REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 26 of 2008

JUMA OMAR DUME …….. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(*From the Original Conviction and Sentence in the Criminal Case No. 55 of 2008 of*

The Senior Resident Magistrate's Court at Kaloleni – Andayi W. F. – SRM)

JUDGMENT

The appellant **Juma Omar Dume,** (hereinafter "the appellant"), was charged with the offence of defilement of a child contrary to Section 8(1) as read with subsection 3 of the Sexual offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 14th September, 2007 in Kaloleni District within Coast Province committed an act which caused penetration with a genital organ namely a penis to W.U.J, a child aged 15 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

On 1st February, 2008 the appellant appeared before W. F. Andayi, then a Senior Resident Magistrate and when the main charge was read over to the appellant he is alleged to have stated, "It's true." The alternative charge was also read over to the appellant and the same response is stated to have been made. The record shows that the Learned Senior Resident Magistrate then entered a plea of guilty to both the main and the alternative charge. The prosecutor then narrated the following facts:-

"***It is alleged that accused committed this offence on 14th September, 2007 at 7.00pm against W.U.J aged 15 years and a pupil at J Primary School in Class 8. She met the accused person on her way from school who stopped her. He seduced her and convinced her to have sexual intercourse and she obliged. The accused led her to nearby bushes where they had sexual intercourse for about thirty minutes. The complainant felt pain as accused made penetration into her genital organs with his penis and this caused accused to stop the act. The complainant recollected herself and went home. She did not disclose the fact to anybody. She says she had never had sexual intercourse before and that was her first time. She came to realize on 1st January, 2008 that she was expectant. This prompted her to reveal to her mother who made a report to the head teacher … the chief … and … the police. The complainant was issued with a P3 form … She was taken to St. Lukes Hospital where she was examined and found to be six months pregnant. The accused was subsequently arrested, and charged with the offences, …"***

The record shows that after those facts had been stated, the appellant responded as follows:-

"***The facts are correct only that it is not true, that was the first time. I have been her friend. I know she is 16 years old."***

Nevertheless the Learned Senior Resident Magistrate convicted the appellant on the principal charge. In mitigation, the appellant stated as follows:-

"***I ask for forgiveness. I did not know that it would turn out to be this bad. I also wanted the complainant to be present today so that we can discuss the way forward but I cannot see her."***

The Learned Senior Resident Magistrate, after taking into account the appellant's mitigation sentenced the appellant to 15 years imprisonment. The appellant was dissatisfied and has appealed to this court on the main grounds that his plea was not unequivocal and that the learned trial Magistrate erred in law and in fact in convicting the appellant without ascertaining the actual and true age of the complainant.

When the appeal came up for hearing before me on 13th July 2009, Mr. Onserio Learned State Counsel, conceded the appeal on the grounds that indeed the plea of the appellant was not unequivocal and further that the Learned Senior Resident Magistrate did not appreciate the importance of ascertaining the age of the complainant.

I have considered the record of this case and I am satisfied that the plea of the appellant was not properly taken. After the prosecutor narrated the facts of the offence, the appellant did not substantially agree with them. He stated that he had not just had a single act of intercourse with the complainant but that he was her friend. He further stated that he knew that the complainant was 16 years of age. The appellant therefore substantially disputed the facts as narrated by the prosecution. His explanation of the facts indicated that in his mind, he knew that he had not committed any offence. In my judgment, the appellant's explanation raised questions about his guilt and a change of plea should have been entered.

The appellant's mitigation, as quoted above, also suggested that the appellant was, even at that stage, concerned with his relationship with the complainant and not the offence for which he had just been convicted. In my view it was not too late even at that step to record a change of plea. Instead the Learned Senior Resident Magistrate was of the view that the appellant was remorseful and deserved lenient treatment which, in his view was, the minimum sentence of 15 years.

In the end I find that the appellant's plea was not unequivocal. The same was not in accordance with the procedure set out in **Adan –Vs- Republic [1973] E.A. 445**. This appeal must therefore be allowed. The Learned State Counsel did not quite, properly in my view urge a retrial. The complainant may now be pursuing her own interests in life and a retrial may adversely disturb her pursuits. This appeal is allowed. The appellant's conviction is hereby quashed and the sentence is set aside. The appellant should be released forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: Mr. Mwawasi holding brief for Kariuki for the appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

27.8.2009