



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 1 OF 2021

MMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the conviction and sentence in Kangema S.O. Case 24 of 2019 by I. Gichobi, SRM, delivered on 10th November 2020]

JUDGMENT

1. The appellant is a minor. He was convicted for *defilement* contrary to section 8 (1) as read with section 8 (3) of the **Sexual Offences Act**. He was committed to a borstal institution for “*a period of nine months followed by two years’ probation*”.
2. The particulars were that on unknown dates in the month of December 2017 in Murang’a County, he caused his penis to penetrate the vagina of SWK [*particulars withheld*] a girl aged 14 years.
3. The appellant lodged an appeal on 1st February 2021 pursuant to leave granted by the High Court on 28th January 2021. There are six grounds but I will condense them into four. Firstly, that the trial was defective for want of assessment of the age of the appellant contrary to section 143 (1) of the **Children Act**. Secondly, that the appellant, as a boy child, was discriminated against by failing to also charge the complainant who had equally defiled the appellant. Thirdly, that the appellant did not get a fair trial as decreed by Article 50 of the **Constitution**. Fourthly, that the sentence was illegal in view of section 6 (1) of the **Borstal Institutions Act**.
4. Learned counsel for the appellant, *Mr. S. Kirubi*, relied entirely on the written submissions dated 16th February 2021 and the attached list of authorities.
5. Learned Prosecution Counsel, *Mr. S. Mutinda*, conceded the appeal.
6. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See ***Pandya v Republic*** [1957] E.A 336, ***Ruwalla v Republic*** [1957] E.A 570, ***Okeno v Republic*** [1972] EA 32. ***Njoroge v Republic*** [1987] KLR 19.
7. The appellant and the complainant (PW1) were *cousins*. They were both aged about 14 years at the time of the offence. There is thus no doubt of *identification*. The intercourse occurred on a number of occasions in the month of December 2017 at the appellant’s home. When the complaint was first made by PW1, she stated that the appellant had forced her into sex. But when she took to the stand, she said it was consensual and that she had made the earlier statement to appease her mother (PW2).
8. The complainant got pregnant and bore a sickly child, *MK* [*particulars withheld*], who died a few months later. When she was examined by the clinical officer (PW3) on 18th July 2018, she was *29/40 weeks + 2 days* pregnant with an expected due date of 29th September 2018. This rhymed well with her evidence that she had intercourse with the appellant in December 2017.
9. Any doubt of the defilement was completely erased by the DNA report dated 4th March 2019 produced by PW4, Police Constable Anne Njeri: It concluded that “*there are 99.99 + % more chances that [the appellant] is the biological father to MK [particulars withheld] who is [the complainant’s] child*”.
10. Based on that water-tight evidence, the defence tendered by the appellant that he did not have sex with the complainant in December 2017 was unbelievable and a sham.
11. From the Child Health Card (exhibit 2) and the evidence of PW1, PW2 and PW3, it was proved that the complainant was born on 23rd August 2004. She was thus approximately 13 years at the time of the offence. I have reached the conclusion that the Republic proved that the

appellant penetrated the complainant as defined in section 2 of the **Sexual Offences Act**.

12. I will turn briefly to the *appellant's* age. Section 143 (1) of the **Children Act** provides that if it appears to the court that the accused is a minor, "the court shall make due inquiry as to the age of that person and for that purpose shall take evidence...". I have studied the charge sheet. It clearly indicated that the suspect was a "juvenile".

13. When the appellant took plea, the court noted that the appellant was a minor. In answer, the appellant said that he was 15 years. The Court asked the prosecutor to provide a copy of his birth certificate. The certificate was placed on the court record on 20th August 2019. The trial court was alive that it was dealing with a minor throughout the trial and sentence. It had even ordered for appointment of a *pro bono* counsel before the appellant's family secured the services of *Mr. Kagwi* Advocate. The learned trial magistrate was equally cognizant that her sentence had to conform with section 191 of the **Children Act**.

14. Granted those circumstances, ground 1 of the petition of appeal that the lower court proceeded without ascertaining the actual age of the appellant is without any merit.

15. I will next deal with the allegation that the appellant was denied a fair trial. As stated, the court established at the point of plea that the suspect was a minor and was released on bail. It called for services of *pro bono* counsel before *Mr. Kagwi* came on record. There is no allegation that the appellant did not comprehend the proceedings. His counsel cross-examined all witnesses at length.

16. The court explained the rights of conducting his defence under section 211 of the **Criminal Procedure Code**. The appellant made an unsworn statement. Upon conviction, the court called for a pre-sentencing report and a victim impact statement. The sentence handed down was irregular but took into account the circumstances of the appellant and the dictates of section 191 of the **Children Act**.

17. My preliminary finding is that the appellant was accorded a fair trial; and, that there was no violation of **Article 50** of the **Constitution**. It must follow that ground 5 of the petition of appeal also fails.

18. Grounds 2, 3 and 4 allege that the trial violated **Article 27** of the **Constitution** by only charging the boy child with the offence. Counsel argued that it was discriminatory as the two minors had defiled each other. He was of the view that the conviction should be set aside on that ground alone. He relied on *POO (a minor) v Director of Public Prosecutions & another*, High Court, Homa Bay, Pet. 1 of 2017 [2017] eKLR and *SKM v Republic*, High Court, Busia, Crim. App. 22 of 2019 [2017] eKLR.

19. I am not persuaded by that argument for a number of reasons. First, it matters little that the intercourse between the two minors was *consensual*. The truth is that none of them had *legal capacity* to give such consent. Secondly, the sexual intercourse with a minor is prohibited by the **Sexual Offences Act**.

20. Thirdly, it is true that the complainant could also have been charged for defilement. But the mere fact that she was not charged or that the boy child was discriminated cannot absolve the appellant of the offence. This was succinctly captured by *Ochieng J* in *CKW v Attorney General & Another*, High Court, Eldoret, Pet. 6 of 2013 [2014] eKLR. I would add that the right against discrimination under **Article 27** of the **Constitution** is not absolute. See generally *Tatu Kamau v Attorney General & others*, High Court, Nairobi, Pet. 244 of 2019 [2021] eKLR.

21. Fourthly, criminal prosecutions are often founded upon complaints. In this case, the girl and her mother lodged the complaint. There is no evidence that the appellant or his parents did so. There are many instances where accomplices are not charged. Sometimes they may not be found; at other times they become state witnesses; or, the DPP may decide to charge some and not others. From the standpoint of criminal law, it is preposterous to say that the accused should be discharged merely because another person who may be equally liable has not been prosecuted.

22. For all the above reasons, and despite the concession made by the Republic, I find that the conviction was safe. The appeal against conviction is accordingly dismissed.

23. I will now turn to the sentence. The lower court considered that the appellant was a first offender but who showed no remorse. The learned trial magistrate was of the view that it was in the best interests of the minor to undergo rehabilitation. After considering the pre-sentence report and victim impact statement, the court committed the appellant to a borstal institution for "a period of nine months followed by two years' probation".

24. That sentence was highly irregular because section 6 (1) of the **Borstal Institutions Act** requires a residential period of three years. I accordingly set aside the sentence. I have taken into account that the appellant is a first offender, the circumstances of the offence, the pre-sentence report and the victim impact statement. In the best interests of the minor, and in accordance with section 191 (1) of the **Children Act**, the appellant shall be placed in a Probation Hostel for a period of twelve months.

25. The upshot is that the appeal against conviction is hereby *dismissed*. I set aside the sentence handed down by the lower court and substitute it with an order that the appellant shall be placed in the **Nairobi Probation Hostel** for a period of **twelve months** under the **Probation of Offenders Act**. A copy of this order shall be transmitted to the Cabinet Secretary responsible for the time being for matters relating to Probation and After Care Services.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 8TH DAY OF APRIL 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Kirubi for the appellant instructed by Kirubi Mwangi Ben & Company Advocates.

Mr. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi, Court Assistant.