REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 516 of 2009

B.K ……..…….....……..APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to Section 8 (3) of the Sexual Offences Act No. 3 of 2006. He denied the offence. However after a full trial he was found guilty, convicted and sentenced to 20 years imprisonment. This is an appeal against both the conviction and sentence.

In the amended petition of appeal the appellant complained that the court proceeded with the trial in complete disregard of the Children's Act that requires a minor to be tried strictly as provide in the said Act. It is also his case that the conviction and sentence was contrary to the law on sentencing of minors. He has also complained that he was detained for 9 days without trial contrary to the Children's Act aforesaid. Consequently, his trial was a nullity in law. Finally, he complained that the learned trial magistrate failed to give due consideration to his defence.

At the instance of the learned counsel for the appellant, and with the concurrence of the learned counsel for the Republic this appeal was argued by way of written submissions. I have had the time to go through the said submissions. The evidence was brief. The complainant was playing outside their home together with her sister, brother and other children. The appellant is said to have appeared, chased away the other children, carried the complainant into his house and defiled her. When the complainant subsequently left the house of the appellant her sister noted some blood dripping on her legs. This was also seen by a passerby who chanced to be at the scene.

The complainant reported what had transpired to her aunt whereupon the matter was reported at Tigoni Police Station and then they were referred to Tigoni District Hospital. From Tigoni Hospital she was referred to Nairobi Women's Hospital. Dr. George Githuka who was then attached to Tigoni District Hospital was the first to receive and examine the complainant. He confirmed that the complainant had been defiled. This is the same doctor who examined the appellant herein but nothing significant was noted. The appellant was subsequently arrested and arraigned in court.

In his defence the appellant denied the offence and said he had nothing to do with the defilement of the

complainant. As the first appellate court it is my duty to go through the entire evidence and evaluate the same with a view to arriving at independent conclusions. This I have done. The complainant's family and that of the appellant were neighbours. The complainant knew the appellant by the name Kimani. He was also known to the sister of the complainant who gave evidence as P.W. 2.

The complainant was subjected to lengthy and searching cross-examination by the counsel for the appellant. She however remained firm and consistent her tender age notwithstanding. At the end of it all, the fact that she was defiled had been established by the prosecution. In convicting the appellant, the learned trial magistrate was persuaded that the prosecution case was proved on the basis of the complainant's evidence and the medical evidence adduced during the trial.

On my part, I also agree with the learned trial magistrate that sufficient evidence was adduced to justify the conviction. The complainant was carried away after the other children were chased away during daylight. The time according to the evidence was 3 p.m. The appellant was well known to the complainant and her sister P.W. 2. Soon after the alleged offence, the complainant emerged with some blood showing on her legs. The medical evidence confirmed the act of defilement. The evidence points to only one person and this is the appellant herein. I have no doubt whatsoever that he is the one who committed this offence on the complainant.

The learned trial magistrate addressed the defence advanced by the appellant who also called his mother as a witness. It is true that the learned trial magistrate did not analyze or give any weight to the said defence in his judgment. However, I find that no miscarriage of justice was occasioned thereby, because even if the leaned trial magistrate had done so, he would still have arrived at the same conclusion, that is, the appellant is guilty of the offence charged.

There is however a disturbing issue which the appellant has raised. At the time of the commission of the offence, he was a juvenile. Indeed the charge sheet indicates as much. After the conviction the learned trial magistrate ordered that an age assessment report be provided. This was done and the report dated 19th August, 2009 confirmed that he was indeed a juvenile at the time of the commission of the offence although as at the time of examination he was slightly above 18 years old.

Thereafter the learned trial magistrate called for a probation officer's report which was prepared and produced, and then formed the view that, because of the issues which had been raised at the conclusion of the case, read with the sentiments of the probation officer, a constitutional interpretation was called for. He undertook to frame the issues with a view to referring the same to the high Court for interpretation. The records however reads that the court convened and made the following order,

"Having considered all the circumstances surrounding this case leading to the conviction the accused is hereby sentenced to 20 years imprisonment".

With profound respect, this was misdirection on the part of the learned trial magistrate. He ought to have noted that the appellant was a juvenile as at the time he was first arraigned in court. The charge sheet indicated as much. The provisions of the Children Act should have been invoked right from the beginning of the trial. The appellant was represented by counsel but unfortunately no objection was raised. Some miscarriage of justice may have occurred but, that alone did not exonerate the appellant from the offence charged.

Once the age assessment report was made which confirmed that the appellant was a juvenile, the learned trial magistrate ought to have applied the provisions of the Children's Act. That Act outlaws the use of the word conviction and sentence and specifically provides at Section 191 the various sentences that may be applied.

A miscarriage of justice, notwithstanding the seriousness of the offence, was visited upon the appellant herein. With respect therefore I agree with the learned counsel for the appellant that the law was breached in the sentencing of the appellant. For the avoidance of any doubt, the material dates in any criminal proceeding is that of the commission of the offence and not that of conviction.

The appellant has spent 3 years in jail. Had the learned trial magistrate ordered him to be confined in a borstal institution, he would be out of that institution by now. Accordingly, the appeal against conviction is hereby dismissed but I hereby order that the period already served in prison is sufficient punishment in the circumstances of this case. Accordingly the appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of November, 2012.

A. MBOGHOLI MSAGHA
JUDGE