REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 196 of 2008

(From original conviction and sentence in the Principal Magistrate's Court Court Oyugis , Criminal Case No.11 of 2008 by R. NGETICH (Acting P.M)

MESHACK OGEGA JOMBO…….APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

JUDGMENT

The appellant was convicted on own plea of guilty by Acting Principal Magistrate, Oyugis, of defiling a girl aged 11 years contrary to *section 8(2) of the Sexual Offences Act, 2006* whose particulars were that on diverse dates between 11th and 16th October, 2008 in Rachuonyo District within Nyanza Province he had carnal knowledge of L.A.O a girl aged 11 years.

The facts as narrated by the prosecution, and accepted by the appellant to be correct, were that on the night of 16/10/08 at 9 p.m the complainant was in their kitchen preparing to sleep when the appellant knocked the door. She opened and appellant asked her to dress up and come with him to be given Kshs. 100/=. She obliged and when she reached the appellant's house, he had carnal knowledge of her the whole night. She reported the matter to her parents next morning. She was taken to Othoro Health Centre where she received treatment. Her P3 was competed. It was produced in court. It revealed she was 11, her hymen had been broken and she was producing a whitish discharge. The appellant was convicted on the facts. The prosecution informed court he was a first offender. In mitigation, he informed court he was a form II student at L Secondary school. He stated this was his first offence and asked to be treated leniently. He informed court he was 20, having been born in 1988.

Before the court sentenced the appellant, it called for the complaint's Birth Certificate. It was produced by the prosecution to reveal she was born on 2/8/97, and was therefore 11. The court then sentenced the appellant to serve for life in prison.

The appellant claimed in his Petition of Appeal that the court hurriedly dealt with him. During the appeal, he complained that this was his first time in court and that he did not understand the consequences of what he was pleading to. Mr. Kemo for the State responded that the plea was unequivocal.

The appellant did not complain that he did follow the proceedings. I note that the proceedings were being interpreted to him in Dholuo language. I am alive to the requirements of *section 207 of the*

Criminal Procedure Code and the procedure set out in *Adan .V.Republic [1974]EA 445* regarding plea taking. The record clearly shows the trial court was careful in observing the procedure. What the appellant stated in mitigation was clear confirmation he was following what was going on. He sought to be treated leniently on account of this being his first offence, his being in school and his age. I am satisfied the plea was unequivocal and that the conviction was properly entered. Appeal against conviction is refused.

Regarding sentence, the appellant lamented that his plea that he was a young man in form II was dismissed by the trial court. Mr. Kemo stated the sentence was legal. The trial court was exercising its own discretion when it ordered the appellant to serve in jail for life. This appellate court cannot interfere with that discretion unless the appellant can show that the court did not consider a material factor, took into consideration immaterial factor, acted on wrong principle of law, or that the sentence was manifestly excessive in the circumstances of the case (See *Wanjema .V. Republic [1971]EA 493).* In sentencing the appellant, the trial court did not indicate it had taken into consideration that the appellant was a first offender or that he was a 20 years old student who was pleading for leniency. The court went for the maximum penalty without apportioning any reasons. This court cannot know if what the prosecution and appellant said influenced the sentence. There can be no question that the behaviour of the appellant was beastly and repulsive. However, the Court of Appeal in *Arrisol .V. R. [1957] E.A.447 at page 449* has advised that:

"*It is unusual to impose the maximum penalty on a first offender and it would be wrong to depart from that rule……..."*

The policy of the law is to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the court the determination to the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit.

It was critically important for the court to consider, and to be shown to have considered, the age of the appellant, the fact that he was in school and his plea for leniency. I further find the trial court proceeded on the wrong principle when it meted out maximum penalty. In all, the sentence was manifestly excessive. It is set aside.

Considering the gravity of the offence, the circumstances under which it was committed, the fact that appellant was a first offender, his age and plea for leniency, I order that he serves 15 years in jail

Dated, signed and delivered this 11th day of November, 2009

A.O.MUCHELULE

JUDGE

11/11./2009

11/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Mutai for state

Appellant-present

Court: Judgment in open court.

A.O.MCUHELULE

JUDGE

11/11/2009