



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APEAL NO. 183 OF 2007

EVANS NYAUNDI MOGAKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Senior Resident Magistrate's court at Homa-Bay criminal case no. 721 of 2007 by E.K. MWAITA -AG.SRM)

Evans Nyaundi Mogaka “*the appellant*” was charged before the Senior Resident Magistrate’s court at Homa-Bay with one count of using influence over relationship with a child contrary to section 15(d) as read with 15(g) of the **Sexual Offences Act**. It was alleged in the particulars that the appellant on 3rd June, 2007 at Cinema area, Rangwe Division within Homa-Bay District of Nyanza province he took advantage over his influence on **V.A**, a girl aged 15 years and procured her with intention of sexual intercourse or any form of sexual abuse. The appellant pleaded not guilty to the charge and he was tried.

Briefly the prosecution case was that the appellant was a boyfriend of PW1 **V.A.O** a girl aged 17 years; the complainant. On 3rd June, 2007 he asked her to accompany him to Kisii to visit his home. They went and on reaching, the appellant left her there. She had carried along her clothes. The appellant after leaving her at home returned to Asumbi in Homa-Bay where he apparently worked as a security guard. Meanwhile PW3, **D.A.O**, the complainant’s mother unaware of what had transpired between the appellant and complainant started looking for her. In the process she got information from a villager that the appellant had been seen walking on foot towards Nyamira with the complainant. She gave information to the police and later caused the appellant to be arrested. The appellant could not explain the whereabouts of the complainant. In the meantime the brother to the appellant, arranged for the complainant to return home after learning of the arrest of the appellant. Upon arrest the appellant was brought to Homa-Bay police station and was later charged with this offence by **PC Stephen Kipyegon (PW6)**.

The appellant in his sworn statement of defence stated that PW2 had a grudge with him in that he had failed to assist her to employ her brother with the security company in which he was then an employee. She therefore hatched this case to see to it that the appellant was sacked from his employment.

The learned magistrate having carefully analysed and evaluated the evidence tendered by both the prosecution and the defence, found for the prosecution. He found the appellant guilty as charged, convicted him and thereafter sentenced him to serve the minimum sentence of 10 years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred the instant appeal. In his petition of appeal filed on 30th October, 2007 the appellant impugned the decision of the learned magistrate on grounds that the prosecution had not proved its case beyond reasonable doubt as required, the complainant had convinced him that she was aged over 20 years and that the sentence imposed was harsh and excessive.

When the appeal came up for hearing, the appellant surprisingly opted to abandon the appeal on conviction. Instead he chose to pursue the appeal on sentence. His wish was duly granted by the court. In

support of the appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive bearing in mind that he was a first offender.

In response, **Mr. Gitonga**, learned state counsel submitted in opposing the appeal on sentence that the sentence imposed was legal. It was the minimum sentence provided by the law. The appellant having been properly convicted, the trial court's hands were tied by law. The sentence imposed should not therefore be interfered with.

I have no doubt at all in my mind that the appellant was wrongly convicted. The appellant was charged with the offence of taking advantage of his influence over or his relationship with the complainant, to procure her for sexual intercourse. For that charge to hold it was expected of the prosecution to prove that the appellant had influence over the complainant and used that influence to entrap and lure her into a sexual relationship. The prosecution too had to prove that the appellant had a relationship with the complainant and finally there was sexual intercourse between them. Having considered the recorded evidence, I am unable to hold as the magistrate did that the case for the prosecution on the charge preferred had been proved to the required standard in criminal cases.

With regard to the alleged influence of the appellant over the complainant, there was no evidence of such influence. The complainant merely stated in her testimony that the appellant was her friend. He cheated her to accompany him to his home and she willingly went along. Cheating is not the same thing as undue influence.

According to her testimony, she was aged 17 years. She therefore had a mind to say no. She did not. She did not say what influence the appellant brought to bear on her such that she could not resist going along with the appellant's proposition. There is no evidence as to what position the appellant held in society such that his influence on her was irresistible. The evidence of her mother too is silent on this aspect of the matter. However from the recorded evidence he was a mere security guard.

Did the appellant have a relationship with the complainant? From the look of things, there was despite the appellant's denial. However, again the evidence of the mother is lacking on this aspect of the matter. However what sought of relationship was it? It is not clear. The complainant merely said they were friends. However, her brother, **J. O (PW5)** in his evidence seen to suggest that their relationship was girlfriend/boyfriend. But as already stated, her mother's evidence is silent on the issue. Why should there be such discrepancy on a matter which should be obvious to the three witnesses. If as claimed by PW4, the appellant was a frequent visitor to their home even at night to see the complainant, Why should their mother play traunt to the fact. It appears to me on the basis of the foregoing that the defence advanced by the appellant based on perceived grudge may after all be true. The truth of the matter is that the appellant and complainant were lovers and which relationship had the blessing of the mother of the complainant.

Did the appellant have sexual intercourse with the appellant"? No credible evidence was proffered by the prosecution on this aspect of the matter as well. The complainant did not say so. All that she said was that whilst in Kisii she slept with him. This statement does not perse connote sexual intercourse. The prosecution should have had medical evidence to prove the allegation. They did not do so with the consequence that sexual intercourse as a fact was not proved.

Then there is the issue of the age of the complainant. According to the charge sheet, the complainant was said to be aged 15years. Yet in her own testimony she claimed to be 17 years. The exact age of the complainant for the offences under the sexual offences Act is critical. There is need to have the age of the complainant determined by credible evidence since in some cases, the sentence imposed is dependent on the age of the complainant. The younger the victim, the stiffer the sentence. In this case, the exact age of the complainant was not established. She may as well have been over 18 years.

For all the foregoing reasons, I would allow the appeal quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 30th June, 2010

ASIKE-MAKHANDIA
JUDGE