



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 15 of 2011

TUMBO MULEIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 10/2011 by Hon. S.K. Mutai, RM on 19/1/2011)

JUDGMENT

On 17th January, 2011, **Tumbo Mulei**, hereinafter "*the appellant*" was arraigned before the Resident Magistrate's Court at Mutomo charged with a single count of defilement contrary to section 8 (1) (3) of the Sexual Offences Act with an alternative count of indecent act with a child contrary to section 11 (1) of the same act. Particulars of the main count were that on 6th January, 2011 at unknown time in [particulars withheld] in Kitui County, the appellant defiled **B.K.** a child aged seven years. The particulars of the alternative count were that on the same day and place, he committed an act of indecency with **B.K.**, a child aged 7 years by touching her private parts namely, vagina.

The appellant conceded to the charges whereupon the prosecution led the facts. Those facts were brief and were as follows:-

"on 16th January, 2011 the complainant was left at home together with her little sisters and her mother went to a nearby school for a meeting. The accused went there and found the complainant in a shamba. Accused requested for a match box but the complainant denied him. Accused convinced the girl to accompany him to a nearby bush. Accused grabbed her hand and took her to a bush and defiled her. Accused tore complainant's clothes accused fled (sic). Complainant cried and went home naked leaving torn clothes at the scene. Complainant was given a leso to cover herself. Complainant informed her mother about the matter. The complainant's mother recovered the torn clothes. Complainant was taken to Mutomo Hospital for treatment. Complainant was issued with a P3 form which was duly filled by a doctor. Accused was traced arrested and charged before court. I produce the P3 form and torn clothes as exhibits."

Upon conviction of his own plea of guilty, he was sentenced to life imprisonment.

Aggrieved by the conviction on sentence aforesaid, the appellant lodged the instant appeal on the grounds that the learned Magistrate did not investigate his mode of arrest acts of intimidation and his age. The learned Magistrate also failed to appreciate that he did not understand the proceedings as they were

conducted in a language that he was not familiar with.

When the appeal came before me for plenary hearing, **Mr.Mukofu**, learned State Counsel conceded the appeal on the grounds that the sentence imposed was illegal and that the age of the complainant was not proved. He however prayed for a retrial in the event that I agreed with him and allowed the appeal on the above grounds. In support of the plea for retrial, he submitted that, the appellant had pleaded guilty to the charges, he had not served a substantial portion of the sentence imposed and finally, that the witnesses were readily available in the event that a retrial is ordered.

In response, the appellant was happy that the State had conceded the appeal. He was also not averse to the order of retrial.

The appellant was charged under section 8 (1) as read with subsection 3 of the Sexual Offences Act. Section 8 (1) of the act creates the offence whereas section 8 (3) is the penalty section. Under section 8(3) a person convicted is entitled to be sentenced upon imprisonment for a term of not less than 20 years. In any event this sentence would apply where the victim who is of the age of twelve and fifteen years. From the charge sheet the victim was alleged to have been aged 7 years at the time. Clearly then this section was inapplicable and the sentence imposed would equally be illegal. Ideally the appellant ought to have been charged under section 8 (1) as read with section 8 (2) of the Sexual Offences Act. Section 8 (2) deals with victims aged eleven years or less. This was the age group of the victim herein.

Besides the foregoing, it is also true that the age of the victim was not determined. As I have said severally before, in its wisdom of lack of it, Parliament chose to categorize the gravity of defilement cases on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence of defilement which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1) of the Sexual Offences Act. In this case, the age of the victim was not medically assessed or proved through any other documentation and or evidence.

For all the foregoing reasons, I am satisfied that the State was right to concede to the appeal. However, I direct that the case be remitted back to the trial court with a direction that the appellant be retried on the self same charge by any other Magistrate of competent jurisdiction other than **Hon. S.K Mutai, R.M** who presided over the initial case. The case should be mentioned before the said court on 5th October 2012 for the retrial to commence. Until then, the appellant shall remain in Prison Custody.

DATED, SIGNED and delivered at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

ASIKE MAKHANDIA
JUDGE