REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 65 of 2006

K.K.K.K…….……..... APPELLANT

- Versus -

REPUBLIC…..……..…. RESPONDENT

J U D G M E N T

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K.K.K.K (the appellant), was convicted on his own plea of guilty on a charge of unnatural offence contrary to section 162 (a) Penal Code and sentenced to serve 14 years imprisonment. The charge was that on 21-4-06 in Kilifi, he had carnal knowledge of C.K against the order of nature.

The charge was read over to appellant in Kiswahili and he replied:-

"true"

The facts were narrated as follows-

That on 21-4-06 at 1.00pm, the complainant was going to K for a crusade when he met the appellant who asked to send him. He requested the complainant to follow him and while he was passing through a bush, the appellant knocked him down and sodomised him. The matter was reported to police and appellant was arrested. A P3 form was filled.

The appellant confirmed the facts to be correct.

Before sentence the court ordered for age assessment of the appellant. It seems no medical age assessment was presented to the trial court but the prosecutor informed the court that appellant had been assessed to be an adult. The victim was a nine year old child.

In mitigation appellant prayed for leniency. The trial magistrate took into consideration the mitigation and the nature of the offence and the maximum sentence which he noted was 21 years.

However due to the seriousness of the offence, appellant was sentenced to serve 14 years imprisonment. His amended grounds of appeal were that the trial magistrate did not record the exact words he used during plea and that the trial magistrate did not keenly consider the medical report which did not tally with the facts.

He filed written submission where he introduced some issues not contained in his grounds of appeal. The plea was unequivocal – if he used other words, then he has not disclosed what words those were and it was Mr. Ogoti's contention that the record was very clear on the language used in the trial court showing there as interpretation from English to Kiswahili and indeed the charge was read over to appellant in Kiswahili and he appropriately responded to the same.

Mr. Ogoti submits that the recording of the plea was proper – I agree and indeed by virtue of accepting the facts as read out to him, then the burden of proof was dispensed with. Appellant complained about the medical evidence – the P3 form showed that around the anus of the victim, there was blood stained faecal matter. The conviction was safe. The appellant complained about his age at the time of sentence, saying he was not examined for age assessment. This court directed for an age assessment and an age assessment certificate dated 20-10-09 signed by Dr. Areba of Malindi District Hospital confirmed appellant is 17 ½ years. He was sentenced on 22nd May 2005, meaning that at the time of sentence he was 13 ½ years.

Under the provisions of the Children's Act No. 8 of 2001 section 190 places a restriction on punishment to the effect that:-

(1) No child shall be ordered to imprisonment or be placed in a detention camp.

A child under the Act is defined as "any human being under the age of eighteen years" which definition then places the appellant even now in the category of a child and so his imprisonment offended the provisions of section 190(1).

There are other methods of dealing with child offenders under section 191 of the same Act. Consequently the sentence meted here was illegal and is set aside. I consider that appellant has been in prison for three years now and that is sufficient punishment. He is subsequently discharged under section 35(1) Penal Code on condition that he should no commit any other offence within the next 12 (twelve) years.

Delivered and dated this **17th** day of **December 2009** at Malindi.

H. A. OMONDI

JUDGE