

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 400 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 3409 of 2010 dated 25th September 2012 in the Chief Magistrate's Court at Thika by Hon. B. J. Ndeda - PM)

MORRIS KINYANJUI KIMOTHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein Morris Kinyanjui Kimotho was convicted by the trial Magistrate for the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006. He had been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was sentenced upon conviction on the main count and sentenced to serve 10 years imprisonment. He appeals against that conviction and sentence.

The Appellant raised various grounds of appeal chief of which was that the age of PW1 and PW2 were not ascertained. Other grounds were that the trial Magistrate erred in law by relying on the prosecution evidence riddled with doubt and inconsistencies; that the trial Magistrate convicted the Appellant on fatally defective charges where the age of PW1 is concerned; that the trial Magistrate erred in both law and fact by rejecting the Appellant's evidence that was not challenged by the prosecution.

In opposing the Appeal, the State Counsel Mr. Okeyo urged the Court to consider the proof of the age of the complainant which was Exhibit 1 a Hospital Card showing that the complainant was born on 30th June 1995. The incident took place on 11th August 2011. He stated that the arresting officer was not capable of ascertaining the age of PW1. As regards the evidence, Mr. Okeyo stated that the evidence of PW1 was very clear. She narrated how the Appellant pulled her, took her to his house and released her the following day after defiling her. This he managed by threatening to stab her with a knife. PW2 was friendly to the Appellant and had been used to procure PW1 with an offer of *mandazi*. The witness PW2 confirmed in his testimony that PW1 never came back until the following day. As regards penetration, a Doctor Caroline Mwacha testified as PW6

If the Appellant left with PW1 in presence of PW2 and he saw her come back the next day, who could she be with if not the Appellant? He was the last person seen with PW1, she testified that she spent the night in his house where she was defiled repeatedly. She was aged 16 years at the time of the offence. The Charge sheet was to effect that **On the 11th day of August 2010 at Gikono Village in Muranga South District within Central Province unlawfully committed an act which caused penetration with AW a child aged 12 years.**

The initials I have used AW are the initials of the name of the complainant PW1. Between the Immunisation Card and the P3, the Immunisation Card Exhibit 1 is more proximate to the time of the birth and it prima facie is evidence of the date of birth of the complainant. Between the two documents I would rely on the Immunisation card as opposed to P3. The charge sheet is not a document that can be relied on for facts. It provides the accused with the charge he faces and the particulars of the same. The age on the charge sheet was not evidence. The evidence led shows that PW1 was aged 16 years at the time of commission of the offence.

Having, at this stage of the appellate process, evaluated and analysed the facts of the case and the verdict of the learned trial Magistrate I find that the said Magistrate did not err either on the law or facts. The prosecution proved its case beyond reasonable doubt based on the strength and consistency of the evidence adduced. The conviction was safe.

The sentence meted out was 10 years. Section 8(4) provides:-

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The Appellant was given a sentence of 10 years. This sentence is below the statutory minimum. I therefore vacate the sentence and impose a sentence of 15 years to run from the date of the conviction by the trial Magistrate.

I find no merit in the Appeal and dismiss it in its entirety.

Dated signed and delivered this 27th day of November 2013

Nzioki wa Makau

JUDGE