



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 159 of 2009

SAMUEL ODONGO OKOTH APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant **SAMUEL ODONGO OKOTH** has filed this appeal contesting his conviction and sentence before the lower court. The Appellant had been arraigned in court and charged with **ATTEMPTED DEFILEMENT OF A GIRL CONTRARY TO SECTION 9(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that

*“On the 23rd day of October, 2008 in Msambweni District within Coast Province attempted to defile **BB** a girl aged ten (10) years”*

In addition the Appellant faced an alternative charge of **INDECENT ASSAULT WITH A CHILD C/SEC 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant initially pleaded not guilty to both charges and his trial commenced on 11th December 2008. After the prosecution had called three (3) witnesses who were heard by the court the Appellant changed his plea to guilty. He was convicted and then sentenced to serve fifteen (15) months in prison. The Appellant thereafter filed this Appeal.

The Appellant who was unrepresented at the hearing of this appeal opted to rely entirely on his written submissions which had been duly filed. **MR. ONSERIO**, learned State Counsel, who appeared for the Respondent State gave oral submissions opposing the appeal.

Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court – see **OKENO –VS- REPUBLIC [1972] E.A.L.R. 32**.

I have carefully perused the Appellant’s written submissions and I note that one of the grounds of appeal was that the charge sheet was defective. I have anxiously perused the charge sheet and I do not note any fatal defect in the manner in which the charges were laid. I do however note that in the particulars of the charge sheet the age of the child is given as ten ‘years’. This does not correspond with the evidence of **PW1 M.M**, the mother of the child who told the court that her daughter **B.B** was aged ten (10) months at the time of this

incident. Does this anomaly render the charge sheet fatally defective? I think not. I note that in the alternative charge the correct age of the child is given i.e. ten **months**. It is entirely plausible that the use of the word '**years**' in the first count was merely a typing error. A charge sheet is merely a synopsis – '**a peep view**' if you like of the main charge. It has been held severally that it need only contain '**sufficient particulars**' such as date and nature of the offence to enable the accused know what charge he faces. I am satisfied that this charge sheet did contain such '**sufficient particulars**'. In any event the evidence adduced by witnesses would expand on the charge sheet. **PW1** clearly stated that her child was ten **months** old. In my view this is a defect which is curable under S. 382 of the Criminal Procedure Code as such error did not occasion a failure of justice.

As stated earlier this trial commenced on 16th December 2008 and three (3) witnesses were heard. The record shows that the Appellant was accorded an opportunity to cross-examine the said witnesses. On 17th August 2008 the Appellant changed his plea to one of guilty. The charges were read out and the Appellant responded '**it is true**'. Recognizing the serious nature of the charge the trial court did ask the Appellant severally if he was sure of his plea. At page 16 line 17 the record shows

“Court: Plea of guilty entered for accused. Court has asked accused about the nature of the plea he is making today and he has 3 times stated “It is true”

The learned trial magistrate proceeded to enter a plea of guilty. However as an added precaution before reading out the facts the trial magistrate directed that the Appellant be examined by a Psychiatrist to establish whether he was fit to plead. This was done on 24th August 2009. The report was presented to court and it indicated that the Appellant was fit to plead. Only then were the charges read out to the Appellant and he responded

“Accused: The facts are correct”

However I do note that the trial magistrate failed to enter a conviction against the Appellant. The trial magistrate thereby failed to comply with S. 207(2) of the Criminal Procedure Code which provides

“(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall [my emphasis] convict him ...”

The trial magistrate had an obligation to **convict** the Appellant before proceeding to sentence. Failure to do this renders the proceedings null and void. A sentence cannot stand where there has been no conviction. For this reason alone this appeal succeeds. The sentence is quashed. I have considered that the offence charged was serious and the victim was a ten month old baby. The Appellant having been sentenced in August 2009 has spent less than a year in prison. A re-trial will not prejudice him. As such I do order a re-trial in this case. The file to be returned to the Senior Resident Magistrate Kwale for a plea to be taken afresh. Mention on 10th August 2010.

Dated and Delivered in

Mombasa this 20th day of July 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

20/7/2010