REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 78 OF 2016

AMOS WAMALWA OMBO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. Desiderious Orimba (Principal Magistrate) in KANGUNDO PM.CR NO. 22 of 2016 delivered on 24th October, 2016.

JUDGEMENT

1. The Appeal arises from the conviction and sentence of Hon Desiderious Orimba Principal Magistrate Kangundo in **Kangundo PM.CR. Number 22 of 2016** dated the 24th October, 2016 where the Appellant was sentenced to serve twenty years imprisonment for the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.

2. Aggrieved by the said conviction and sentence the Appellant lodged the following grounds of appeal:-

(i) The learned magistrate erred in law in convicting and sentencing the Appellant for a term of 20 years yet the Appellant has not attained maturity age qualifying him to obtain national identity card.

(ii) The learned magistrate erred in law in convicting and sentencing the Appellant for a term of 20 years yet the actual age of the complainant was not established to determine her maturity.

(iii) The learned Magistrate erred in law in convicting and sentencing the Appellant for a term of 20 years allegedly in his own admission yet the complainant and all her witnesses were not present in court during the date of hearing.

(iv) The learned magistrate erred in law and fact in convicting and sentencing the Appellant for a term of 20 years without giving the Appellant the benefit of doubt since the complainant and prosecution witnesses did not appear in court during the hearing to testify and prove their case against the Appellant.

(v) The learned magistrate erred in law and fact in convicting and sentencing the Appellant for a term of 20 years without giving the Appellant the benefit of doubt since the complainant and prosecution witnesses did not appear in court during the hearing to testify and prove their case against the Appellant.

(vi) The learned magistrate erred in law in convicting and sentencng the Appellant for a term of 20 years yet the alleged defilement was not supported by any legal docuemtns such as P.3 form and findings from the qualified medical Practioners.

(vii) The learned magistrate erred in law in failing to appreciate that the Appellant was a first offender and being a young man could not have understood the nature of charges levelled against him by the Complainant and the magistrate further erred in law by merely relying on hearsay on part of the complainant to convict the Appellant.

3. This being the first appellate court, its duty is to re-evaluate the evidence afresh and come to its own conclusion bearing in mind that it did not have the benefit of seeing or hearing the witnesses testify. (See **OKENO =VS- REPUBLIC [1972] EA 32.**

4. It is noted that there was no full trial in this matter since the Appellant is indicated to have pleaded guilty to the charges and was thus convicted on his own unequivocal plea of guilt and subsequently sentenced to serve twenty (20) years imprisonment.

5. The Appellant in support of his grounds of Appeal submitted that the plea was not properly obtained from him since the word "***plea of guilty entered***" was not indicated as soon as the charge was read to him and in which he had admitted the same to be true. He also submitted

that the word "***unlawful"*** was not indicated in the particulars of the charge sheet. Finally the Appellant submitted that the trial court erred in convicting and sentencing him to twenty (20) years yet he had not even attained the age of majority.

6. Mr. Machogu learned counsel for the Respondent submitted that the Appellant pleaded guilty to the charge and facts and was thus convicted on his own plea of guilty and further that during the Appellant's mitigation he confirmed that it was not the first time he had spent with the complainant. The learned counsel further submitted that in view of the plea of guilty, the Appellant could only appeal on the legality of the sentence as provided for by Section 348 for the Criminal Procedure Code. Finally it was submitted for the Respondent that the sentence imposed upon the Appellant was within the law and hence the appeal should be dismissed.

Determination:

7. I have considered the Appellant's grounds of appeal as well as the submissions presented. I have also considered the record of the lower court. I raises the following issues for determination namely:-

(i) Whether the plea recorded by the trial court was unequivocal.

(ii) Whether the failure to include the word "unlawfully" in the particulars of the charge prejudiced the Appellant.

(iii) Whether the Appellant was a minor at the time the plea was taken.

(iv) Whether the sentence imposed upon the Appellant was lawful.

8. As regards the first issue, it is noted from the record of the lower court that the Appellant admitted the charge as well as the facts when the same were read to him in English and Kiswahili language. The Appellant has faulted the plea on the ground that the word "*plea of guilty*" was not entered after he admitted the charge. Indeed the learned trial magistrate did not indicate the said words but he did so after the Appellant had admitted the facts. I find the failure by the trial court to indicate the words "*plea of guilty"* immediately the Appellant admitted the charge was not fatal and did not prejudice the Appellant in any way since the said words were indicated after he had admitted to the facts. The learned trial magistrate had to wait to receive the response from the Appellant on the charge and facts before entering the plea of guilty. Indeed the trial magistrate upon entering the said words "*plea of guilty*" proceeded to convict the Appellant on his own plea of guilty. I find the plea entered for the Appellant was an unequivocal one. It is further noted that the Appellant's response to the facts did not qualify the charges so as to direct the trial court to enter a plea of not guilty. Even the Appellant's own mitigation left no doubt as to the plea of guilty when he stated as follows:-

> "***This was not the first time I was spending with her. She came when she heard that my wife was around. She came and refused to go back. She wanted me to have her****."*

The trial court received from the Prosecution a Post Rape Care form which was produced as an exhibit and which contained the date of birth of the complainant as 1/2/2003 thereby tallying with her age being 13 years old as per the particulars of the charge. The said form also indicated that there was a tear of the complainant's hymen as well as the presence of a whitish smelling discharge on her vagina. All these were part of the facts of the charge and particulars to which the Appellant admitted. The Appellant has also raised an issue to the effect that the facts read contained a description of children who were allegedly defiled by him. I have perused the said facts and note that even though the word "*children*" is indicated, the core of the facts was that the same had to do with a girl who was taken to Mama Lucy Hospital for treatment and check up and for whom a Post Rape Care form was filled and produced as an exhibit. The details captured on the said form from the complainant were as follows:-

> "*Survivor brought by the mother she says* ***"Shosho alinifukuza nyumbani nikaenda kwa Amos boyfriend yangu. Tulilala na yeye on Monday, Wednesday, na Thursday usiku bila condom."***

Loosely translated, the above words captured on the Post Rape Care form were as follows:-

> "*Survivor brought by the mother. She says* ***"Grandmother chased me from home and I went to the house of Amos my boyfriend. We slept with him on Monday, Wednesday and Thursday without a condom".***

The Post Rape Care form was in respect of one girl by the name of R K who was the complainant as per the particulars of the charge sheet. Hence the facts related to the said R K who was the complainant in the case and not about alleged children as claimed by the Appellant. In any event the appellant admitted the facts and in his mitigation confirmed that it was not the first time he was spending with the complainant. It is therefore quite clear that the Appellant was referring to the complainant and not any children. He did not qualify the facts as read to him but admitted to the same and went ahead in his mitigation to confirm that he had been sleeping around with the complainant.

From the aforegoing observations, I find that the plea recorded by the trial court was unequivocal.

9. As regards the second issue, it is noted that indeed the word "*unlawfully*" was not indicated in the particulars of the charge sheet. However the failure by the prosecution to indicate the same was not fatal as the same is curable under Section 382 of the Criminal Procedure Code. Indeed under the Sexual Offences Act. No. 3 of 2006 intercourse with a child is termed as defilement. Section 2 of the said Act defines defilement as the complete or partial insertion of a sexual organ of a person into the Sexual organ of another person. Again under Section 43 of the said Act an act is intentional and unlawful if it is committed as follows:-

(a) in any coercive circumstances.

(b) under false pretences or by fraudulent means, or

(c) ***in respect of a person who is incapable of appreciating the nature of an act which causes the offences***.

From the above provisions and bearing in mind that the complainant then aged 13 years old was for all intents and purposes a minor and a child at that and therefore she did not have capacity to consent to any sexual intercourse. It is therefore obvious that any sexual intercourse involving a minor or child is *ipso facto* unlawful. It is my considered view that the Appellant who admitted to the charge of defilement cannot seek refuge on the failure by the prosecution to indicate the word "*unlawful"* on the particulars of the charge sheet yet the act of defilement in itself is unlawful. As pointed out above the provisions of Section 382 of the Criminal Procedure Code cures the said defect. Hence the Appellant was not prejudiced by the omission to include the word "unlawful" in the particulars of the charge.

10. As regards the third issue, the record of the lower court shows that the Appellant was taken for age assessment which placed his age at 21 years old. The age assessment report dated 21/10/2016 from Machakos Level Four Hospital confirmed that he was aged 21 years old. Hence the Appellant's claim that he was a minor at the time the plea was taken is without merit. The plea was taken on 17/10/2016 and the age assessment conducted four days later and it is therefore clear that he was then aged 21 years old and was an adult. The trial court therefore dealt with him as an adult and not a minor.

11. As regards the last issue, I need to point out that the Appellant having unequivocally pleaded guilty to the charge, he can only appeal on sentence which should touch on the extent or legality thereof as per the provisions of Section 348 of the Criminal Procedure Code. The Appellant in his Memorandum of appeal faulted the trial court for sentencing him to 20 years imprisonment without considering the fact that he was a first offender. Indeed sentencing is an exercise of judicial discretion by the trial court which has to consider various factors before settling on the suitable sentence to be meted out. It is trite that an appellate court does not as a matter of course interfere with the trial court's sentence unless it is shown that the sentence imposed is not legal or is harsh and excessive as to amount to a miscarriage of justice or that the court acted on wrong principles or exercised its discretion capriciously. The Appellant herein had been charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual offences Act No. 3 of 2006 which provided that a person convicted of an offence under the said Section and where the age of the victim is between the age of 12 and 15 years, shall be liable to be sentenced to imprisonment of 20 years. In the present case, the complainant was aged 13 years old and was thus within the 12 – 15 years bracket and which attracts a minimum sentence of twenty years. The sentence imposed upon the Appellant was within the law and was therefore legal. The trial court had no option but to go by the minimum sentence imposed by the statute even though the Appellant's mitigation had been taken into account.

12. In the result it is the finding of this court that the Appellant's Appeal lacks merit. The same is ordered dismissed. The trial court's conviction and sentence is upheld.

Orders accordingly.

Dated and delivered at Machakos this 14th day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Amos Wamalwa Ombo – the Appellant

Machogu – for Respondent

Kituva – Court Assistant