



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 406 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 855 of 2011 dated 9th August 2012 in the Chief Magistrate's Court at Thika by Hon. D. Mulekyo - SPM)

MUTUNGA KOMU MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant Mutunga Komu Mutisya was convicted for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006. The Appellant was not convicted on the main count but the alternative to the defilement charge.

He has appealed to this Court against the said conviction and sentence. The Memorandum of Appeal had the following grounds:-

1. That the learned trial Magistrate made an error in both law and facts to convict the Appellant for the offence of indecent assault without considering that there was no evidence to prove the offence.
2. That the learned trial Magistrate made an error in law and facts to convict the Appellant relying on the defective charge sheet.
3. That the learned trial Magistrate made an error in law and facts by relying to adequately consider Appellant's defence.

He was furnished with the certified proceedings and he did not file any additional or Amended Grounds of Appeal. He urged the Appeal and stated that he was unfairly convicted. He was not examined by a doctor, the mother of the complainant was his friend previously and the Appellant moved and got married. He said she followed him to where he moved and he was arrested while going home.

Mr. Okeyo learned State Counsel for the Respondent opposed the Appeal. He said that the victim was mentally challenged and that her age was established as 15 years as shown by the birth certificate – Exhibit 5 and that there was penetration as shown by Exhibit 1. The Doctor observed that there was seminal discharge and a torn hymen coming to a conclusion that there was sexual activity. The Appellant was linked to the offence by the evidence of PW1 the victim with the assistance of PW3 a teacher trained on how to deal with the mentally challenged. She rendered the victims evidence credible. PW2 the aunt of PW1 found the Appellant with PW1 in the Appellant's house. At the time

the Aunt caught them, the Appellant was touching the buttocks and breasts of the complainant. PW2 placed the Appellant at the scene.

The Appellant when confronted by the mother of the victim exhibited arrogance and dared the mother to report to the Police. During cross-examination the Appellant said he had a wife and could not do what he was accused of doing. However, when he was put on his defence he curiously omitted to call his wife as his witness having referred to her extensively in his evidence. The Appellant was charged under Section 8(1) and (2) of the Sexual Offences Act and given 10 years. He should have been charged under Section 7 of the Sexual Offences Act which relates to children with mental disability. Mr. Okeyo submitted that with the evidence available, that cannot render the sentence a nullity since Section 354 of the Criminal Procedure Code gives the Court powers to vary or rectify such an anomaly. He urged the Court to do so. The sentence of 10 years meted out is lawful as Section 7 of the Sexual Offences Act provides for that:-

7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

The Criminal Procedure Code provides under Section 354(3)(d) as follows:-

354 (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.

I therefore in accordance with this Section of the Criminal Procedure Code interfere with the finding by altering the conviction under Section 8 of the Sexual Offences Act to a conviction under Section 7 of the Sexual Offences Act. The sentence under Section 7 is the same sentence the trial Magistrate meted out and I shall not disturb the sentence. The sentence given is the minimum provided for in statute and the Magistrate in sentencing the Appellant to 10 years did not make an error as the sentence is within the statutory provision.

Having carefully considered Grounds and Petition of Appeal I find that there is no merit in the Appeal. The conviction was safe and the sentence lawful. I dismiss the Appeal in its entirety.

Dated signed and delivered this 27th day of November 2013

Nzioki wa Makau

JUDGE