



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 33 OF 2008.

JAMES GITHINJI MOKUA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(From the original conviction and sentence in criminal case no. 4026 of 2006 of the SPM, Kitale)

J U D G M E N T.

1. The appellant James Githinji Mokuwa was charged with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act 2006. The particulars of the offence state that on 25th February, 2003 at [PARTICULARS WITHHELD] Trans Nzoia District within Rift Valley Province by use of genital organ caused penetration into genital organ of N.N.N, a girl aged 9 years. The appellant also faced an alternative charge of indecent charge of achild contrary to section 2 of the Sexual offences Act 2006. The particulars of the offence states that on 25th February, 2003 2003 in Trans Nzoia District within Rift Valley Province by use of genital organ caused penetration into genital organ of N. N.N, a girl aged 9 years. The appellant pleaded not guilty and after trial he was convictedof the alternative charge of indecent act contrary to section 2 of the Sexual Offences Act and sentenced to 10 years imprisonment. During the hearing of this appeal the appellant pursued the appeal against the sentence on the ground that he is sickly and appealed to this court to exercise mercy on him. This appeal was opposed by the state. The learned state counsel supported the judgment by the trial court which was based on congent evidence by the complainant andher brother who caught the appellant in the act. This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determiantion on whether or not to uphold the conviction. In so doing this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. I now wish to set out albeit briefly, the evidence that was before the trial court the basis of the conviction and sentence of the appellant.

2. After conducting a voire dire examination of N.N.N, PW1 and complainant ion this matter, the learned trial magistrate was satisfied that the complainant understood the essence of giving sworn

statement. She was sworn and gave evidence of how on 27th February, 2003 she was at home with her brother when the appellant sent her brother to buy mandazi. The appellant carried the complainant and placed her on a bed cover her mouth using his hand, removed her underpants and tried to insert his penis into her vagina while doing that Simon Karuri, PW3 returned and caught the appellant in the act. The appellant removed himself from the complainant and pretended to sleep while facing the wall. PW3 ran and summoned the complainant's aunt who came with the other neighbours and locked up the appellant until he was arrested by a Police reservist officer Fred Wamalwa Nyonges, PW3. The complainant was examined by Jimmy Peter Simiyu, PW4, a clinical officer attached to Kitale District Hospital. He found that the complainant had a lacerated (bruised) and some slight bleeding from her vagina. The hymen was intact. A yeast and pus cells were seen from a high vagina swab which was taken from the complainant and was indicated that she had a sexually transmitted disease. PW4 confirmed that the complainant was a victim of defilement. However, in her judgment the learned trial magistrate found the evidence by the complainant and her brother was credible and both were able to withstand vigorous cross-examination by the appellant. The learned trial magistrate resolved the issue of there having been a grudge or bad blood between the appellant and the mother of the complainant. The only reason why the appellant was convicted on the alternative charge is because the medical evidence revealed that the complainant's hymen was intact and since it was not perforated the trial court held that there was no penetration thus the charge of defilement could not stand and thus convicted the appellant with the alternative charge of indecent act.

3. This appeal is only on sentence, the sentence prescribed by law for the charge of sexual assault which I find the appellant found to have committed carries a minimum sentence of 10 years. I therefore find no justification in interfering with the discretion of the learned trial magistrate who passed the sentence. In any event the principles to bring to bear in mind on whether to alter the sentence were clearly articulated in the case of **OGALO s/o OWUOR [1954] E.A.C.A. at page 270** where the Court of Appeal held as follows:-

“The court does not alter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”

4. Accordingly I find no merit in this appeal. The decision of the trial court and sentence is upheld. The appeal is dismissed.

Judgment read and signed this 11th day of February, 2011.

M.K. KOOME.

JUDGE.