



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 30 of 2006

H M..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant was on the 7th March, 2006 convicted of the offence of defilement of a girl contrary to Section 145 (1) of the Penal Code. He had been charged on 27th August, 2002 with – to wit that on the 18th August, 2002 at *[particulars withheld]* Estate in Uasin Gishu District within Rift Valley Province had carnal knowledge of R W a girl under the age of fourteen years. The Appellant upon conviction was sentenced to 10 years imprisonment.

Being aggrieved, the Appellant lodged his appeal on 21st March, 2006. He initially filed the Petition of Appeal by himself but upon retaining Counsel to act for him, he filed Supplementary grounds of Appeal on 3rd November, 2006.

At the hearing his Counsel prosecuted all the grounds of appeal with emphasis on the following grounds in the Supplementary Memorandum:-

Ground 1 – That the Learned Trial Magistrate erred in law and in fact in convicting and sentencing the appellant for a period of ten (10) years.

Ground 2 – The Trial Magistrate erred in law and fact in not considering the age of the accused person vis-à-vis the age of the complainant at the time of the alleged offence.

Ground 6 – The Learned Trial Magistrate erred in law and fact in convicting and sentencing the accused (appellant) without proof that she had sexual intercourse in the absence of spermatozoa in her vagina and/or private parts.

Ground 7 – That the Learned Trial Magistrate erred in law and fact in relying on the doctor's evidence which never established nor corroborated the essential fact of penetration.

Mr. Omboto for the Appellant submitted inter alia, that:-

- At the time of the alleged commission of the offence, the Appellant was himself 17 years of age.
- Both the complainant and the accused were minors.

- The sentence of 10 years was illegal and excessive.
- The sentence was in contravention of the Children’s Act – Section 184, part 13.
- That Section 190 (1) (g) of the Act regulated and restricted punishment of minors.
- That the Appellant ought to have been sent to a Borstal Institution
- That the Chief Magistrate who delivered the Judgment and sentenced the Appellant Mrs. F. Muchemi had no jurisdiction to handle Children’s matters.
- That Section 200 of the Criminal Procedure Code was not complied with when the said Magistrate took over the trial from the first Magistrate.
- That the terms – “conviction” and “sentence” ought not to have been used and applied in reference to the Appellant, who was a minor.
- The Trial Court ought to have ordered that the appellant required “care” and “protection”.
- The Appellant was convicted without proof that she had sexual intercourse in the absence of the finding of spermatozoa in her vagina and/or private parts.
- There was no proper investigations and evidence to link the Appellant with the offence.

On behalf of the Respondent (the State), Mr. Omutelema, Senior Principal State Counsel argued inter alia, that:-

- The State opposed the appeal against conviction.
- There was overwhelming evidence that the Appellant committed the offence.
- The Complainant recognized the Appellant.
- She informed her parents immediately after the incident.
- No ground in the Appeal in respect of Section 200 of the Criminal Procedure code was raised.
- That the Chief Magistrate Hon. F. Muchemi was only delivering Judgment and thereafter sentenced the Appellant.
- At the time the offence took place he was a minor. However, at the time the Judgment was delivered the issue that he was a minor was not raised. He told the Court on 29.04.06 that he was 17 years yet Judgment had been delivered. There was no evidence of his age.
- Section 200 (1) Criminal Procedure Code allowed the Magistrate to read and deliver the Judgment of a predecessor.
- The doctor had proved the fact that the girl/complainant had been defiled. The question of spermatozoa was therefore irrelevant.

With regard to sentence Mr. Omutelema conceded that the sentence of 10 years was excessive and that the Court ought to have taken into account that the Appellant was still a minor at the said time. The sentence in respect of 5 strokes was illegal as such a sentence was removed through the repeal of the law by Act No. 5 of 2003.

I have considered the grounds of appeal, the proceedings, judgment and the submissions by Counsel.

The complainant was 14 years of age. She clearly saw the face of the Appellant in the moonlight. She recognized and identified him. She had previously seen him when he visited his mother who stayed in the same compound as the complainant. The complainant was crying when she went back to her parent's house. The attacker had ran away. When the accused was arrested and taken to the Police Station, he confessed to the Charge to PW3 Inspector Faith Wafula. The confession was admitted in evidence by the Court since it was made before the repeal of the law permitting confessions before the Police. The Charge and Cautionary Statement was produced in evidence on 19.06.03 before the Evidence Act was amended to include Section 25A which commenced on 25th July, 2003 vide the Criminal Law (Amendment) Act of 2003.

The Trial Court considered the provisions of Section 124 of the Evidence Act and accepted the evidence of the Complainant who was a child but not of tender years (10 yrs and below) and victim of the offence. The reasons for the conviction are set out in the judgment. The child's evidence was uncontroverted and the Accused admitted having committed the offence. The trial Court found the said evidence was obtained from the Accused voluntarily and in accordance with the Judge's Rules.

The doctor's evidence was consistent with the testimony of the complainant. The doctor PW3 examined the complainant the day after the offence was alleged to have been committed. He found that the complainant had a freshly broken hymen and a slight whitish discharge from the vagina. He concluded that there had been invasion of the complainant's private parts by a forceful blunt object probably through sexual intercourse. In the circumstances, the finding by the trial Court that the Complainant had been defiled was a proper finding. The absence of spermatozoa during examination does not controvert or shake the overwhelming evidence against the appellant. It is my view that penetration was proved by the fact that the hymen had been recently broken and was still fresh.

There is no dispute that for the purposes of the Children's Act, Cap No. 8 of 2001 that both the Appellant and the complainant were children i.e. under the age of 18 years. The Appellant was 17 years while the complainant was 14 years. Sections 18 A (1) and 185 did not deprive the trial Court of its jurisdiction to try the Appellant in respect of the offence herein. The Court had the power and discretion to remit the case to the Children's Court but this failure or non-election does not render the proceedings invalid.

Did the Hon. F. Muchemi Chief Magistrate have the jurisdiction to hear the case? The Appellant was not charged in the Children's Court. He was charged in the mainstream Criminal Court. As a result the Hon. F. Muchemi had jurisdiction to hear and determine the case. It would perhaps have been prudent to refer the case to the Children's Court in compliance with Section 185 (1) of the Children's Act. However, failure to do this did not render the Court or Magistrate to be incompetent to try the case.

I disallow the ground raised during submission in respect of Section 200 of the Criminal Procedure Code since it was not expressly raised in the grounds of Appeal. In any case, the Hon. F. Muchemi was perfectly entitled in law to read and deliver the judgment on behalf of her predecessor in the case. There was no hearing per se and no necessity of recalling any witnesses.

Since the proceedings and trial were not carried out by a Children's Court the use of the terms "conviction" and "sentence" does not render the conviction and sentence to be illegal.

With regard to the sentence, the Respondent has conceded that the sentence of 10 years was excessive in the circumstances. The Accused/Appellant had been charged on 27th August, 2002. By the time he was convicted he was an adult i.e. 21 years old. As a result I do not think that strictly it was wrong for him to be detained or serve sentence in a prison.

In the light of the foregoing, I do hereby find and hold that the conviction of the Appellant was sound and proper and the same is upheld. With regard to sentence I do find that a period of 10 years is excessive in the circumstances.

Still, the offence was serious and violated the innocence and private rights of a minor/girl child. It was

carried out violently, if not brutally. The Appellant must be deterred in any event by a reasonable and appropriate custodial sentence.

Accordingly, I do hereby set aside the sentence of 10 years and 5 strokes and substitute it with one of four (4) years with effect from the date of his conviction i.e. 7th March, 2006.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE