



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 239 OF 2011

BONIFACE MUTUA NGOLANYIA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 910 of 2010 Republic vs. Boniface Mutua Ngolanyia in the Chief Magistrate's Court at Thika by L. Wachira Senior Resident Magistrate on 3rd March 2010)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to **section 8(1)(2) of the Sexual Offences Act**. The particulars were that on 25th February 2010, at (particulars withheld) Village in Thika District within Central Province, he committed an act which caused penetration with N W, a child aged 15 years and with mental disabilities. The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to **section 11(6) of the Sexual Offences Act**, the particulars being that on 25th February 2010, at (particulars withheld) Village in Thika District within Central Province, he committed an indecent act with a child namely N W by touching her genital organs.

After hearing the case to its conclusion, the trial magistrate found the Appellant guilty of the offence of defilement and proceeded to convict him of that offence. The trial magistrate then sentenced the Appellant to serve a term of 10 years in prison.

Being aggrieved by both the conviction and sentence, the Appellant filed his Petition of Appeal dated 24th August 2011 but later filed the following amended grounds of appeal:

1. That the entire trial was a nullity as it proceeded on a defective charge in that the age of the complainant does not fall under the provisions of **section 8(1)(2) of the Sexual Offences Act**.
2. That he was prejudiced by not having the substance of the charge and every element thereof explained to him in a language that he was conversant with, that PW6 testified in a language that he is not well conversant with the result that he could not cross-examine him leading to a mistrial.

On the first ground of appeal, the Appellant submitted that the provisions of the law under which he was charged namely **section 8(1)(2) of the Sexual Offences Act** was at variance with the particulars of the charge sheet and does not support the charge as the complainant was aged 15 years. He made the point that in his case, the complainant did not fall under the age category of 11 years or less as per **section 8(2) of the Sexual Offences Act** and that therefore he was charged with the wrong provision of the law. He

further raised the inconsistencies regarding the age of the complainant during the time of the offence by noting that PW1 stated that the complainant was born in 1993 and was therefore 17 years old at the time of the offence, that PW2 being the complainant herself indicated that she was 14 years old and further that PW6 produced a P3 form completed by the examining doctor namely Dr. Karuri who indicated the age of the complainant as being 15 years. The Appellant further submitted that he should have been charged under **section 8(1)(3) of the Sexual Offences Act**. In light of that, he contended that he pleaded to a defective charge and the plea entered was in respect of a defective charge therefore the subsequent conviction was invalid.

The Appellant also raised an issue with the evidence of the prosecution on the date when the offence was alleged to have been committed. He noted that the charge sheet stated the date of the offence as being 25th February 2010. The Appellant noted that PW3 and PW4 confirmed that date but that the whole evidence was invalidated by the testimony of PW6 who stated that the complainant was treated on 22nd February 2010, three days prior to the date when the offence is said to have been committed. He noted that he was still convicted on the basis of this evidence. The Appellant stated that the prosecution did not give any good reason why they never called Dr. Karuri personally instead of having Dr. Kinyua testify on his behalf. He contended that the whereabouts of Dr. Karuri were not disclosed to the court thereby prejudicing him as he was deprived of the opportunity to cross-examine him. He stated that the failure to call Dr. Karuri resulted in a big gap in the case of the prosecution and that in his opinion, the prosecution did not prove its case beyond reasonable doubt. He noted that the issue of the date of treatment of 22nd February 2010 which was not mentioned by PW4 created a reasonable doubt on the prosecution case.

The Appellant did not make any submissions on the second ground of appeal wherein he stated that he was not well conversant with the language used by the court.

The State opposed the appeal and submitted that the sentence meted out on the Appellant of 10 years imprisonment was below the one prescribed in **section 8(3) of the Sexual Offences Act** which provides that a person who commits an offence of defilement with a child between the age of twelve to fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The State noted that the complainant was 15 years old and prayed for an enhancement of the sentence to comply with the law.

On the Appellant's first ground of appeal, I note that he was charged with defiling a child aged eleven years and below while in actual fact, the complainant was aged 15 years, which is an age category covered by **section 8(3)** and not **section 8(2)** as was noted in the charge sheet. However, I am of the view that this error is minor to the extent that it does not alter in any material way the gravity of the offence that the Appellant was charged with and on this point, I wish to rely on section 382 of the Criminal Procedure Code which stated that no finding, sentence shall be reversed on account of an error, omission or irregularity in the charge unless such error has occasioned a failure of justice. In this case, I find that the error in the charge sheet does not occasion a failure of justice.

Further, I am also of the view that the submission that the date of treatment of the complainant being stated as 22nd February 2010 yet the offence was said to have been committed on 25th February 2010 is also not a material point warranting much notice. It is to be noted that the examining doctor being Dr. Karuri was the one who completed the P3 form but the same was produced in court by Dr. Juliet Kinyua on behalf of Dr. Karuri. This was done with the consent of the Appellant. In those circumstances, it comes as no surprise that there would be a mix up with dates. I do not find any merit in lending much weight to the date indicated to have been when the complainant was examined. Further, I am of the view that the Appellant had ample opportunity to cross-examine PW6 on the contents of the P3 form and he did take up that opportunity and did cross-examine PW6. There is no evidence in the trial court record that the Appellant raised this particular question during that cross-examination. I do not see why the Appellant sees it fit to raise that question now. Accordingly, I find that that ground must fail.

On the ground of appeal that the Appellant was not conversant with the language being used by the trial court, I find that this holds no water owing to the fact that this was never raised during the trial of this case. Upon perusal of the proceedings of the trial court, there is nowhere where the Appellant stated that

he did not understand what was going on in court. Further, it is evident from the court record that the Appellant cross-examined PW6 in Swahili. Clearly, it is not true that the Appellant did not understand the language used in the trial.

Overall, I find that the Appellant has failed to prove his grounds of appeal and I therefore dismiss his appeal.

Further, I note that the trial magistrate failed to apply **section 8(3) of the Sexual Offences Act** when he was sentencing the Appellant. It is clear that the Appellant should have been sentenced to not 10 but to 20 years imprisonment for defiling the complainant who was aged 15 years at the time of the offence. Accordingly, I enhance the Appellant's imprisonment to 20 years.

SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY OF November 2013

MARY M. GITUMBI

JUDGE