



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 254 OF 2008

LESIT, J

A.M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Moyale PM'S case No. 381 of 2008 – CHARLES OBULUTSA(PM)

JUDGMENT

The appellant A.M. was convicted for the offence of Sexual assault contrary to section 5 (1) (a) of the Sexual Offence Act. (Hereinafter SOA). He was sentenced to 20 years imprisonment. The appellant was aggrieved by the conviction and sentence and so filed this appeal.

The petition and grounds of appeal filed by the appellant herein challenge both the conviction and sentence. However when the appellant appeared in court he informed the court that he was appealing only against the sentence. In his oral submission, the appellant urged the court to reconsider the sentence as he was 30 years old and the sentence excessive.

Mr. Kimathi learned state counsel urged the court to exercise its discretion bearing in mind the minimum sentence under the law. Counsel also urged the court to consider that the complainant was 12 years old.

I have considered this appeal S.354 (3) of the Criminal Procedure Code, this court's powers are stipulated as follows:-

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

(a) in an appeal from a conviction –

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of

the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order Summary allowance of appeal.

(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.

The appellant was convicted of an offence under Section 5 (1) (a) (i) of the Sexual Offence Act. The penalty for such offence is provided under S.5 (2) of Sexual Offence Act. It provides that a person convicted of an offence under that section is liable to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

Before passing sentence, a trial court is expected to consider mitigating circumstances as stated to it by the accused or his counsel. The court should also take into account other factors affecting sentence.

For the purposes of this appeal, it was important for the learned trial magistrate to consider the age of both the offender and the victim. He should have also considered the circumstances of the offence, the previous antecedents of the accused if any and any aggravating factors.

The learned trial magistrate did not consider that the appellant was a first offender. He did not consider the appellant's age. From the record of the proceedings there were no aggravating factors.

I think that being his first offence, the fact he was a young offender, and the fact that there were no aggravating factors involved, the learned trial magistrate gave an excessive sentence. I will therefore allow the appeal and reduce the sentence from 20 years imprisonment to 10 years imprisonment. The appeal succeeds to that extent.

Dated signed and delivered this 28th day of July 2011.

LESIIT, J
JUDGE