



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.27 OF 2010

(From Bungoma original CM CR. NO.346 of 2008)

BENARD SIFUNA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Bernard Sifuna was charged and convicted of defilement of a child contrary to section 8 (1) of the Sexual Offences Act. He was jailed for 15 years. The Appellant being dissatisfied with the conviction and sentence lodged this appeal.

The grounds of appeal were that the trial court failed to analyze the evidence on record; that the doctor who testified is not the one who attended to the patient; that his constitutional rights were violated by the state for over-remanding him in custody contrary to section 72 (3) of the former constitution.

The state conceded to the appeal. Mr. Okeyo holding brief for Mr. Ogoti submitted that the age of the victim was not established which is a requirement of the law. The sentence will always depend on the age of the complainant. The state urged the court to quash the conviction and set aside the sentence and order a retrial. The appellant had no objection to the proposals of the state. I have perused the evidence and I agree with the state counsel that the prosecution did not comply with the legal requirements as to age. The complainant herself (PW1) told the court that she was aged eight (8) years. The clinical officer PW4 only testified on his clinical findings on the act of penetration. He said the girl was presented to him by the O.C.S Malakisi Police Station for examination in regard to a sexual assault. PW4 said the girl was aged 7 years which is the age given in the P.3 form. Part I which was and is supposed to be filled by the police. The police may have gotten the estimated age from the parents of the minor.

There was need to do age assessment or produce a birth certificate which would prove the age of the complainant. In the absence of establishment of age of the complainant any sentence imposed by the trial court shall have no legal basis and may be illegal. It is therefore not possible to tell on what criteria the trial magistrate based the sentence of fifteen (15) years imprisonment.

I therefore set aside the conviction and the sentence. This case was registered in court on 04/03/2008 and concluded on 12/09/2008. This appeal was filed on 16/03/2010 and has been concluded within three (3) months. This has been fast tracked matter and the Appellant will not suffer any prejudice if a retrial is ordered. I hereby order that retrial be done by a magistrate other than the trial magistrate. The Appellant to be remanded in custody till 26/07/2011 when he will appear before the Chief Magistrate Bungoma for plea.

F. N. MUCHEMI

JUDGE

Judgment dated and delivered on the 20th day of July, 2011 in the presence of the Appellant and the state counsel.

F. N. MUCHEMI
JUDGE