REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 29 OF 2017

[FORMERLY ELDORET HCCRA NO 133 OF 2013]

KIPKEMOI KAKUKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal

Magistrate's Court at Kabarnet Cr. Case no 687 of 2012 delivered

on the 18th day of April, 2013 by Hon. E. Bett Ag. SRM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for 25 years for the offence of attempted defilement contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act. The appeal was based to the principle ground of lack of sufficient evidence as set out in Grounds of Appeal dated 17/7/2013. At the hearing, the appellant raised the additional issue that he was 17years at trial.

2. The particulars of the offence were that he had "*on the 27th day of November 2012 at [particulars withheld]area in East Pokot District of Baringo County intentionally attempted to cause his penis to penetrate the vagina of A.T. a child of 12 years*".

3. The DPP did not oppose the appeal urging that as the appellant was 17 years at the time of his trial, the sentence of 25 years imprisonment was illegal and that according to the Children Act he should have been sentenced to a Borstal Institution. The DPP also conceded that there could have been a mistrial as the appellant who was a child at the time of his trial was not represented by an advocate.

4. In discharge of the duty of the 1st appellate court, I have considered the evidence before the trial court and it would appear that the evidence of the complainant girl as to how the appellant lured her into the forest, grabbed her hand and pushed her to the ground and was about to defile her when upon her screams one Joseph (PW3) came running with a panga to her rescue, was corroborated by the evidence of the said Joseph Lotum PW3 who knew the accused and who had seen him only 30 minutes before the incident when the appellant had gone to ask for water at his house PW3 testified that he later rescued the girl, as follows:

> "*He left. Few minutes later, I heard a child screams I thought it was my daughter. The screams became stronger and I ran fast towards that direction. I then saw the accused with his bag. The child was lying down naked. The accused was still standing. He saw me and ran away. I gave chase also shouting and calling for help. I then came back to the child and saw it was somebody I know*".

5. I consider that there is a material evidence upon which a Court in a proper trial could convict for attempted defilement.

6. However, I agree with the DPP that the sentence of imprisonment on the appellant who, by the age assessment reports of 21/6/13 and 2/7/13, was shown as respectively *"17 years of age"* and *"appropriately 18 years of age"*, may have been illegal. The appellant may have been a child at the time of his Judgment. He was definitely a child when this trial commenced over 7 months earlier.

7. Under section 190 of the Children Act it provided that a child may not be sentenced to imprisonment as follows:

> ***190. (1)*** *No child shall be ordered to imprisonment or to be placed in a detention camp.*

Section 191 (1) (g) of the Act further provides:

> ***191. (1) (g)*** *in the case of a child who obtained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*

8. In sentencing the appellant to imprisonment for 25 years, the trial Court stated as follows:

> *"I have seen the age assessment report by the medical superintendent Kabarnet District Hospital confirming the accused as 18 years. I now proceed with sentencing.*
>
> *The accused raped a 12 year old girl and had not shown any remorse in his mitigation*
>
> *He is however youthful and this is his first offence.*
>
> *Accordingly he shall serve 25 (twenty five) years imprisonment.*
>
> *Right of appeal."*

9. With respect, the age assessment did not confirm the accused to be 18 years but *"appropriately 18 years."* Two reports for 5/4/13 by one M. Cheburet gave an assessment of *"under 18 years (approximately 17 years of age"* and by M. Suswa of 21/6/13 as *"17 years old."* The trial Court's order for *"a second age assessment report,"* in view of ensuing sentence, may appear to have been geared to laying a basis for the harsh sentence. Or why was it necessary to call for a second age assessment report?

10. Section 9 (2) of the Sexual Offences Act provides that:

"(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

The trial Court noted that the appellant was a first offender, and if and not, therefore, have been justified to sentence him to imprisonment for 25 years rather than the minimum 10 years. In ***Arrisol v. R*** (1957) EA 447 it was held that *"it is unusual to impose the maximum sentence on a first offender."*

11. The language of the trial Court in sentencing is also tell-tale: while the appellant was charged with attempted defilement, the trial Court said in justifying the harsh sentence that "the accused raped a 12 year old girl…"

12. Most importantly, the trial Court proceedings were held in contravention of the law in breach of the child's rights guaranteed under section 186 (b) of the Children Act as follows:

> *"186. Every child accused of having infringed any law shall –*
>
> > *(b) if he is liable to obtain legal assistance to be provided by the Government with assistance in the preparation and presentation of his defence."*

See also section 77 of the Children Act on the duty of Court "to Order that the child be granted legal representation."

13. The appellant was clearly prejudiced by the lack of legal representation in the trial and had, in fact, at plea stage pleaded guilty to the charge before he changed the plea to one of not guilty on the date reserved for sentencing by the same Magistrate who eventually heard the case. This may obviously have led the Court to the harsh view of the appellant betrayed in sentencing ruling.

14. For the reason that the trial of the appellant, who was undoubtly a minor on the 30/11/12 when his trial commenced, was without legal representation, the appellant's right under section 186 of the Children Act was violated and his trial was a mistrial.

15. The Court would have ordered a retrial in the case were it not for the fact of the great prejudice that the appellant would be occasioned by much retrial because, he has since arrest on 30/11/12 been in custody awaiting trial and upon sentence on 9/7/13 for the illegal sentence of imprisonment for 25 years. The appellant has been in custody for over 6 years.

16. The case was one, not of defilement as stated by the trial Court, but of attempted defilement which is obviously a lesser offence, and the Court does not feel compelled to order to retrial in the circumstances of the case where the appellant has been in custody for over 6 years and where the minimum sentence is imprisonment for ten years. It would not be in the interest of justice. See ***Fatehali Manji v. R*** (1966) 343 and ***Opicho v. R*** (2009) KLR 69.

Order

17. The accused shall be released from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.