plea of guilty and sentenced to 18 years; that the minimum sentence is 15 years and therefore the sentence was lawful; that the trial was conducted in the language the appellant understands. He further submitted that there is no evidence that the appellant was threatened by the police and that section 7 of the Penal Code provides that ignorance of the law is not a defence.

Section 348 of the Criminal Procedure Code provides thus:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

I have considered the grounds of appeal advanced by the appellant. It is not true that the trial magistrate did not consider the mitigation. He considered it and told the appellant that ignorance of the law is no defence.

The issue that the appellant was not given enough time to reflect on the consequences of the offence is not true. This was a plea of guilty and after he pleaded, the facts were read to him. He had the chance to deny the charges but he chose to tell the court that he had gone home with the girl and even paid dowry. He did not report the matter to the authorities that the girl has refused to go home if this was what happened.

I do not believe the appellant when he states that the police coerced him to admit the offence promising to release him. Once the appellant was in court, it is not a police matter but the court.

This was a plea and the appellant cannot claim that he was not accorded a fair trial. The trial magistrates followed the law in taking the plea and allowing the appellant to plea and state if the facts were correct as well as to mitigate. There is nothing unfair about that procedure.

I have considered this appeal and I find that it has no merit. The plea was taken in accordance with the

law. The medical report confirmed that the girl had been defiled. The facts and the mitigation of the appellant show that the two had been living together and husband and wife and it seems the parents were aware of it and allowed it to happen. There needs to be a law making such parents criminally responsible for such acts. The law is clear that a child under 18 years under Kenyan law has no capacity to give consent.

Section 8(4) of the Sexual Offences Act provides for a minimum of 15 years imprisonment. The upper limit is not given. A sentence of 18 years imprisonment is not harsh or excessive.

I have given this matter due consideration and find that the appeal has not merit. It is hereby dismissed. However I note that the appellant is a first offender and for that reason I will and do hereby reduce the sentence to 15 years imprisonment. I make orders accordingly.

Dated, signed and delivered this 28th November 2013.

S.N. MUTUKU

JUDGE