



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 131 OF 2016

MICHAEL ONYANGO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from Judgment, Conviction and sentence delivered on 03.10.2016 in SRM's Ukwala Criminal (SO) Case No. 581 of 2014 by Hon. Gladys Adhiambo, Senior Resident Magistrate)

JUDGMENT

1. This appeal is the oldest before this court in terms of all pending appeals because our efforts to get the original trial court record from Ukwala Law Courts has been unsuccessful since inception of the appeal. It was not until 6/1/2021 when the Head of Station, Ukwala Law Courts, Hon. C.N. Sindani wrote to this court confirming that the original court record could not be traced that this appeal had to be set down for hearing.
2. Nonetheless, the certified typed proceedings and photocopies of handwritten proceedings were availed for this court to hear and determine the appeal, after back and forth on the whereabouts of the original trial court record.
3. The Appellant Michael Onyango Ochieng was charged, with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. Particulars of the charge are that on the 18th day of October 2014 at [Particulars Withheld] village, Siranga sub-location in Ugenya District within Siaya County, he intentionally caused his penis to penetrate the vagina of **LA**, [full name withheld] a child aged 13 years.
4. The Appellant was also charged with the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act. Particulars are that on the 18th day of October 2014 at [Particulars Withheld] village, Siranga sub-location, within Ugenya District within Siaya County, he intentionally touched the vagina of LA a child aged 13 years with his penis.
5. The Appellant took Plea on 10/11/2014 and denied the charges before Hon. R.M. Oanda, Ag. Principal Magistrate, Ukwala Law Courts.
6. The Prosecution called 6 witnesses to establish a prima facie case against the appellant.
7. Placed on his defence, the Appellant gave unsworn statement of defence and called no witness.
8. In her judgment dated 3/10/2016 Hon. G. Adhiambo, Senior Resident Magistrate found the appellant guilty of the alternative charge of committing an indecent act with a child and acquitted him of the main charge of defilement after a finding that the prosecution had not proved the substantive charge against the appellant beyond reasonable doubt. She then sentenced the appellant to serve ten years imprisonment.
9. Aggrieved by the judgment, conviction and sentence, the appellant filed this appeal on 10/10/2016 setting out the following 4 grounds of appeal:-
 - 1) ***That, the learned trial magistrate erred in law and fact in convicting the Appellant despite the contradictory prosecution evidence.***
 - 2) ***That, the learned trial magistrate erred in law and fact by convicting in a case that had been conclusively proved.***
 - 3) ***That, the findings of the trial magistrate was against the prosecution's evidence adduced and could not hold a basis for a conviction.***

4) That, Appellant cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.

10. The appeal was admitted to hearing on 19/10/2020 and directions given for filing of written submissions to canvass the appeal on 20/1/2021.

11. The appellant filed his written submissions on 10/2/2021 whereas the Respondent filed its written submissions on 24/2/2021 through Principal Prosecution Counsel, Mr Edward Kakoi, opposing the appeal.

12. Core to the determination of this appeal is that albeit the appellant's grounds of appeal challenge conviction and sentence, in the submissions filed, the appellant does not challenge the conviction. He only focusses on the sentence, urging the court to be lenient to him and reduce the 10 years imprisonment imposed on him to an alternative and justifiable sentence. He then proceeds to mitigate stating that he is an orphan, is remorseful for what transpired on the fateful day since he was young and did not know the consequences of breaking the law. He categorically states that, **"I am not appealing against conviction and sentence but for sentence review under leniency only. That I have suffered very much while in prison wall since 2016...."**

13. He submits that he is currently reformed and a born again Christian for the period he has been in prison as he has undergone theological course and attained a certificate which he annexed to his submissions dated 21.3.2019.

14. The Respondent's counsel's submissions oppose the appeal that challenged conviction. As the appeal against conviction and sentence are effectively withdrawn through submissions filed by the appellant, this court proceeds to treat the appeal against conviction as wholly withdrawn and I shall only consider the Plea for sentence reduction hence the Respondent's submissions are rendered irrelevant.

DETERMINATION

15. Having considered the appellant's submissions on sentence reduction, the main issue for determination is whether this court should interfere with the sentence imposed on the appellant under Section 11(1) of the Sexual Offences Act, sentencing being in the discretion of the trial court.

16. Section 11(1) of the Sexual Offences Act which creates the offence of committing an indecent act with a child, any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

17. The appellant was handed the minimum mandatory sentence under the Section. The trial magistrate in her sentencing remarks indicated that the accused was a first offender and that the offence was prevalent hence a deterrent sentence was deserved.

18. It is worth noting that as at 3/10/2016, the courts countrywide used to impose minimum or maximum mandatory sentences where the Statute provided for such minimum/maximum mandatory sentences, on account that courts had no discretion where the law provided for mandatory minimum or maximum sentences. However, following the Supreme Court's decision in **Francis Karioko Muruatetu & Another V Republic [2017] eKLR** and followed by the Court of Appeal decision in **Jared Injiri Koita Vs Republic [2019] eKLR**, it has become apparent that sentencing is purely in the judicial and judicious discretion of the sentencing trial court, having regard to the mitigations and circumstances under which the offence was committed.

19. Off course, there can be no justification for committing a sexual offence against a child. Sexual offences are traumatizing to victims and dehumanize or indignify victims. At times, sexual offences are used as weapons of war.

20. Nonetheless, the appellant mitigated stating that he was 22 years old. If that is the case as at 3/10/2016, then he was 20 years old as at 18/10/2014. He was no doubt an adult hence custodial sentence was lawful. However, it is clear that the appellant was handed the mandatory minimum sentence of 10 years imprisonment, upon conviction in 2016. He has now been in prison custody since his conviction as he had been on bond courtesy of a neighbour who stood surety for him. He did not abscond or breach bond terms. He has therefore been in custody for close to five (5) years of the ten (10) years imprisonment.

21. From the mitigations given, it is clear that the appellant who was a young adult when he committed the offence has now learnt life's skills while in prison. He has a certificate in Biblical Studies and has learnt his lesson of the consequences of committing such a heinous crime against a 13 year old. Sexual offences are traumatizing to the victims. It is for that reason that stiffer penalties were enacted for convicted offenders.

22. As the appellant has been in prison custody from 3/10/2016 awaiting the hearing of his appeal whose original trial court file vanished under unclear circumstances, within which period he has had introspection and decided to withdraw his appeal against conviction, meaning that he acknowledges that he committed the offence and is remorseful, only seeking for lenient sentence; and as the minimum mandatory sentences no longer exist although the court can, depending on the circumstances of each case, impose such sentence, which is lawful, however harsh it may appear. However, it is the view of this court that there is no empirical evidence that the harsher sentences have ever deterred the would be offenders from committing even more serious offences, including murder. Considering the fact that the appellant has withdrawn his appeal against conviction meaning he readily admits committing the offence as a first offender and is remorseful, and considering his age, I hereby allow the appeal against sentence and set aside the ten (10) years minimum mandatory prison term imposed on the appellant and substitute it with five (5) years imprisonment to be calculated from date of sentencing on 3/10/2016 as the appellant was on bond during the trial.

23. File closed.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 8TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE

In the Presence of:

Appellant present in person in Kisumu Maximum prison virtually

Mr. Kakoi, Principal Prosecution Counsel

Court Assistants: Modestar and Mr. Mboya