REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 52 OF 2017

STEPHEN ODUOR OWAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment, conviction and sentence passed on 18th May 2017

by Hon G. Adhiambo, SRM in Ukwala SRM criminal Case No 195 of 2017[SOA])

JUDGMENT

1. On 18.5.2017 the Appellant, **Stephen Oduor Owako** was convicted on his own plea of guilty with the offence of **defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act**.

2. The charge for which the Appellant was convicted and sentenced to serve 15 years imprisonment by **Hon. G. Adhiambo, SRM,** Ukwala was that the Appellant, defiled EAO. a child aged 16 years. The initial charge was that the Complainant was aged 14 years but the Child's immunization card showed that she was 16 years hence the trial Court convicted the Appellant under **Section 8(4) instead of Section 8(3) of the Sexual Offences Act.**

3. Upon the plea being taken, in a language which the Appellant himself stated that he understood, namely, Kiswahili he stated that the charge was true and upon detailed facts being read back to him in Kiswahili, and exhibits being produced namely, P3 forms for the Appellant and the victim, treatment book for the Appellant, the Victim's immunization card showing her date of birth to be 10.9.2000, he stated that it is true he had sex with EAO. the Complainant.

4. After the Prosecutor submitted that the Appellant was a first offender, in mitigation, the Appellant stated that the Complainant was his girlfriend since the previous year and that he did not see her other friends.

5. The trial Court considered the mitigation, the fact that the Appellant was a first offender and the seriousness of the offence and sentenced him to serve fifteen years imprisonment.

6. On 31.5.2017 the Appellant filed this appeal challenging the conviction and sentence imposed on him claiming:

> ***1. That I was in a state of confusion hence pleaded guilty to the offence in question.***
>
> ***2. The facts of the case were not supported with the medical evidence to warrant a conviction.***
>
> ***He prayed that the conviction be quashed, sentence be set aside and the case set for a retrial.***
>
> ***3. He also prayed that he be present during the hearing of the appeal.***

7. This appeal was admitted to hearing on 23.6.2017 by Hon J. Makau J, upon the trial Court record being availed on 16.6.2017.

8. The Appellant had an advocate on record representing him in this appeal but on 26.11.2018 the advocate, Mr. Charles Ochieng withdrew from acting for the Appellant.

9. The Appellant asked the Court to grant him more time to instruct another advocate to represent him which request the Court granted and

gave him liberty to file written submissions.

10. On 25.2.2019 the Appellant informed the Court that his Advocate had withdrawn from the case and that he wished to act in person and that he was ready to argue his appeal orally.

11. The Appellant then submitted that he was arrested at night, beaten and told to accept the offence that he did not commit. He stated that he pleaded guilty because the Police beat him up.

12. In response, Mr. Okachi Senior Principal Prosecution Counsel submitted opposing the appeal and maintaining that the plea was unequivocal and that the sentence was lawful.

13. The judgment in this appeal was to be delivered on 24.4.2019 but the Appellant was not brought to Court as the vehicle transporting Prisoners from Kisumu was said to have broken down from Kisumu. The court was then engaged in a three Judge Bench Judgment writing in Nakuru.

14. Judgment was fixed for 17.6.2019 but on the latter date the Court was engaged in Nairobi in Petition No. 88/2015 3J Bench hence the delay in delivery of this judgment.

DETERMINATION

15. I have carefully considered the appeal by the Appellant. The Appellant claims that he was in a state of confusion that is why he pleaded guilty and that facts of the case were not supported by Medical evidence to warrant a conviction.

16. The main issues for determination therefore are drawn from the two grounds of appeal above s filed by the appellant.

17. On whether the Appellant was in a state of confusion that is why he pleaded guilty, the Appellant submitted that he was beaten by the Police and told to admit the offence.

18. I have perused the trial Court record and nowhere do I find any Complaint by the Appellant to the trial Magistrate that he was assaulted. The P3 form Ex.2 for the Appellant dated 17.5.2017 shows that he was taken to hospital for examination on allegation that on 15.5.2017 he had defiled a minor, 14 year old school girl while from school at around 4 p.m. The doctor who examined him at Sigomere sub-county Hospital Victor Godia did not note any injuries on him. In addition, the P3 form shows that he was relaxed not tensed.

19. When he appeared before the Court for plea on 18.5.2017, he did not intimate that he was assaulted.

20. The record shows that the Appellant was asked some questions by the Court including his age which he stated was 23 years, and the language that he understood well which he stated was Kiswahili.

21. Therefore, albeit in a supplementary Petition of Appeal dated 31.5.2017 filed without leave of Court the Appellant claimed that the plea was equivocal, and that the Appellant remained silent in Court and did not answer any question when the plea was being taken, I find the allegations being afterthought and misguided.

22. The language used in court was indicated to be in Kiswahili and after facts were read out to him in Kiswahili, he admitted saying he had sex with the Complainant.

23. Further in mitigation, he stated that the Complainant was his girlfriend from the previous year. This in my view did not render the plea equivocal as a child under the age of 18 years under the law cannot consent to having sex.

24. This Court does not find any reason why the trial Magistrate would record words which the Appellant did not state before her.

25. In addition, the Appellant claims that the charge was defective in that the facts were not supported by medical evidence.

26. I have perused the charge sheet and the sentencing remarks by the trial Court. Albeit the charge was under **Section 8(1) and (3), the latter** being the Penal Section, the facts and documentary evidence produced proved that the age of the Complainant was 16 years not 14 years hence the trial Court sentenced the Appellant under **Section 8(4) of the Sexual Offences Act which has a lesser sentence than Section 8(3) of the Act.**

27. In my humble view, there was no material defect in the charge sheet. The defect was curable and did not in any way prejudice the Appellant. The Appellant has not demonstrated any miscarriage of Justice by the minor defect in the charge sheet, which was rectified in his favour.

28. Furthermore, framing the **Section as 8(1) (3) and not 8(1) as read with 8(3)** is no defect capable of rendering the trial or plea of guilty void or equivocal.

29. On the facts as read out by the Prosecution, I have carefully perused the facts and I find and hold that they disclosed an offence under **Section 8(1) as read with Section 8(4) of the sexual offences Act.**

30. The facts disclosed that the victim was aged 16 years as shown by the child's immunization card showing her date of birth to be 10.9.2000. The card was produced as an exhibit. The age of a child was therefore proved to be 16 years as at 15.5.2017.

31. On penetration, P3 form filled on 16.5.2017 by Dr. Victor Godia showed that on examination, the child had hyperpigmentation of vaginal walls, oedanalis lacerated and tender and a long standing broken hymen. She also had whitish virginal discharge.

32. The vaginal walls were tender lacerated suggestive of recent vaginal penetration although the victim reported that the Appellant had previously defiled her in April hence the longstanding broken hymen.

33. The facts also disclosed that the victim reported to have been waylaid on her way from school on the material date at 4 p.m., taken into the Appellant's house and defiled severally before her fellow pupils reported to her mother who went to the scene and rescued her.

34. The Appellant admitted the above facts which in my view, disclosed that there was penetration and that the victim knew the Appellant very well as he had even previously defiled her but it appears she did not report the incident. The Appellant was with the victim for some time defiling her and when he was arrested in his house where he was locked up with the child, he was found naked in bed.

35. There is no mistaken identity hence the Appellant was positively identified as the Victim's defiler.

36. Accordingly, I find and hold that the facts disclosed all the three ingredients of defilement of a child and therefore the trial Court did not err in convicting and sentencing the Appellant on those facts.

37. On whether sentence meted out was harsh, the section under which the Appellant was charged provides for minimum sentences and so, the sentence meted out was lawful. However, sentencing is in the discretion of the Court and therefore the mandatoriness of minimum or maximum sentences having been successfully challenged before competent Courts of Law where mandatory sentence was meted out, this Court has the power to interfere, having regard to the circumstances of each case. **See Jared Koita Injiri v Republic [2019] eKLR** where the Court of Appeal at Kisumu stated:

> ***"This then leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;***
>
> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."***
>
> ***In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.***
>
> ***The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
>
> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.***

38. In the present case, the Appellant was convicted and sentenced on his own plea of guilty which plea I have found was unequivocal and the charge was not defective.

39. The Appellant was given the opportunity to mitigate before he was sentenced, under **Section 8(4)** which provides for a shorter sentence as opposed to **Section 8(3)** where the minimum sentence would have been 20 years imprisonment. The Appellant was sentenced to serve 15 years imprisonment on 18.5.2017. He has now served two years and four months.

40. In the spirit of **C.A. CRA 93/2014 v Republic (supra), and** considering the age of the Accused as a young adult and the fact that Appellant took advantage of the Complainant, I order that a victim impact statement of the complainant be filed together with a social inquiry report on the appellant by the Siaya County probation Officer for consideration in resentencing on 12/11/2019. The prosecution to summon the complainant to attend court then.

41. Accordingly, the appeal against conviction is dismissed. The appeal against sentence to be considered on 12/11/2019.

42. Orders accordingly.

Dated, Signed and Delivered at Siaya This 2nd day of October, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi Senior Principal prosecution Counsel for the State

Appellant in person

CA: Brenda and Modestar.