



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)
CRIMINAL PPEAL NO. 110 OF 2006

BETWEEN

YUSSUF DAHAR AROG..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the sentence pronounced by Senior Resident Magistrate J.G. King'ori in Criminal Case No. 1033 of 2004 at the Garissa Law Courts on 22nd November, 2004)

JUDGEMENT

The appellant was charged with the offence of defilement of a girl contrary to s.145(1) of the Penal Code (Cap.63). The particulars were that, on 1st November, 2004 at Ammuma Location in Garissa District, within North Eastern Province, he unlawfully had carnal knowledge of ***Ambyan Yusuf Ali***, a girl under the age of fourteen years.

After the substance of the charge and every element thereof was read out to the appellant herein, in a language that he understands, he responded: "it is true, I plead guilty."

The prosecutor then set out the facts of the case. On 1st November, 2004 at 12.00 noon, the complainant who was aged 12 years, was sent by her mother to Ammuma, to take food to her grandfather. The appellant, who the complainant met on the way, grabbed her and had carnal knowledge of her without her consent. The appellant left her bleeding profusely, and warned her not to tell anybody, failing which he would stab her with a knife. The complainant, however, reported the matter to one ***Mohammed Aden***, who escorted her to Hagadera Police Post, where she reported the matter. The complainant was referred to Hagadera Hospital, where she was treated. After she returned to Ammuma, the complainant identified the appellant to Administration Police officers, on the same day. The appellant was thereupon arrested and taken to the Police station, where he was charged. A P3 form subsequently produced before the trial Court, showed that the complainant had indeed been sexually assaulted, and her *labia minora* had been lacerated in the process.

The trial Court convicted the appellant on his own plea of guilty. The prosecution stated that he could be treated as a first offender. The learned Senior Resident Magistrate then remarked as follows:

“The accused has pleaded guilty to the charge and is treated as a first offender. He asks the Court to release him but the offence is serious, attracting a sentence of life imprisonment. The offence is extremely notorious in the [area of] jurisdiction of the Court. The appropriate sentence is a long jail term... He has inflicted on the complainant a life-long psychological trauma.”

He sentenced the appellant to 40 years’ imprisonment.

In his grounds of appeal the appellant states that: (i) the trial Court had made an error of law and fact by convicting him on his own plea of guilty without ascertaining his mental status; (ii) due to mental illness he was unable to fully understand the substance of the charge and its consequences; (iii) the trial was prejudicial to him, and he seeks a retrial; (iv) the sentence imposed was harsh and excessive.

On the occasion of hearing this appeal, on 13th June, 2007 the appellant who spoke in the Somali language, asked that the State Counsel do begin, and he would then respond.

Learned State counsel **Ms. Gateru** urged that the conviction entered by the trial Court was safe, and the sentence meted out was lawful. The plea had been properly taken; the appellant had fully understood the substance of the charge; the appellant had pleaded guilty; the appellant had been treated as a first offender.

Counsel submitted, however, that given the fact that the appellant had saved the Court’s time by pleading guilty, the sentence awarded was harsh. She called upon the Court to sustain conviction, but to substitute sentence with any other appropriate sentence.

In response, the appellant said as follows:

“It is true I committed the offence, but it was accidental. I request leniency. My complaint is about the sentence awarded. I have been in prison for three years...I am a family man with two children....I request that the sentence be deemed completed.”

This Court cannot consider some of the elements in the grounds of appeal, as they have not been taken up during this hearing, by the appellant himself. I note that it is a presumption of the law stated in the Penal Code (Cap.63), s.11 that –

“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

I must, therefore concern myself solely with the question whether the sentence of 40 years’ imprisonment imposed by the trial Court was or was not manifestly excessive. S.145(1) of the Penal Code, which was in force at the time of the offence, thus stated:

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”

Such is, of course, a maximum sentence, and within that constraint, the Court has a wide discretion which it exercises on judicial principles. Such principles would, I believe, take into account the *ordinary span of life of a human being*; the *general circumstances surrounding the commission of the offence*; the *possibility that the culprit may reform* and become a law-abiding member of the community; the *goals of peace and mutual tolerance and accommodation among people* – those who are injured, and those who have occasioned injury.

Such principles would not, in my opinion, and taking into account the circumstances of this case, accord with an extremely harsh sentence such as the one in question herein. I would consider a 40-year term of imprisonment, in the circumstances of this case, to be manifestly harsh and excessive; and accordingly I will substitute it with a different sentence.

I allow the appeal on sentence, set aside the term of imprisonment imposed by the learned Senior Resident Magistrate, and substitute the same with a ten-year term of imprisonment which runs from the date of sentence by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 17th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ndungu

For the Respondent: Ms. Gateru

Appellant in person