



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 6 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 14 of 2011 of the Senior Resident Magistrate’s Court at Kaloleni – D. M. Machage, SRM)

MUNGA NZAKA
..... APPELLANT

- Versus -

REPUBLIC RESPON
DENT

J U D G M E N T

This is an appeal by **Munga Nzaka** against the sentence of a 15 year prison term imposed on him by the Senior Resident Magistrate Kaloleni on 13th January, 2011. This was upon a conviction on the charge of Defilement of a child contrary to Section 8(1) as read with Section 8(4) of The Sexual Offences Act, 2006.

The particulars of the offence, briefly is that on diverse dates in July 2010 the appellant defiled a child aged 17 years. That defilement led to a pregnancy.

The appellant does not challenge the conviction. In his grievance against sentence he raises the following grounds:-

(a) that the learned Magistrate did not accord him an opportunity to tender his mitigation.

(b) the learned Magistrate did not make an assessment of him prior to passing sentence

(c) that the learned Magistrate passed a harsh and excessive sentence

The minimum punishment prescribed by Section 8(4) of The Sexual Offences Act, 2006 for defilement of a girl aged between sixteen and eighteen years is a prison term of 15 years. The appellant does not say that the sentence is unlawful.

A trial court has discretion to impose what it considers an appropriate sentence within the parameters prescribed by the law. An appellate court will rarely interfere with a lawful sentence of the trial court unless in arriving at sentence, the sentencing court acted capriciously or imposed a manifestly harsh or excessive sentence or acted on wrong principle or failed to take into account correct principles. (see **Wanjema –Vs- Republic [1971]1 EA 493**). As they are intimately related, this court shall deal with

all the three grounds together. The court proceedings shows that after a conviction was entered the following transpired.

“Court prosecutor – No records.

Mitigation accused 1 use Kiswahili. N/A”

While it is quite clear that the accused was given an opportunity to mitigate what he said in reply is unclear. The learned Magistrate recorded his answer using the abbreviation ‘N/A’. Does N/A stand for “Not applicable” as suggested by the appellants advocate or “No answer” as would seem more logical. Only the Magistrate knows. Things may have been helped if the trial Magistrate had discussed the appellants mitigation in the sentencing notes, but he did not. Sentencing is an important part of the trial process. A trial court has a duty to invite an accused person to offer mitigation and sentence should be pronounced only after the court receives mitigating circumstances, if any are offered. This is an important principle of sentencing which could entitle an interference with the sentence if not observed (see **Criminal Appeal No. 359 of 2006 Edwin Otieno Odhiambo –Vs- Republic**). As already noted the court record does not reveal the mitigation, if any, made by the appellant. The opportunity given to the accused to offer his mitigation was negated by the fact that the learned Magistrate failed to properly record his answer and to that extent the trial court breached a principle of sentencing.

We now turn to consider whether that breach should entitle this court to interfere with the sentence imposed. The Sexual Offences Act is a fairly recent statute and came into force on 21st July, 2006. Section 8 of The Sexual Offences Act replaced Section 145(1) of The Penal Code. The Sexual Offences Act prescribes different punishment depending on the age of the victim. Sections 8(2), 8(3) and 8(4) sets out the categories of age and the sentences therefor. The people of Kenya speaking through their elected representatives prescribed minimum sentences for the offence of defilement. This is not an outdated provision of the law which can be said to be out of step with the wishes of the people.

The learned Magistrate imposed the minimum sentence available in law. Let us exam the circumstances of this case vis-à-vis the imposed sentence. The appellant is not (and was not at the time of the conviction) a person below the age of eighteen so as to deserve different sentence under the provisions of Section 8(7) of The Sexual Offences Act.

Secondly, the defilement resulted in an unwanted and unplanned pregnancy, and perhaps, motherhood. In addition, the facts that were admitted by the appellant is that he defiled the complainant several times. Looked at as a whole the sentence, in my view, is not excessive and harsh and this court will not interfere with it.

On this occasion non-observe of a principle of sentencing has not resulted in a failure of justice and this court, looking at the provisions of Section 382 of The Criminal Procedure Code, does not find any reason at all to alter the sentence imposed.

Ultimately, the appeal has no merit and is hereby dismissed.

Dated and delivered at Mombasa this 28th day of November, 2011.

F. TUIYOTT
JUDGE