REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 103 of 2006

HESBON AGUI MANYENYE……...……..…….. APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1407 of 2005 of the

Chief Magistrate's Court at Kibera – Mrs. Muketi P.M)

JUDGMENT

HESBON AGUI MANYENYE, the appellant, was charged before the subordinate court with one count of defilement of a girl contrary to section 145(1) of the Penal Code. He was also charged with an alternative count of indecent assault of a female contrary to section 144(1) of the Penal Code. The particulars of the main count of defilement were that on 14th February 2005 at [*particulars witheld*] village in Nairobi, within the Nairobi area had carnal knowledge of MKK a girl under the age of 14 years. The particulars of the alternative count, on the other hand, were that on the same 14th February 2005 at [*particulars witheld*] village in Nairobi, within the Nairobi area, unlawfully and indecently assaulted MKK by touching her private parts.

When the case came for plea on 24.2.2005, the appellant was recorded as having pleaded guilty. He was convicted and sentenced to 10 years imprisonment. Being dissatisfied, the appellant has appealed to this court against the sentence.

The learned State Counsel, Mrs. Gakobo opposed the appeal against sentence. It was counsel's contention that the maximum sentence was life imprisonment, and therefore, the sentence of 10 years imprisonment was neither excessive nor unlawfully taking into account that the victim was a minor aged 4 years and she would suffer trauma for the rest of her life. Counsel also contended that the subordinate court took into account the fact that the appellant was a first offender before meting the sentence.

I have perused the proceedings before the subordinate court. This was a case where there was a main count of defilement, and an alternative count of indecent assault. It is not clear from the record whether the appellant pleaded guilty to the main charge or to the alternative charge. It is however recorded by the learned trial magistrate that the appellant was explained the charge several times and his answer was "I did so".

Thereafter, the prosecutor summarized the facts and a P3 form was produced. Because the facts are

short, I will reproduce them. They are as follows –

"**On 14.2.2005 at** [*particulars witheld*] **village at 1.00 p.m. – the accused a neighbour of the complainant had called the complainant in his house that he wanted to give him lunch. The child was seen by neighbours going to the accused's house. One of the neighbours went in and found the accused raping the minor. She shouted for help and neighbours came. The accused was straight away arrested. The girl was taken to hospital. She was issued with a P3 form. I wish to produce the P3. She was examined. The child was taken to the Nairobi Hospital. Blood and saliva were taken to the Government Analyst. I wish to tender the accused's P3. The child was 4 years".**

To these facts, the appellant was recorded as having said, 'facts are correct". He was consequently convicted and sentenced.

In my view, the learned trial magistrate should have stated whether she convicted on the man count or on the alternative count. However, since the prosecutor stated in the facts that the appellant was found by a neighbour raping the victim, I take it that the appellant was convicted and sentence on the main count.

The facts as narrated by the prosecutor are not supported by the medical evidence tendered. The victim (child) was examined at the Nairobi Women's Hospital the day after the alleged incident, that is 15.2.2005. The medical report signed by Dr. Muhombe states–

Genital Examination

Ø Normal pre-pubertal genitalia seen

Ø Farchettee was crythemous and tender

Ø Hymen was intact

Ø No tears, laceration or bleeding seen

Ø Anus : No bruising, laceration or tears. Anal sphincter tone normal.

The rest of systematic examination was normal.

The Report does not say what is abnormal and what could have caused the abnormality. It merely concludes that "diagnosis defilement". The P3 form filled by the police surgeon on 23.2.2005 relied on the medical report from Nairobi Women's Hospital as it reproduced the finding in the hospital's medical report.

In my view, for there to be defilement, there has to be penetration, to whatever little extent. There was no proof on the facts, that there was any penetration at all. Therefore a conviction cannot be founded on the main charge of defilement even if the appellant is said to have pleaded guilty, as the facts did not disclose the offence alleged.

The evidence is evidence of indecent assault, as clearly the appellant remove the pants of the child victim, and touched her private parts. He was also charged in the alternative with the offence of indecent assault. I will therefore convict the appellant for the offence of indecent assault contrary to section 144(1) of the Penal Code.

The appellant has appealed against sentence. Though the learned State Counsel has argued that the maximum sentence is life imprisonment, that is the maximum sentence for an offence of defilement. The maximum sentence for the offence of defilement is imprisonment with hard labour for fourteen years. Indeed, the learned trial magistrate considered the mitigating factors before sentencing. However, the sentence imposed appears to have been based on the maximum sentence of life imprisonment for an offence of defilement. I appreciate that the victim, a child of 4 years, will suffer trauma for the rest of her

life. I however consider that with the maximum sentence of 14 years imprisonment, 10 years imprisonment for a first offender is harsh and excessive.

I am aware that sentencing is a discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error in principle must be inferred – see **SHADRACK KIPROTICH KOG –vs- REPUBLIC – Criminal Appeal No. 253 of 2003 Eldoret** (unreported). In our present case, I am of the view that had the learned magistrate taken into account the fact that the offence disclosed was indecent assault rather than defilement, she would not have sentenced the appellant to serve 10 years imprisonment. Even the offence of indecent assault is serious offence. The appellant being a first offender, I will sentence him to serve 6 years imprisonment.

Consequently, I quash the conviction of the subordinate court for the offence of defilement and set aside the sentence imposed. I substitute the same with a conviction for indecent assault contrary to section 144(1) of the Penal Code. The appellant will serve a sentence of six (6) years imprisonment with hard labour, from the date he was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 1st October 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Mrs. Gakobo for State

Erick - court clerk