



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 20 OF 2018

JOHN MUNYOLE AVAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior

Resident Magistrate's Court at Winam (Hon. B. Kasavuli SRM)

dated the 18th May 2017 in Winam SRMCRC No. 954 of 2015)

JUDGMENT

1. The Appellant, **JOHN MUNYOLE AVAE**, was convicted for the offence of **Defilement** Contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He was then sentenced to 20 years imprisonment.
2. In his appeal, the Appellant has noted that the offences of defilement are categorized within specified age brackets.
3. In that respect, the Appellant is very right. I say so because the provisions of **Section 8(1)** of the **Sexual Offences Act** defines the offence of **Defilement** as the act which causes penetration with a child.
4. Thereafter **Sub-section (2)** provides that if the child was eleven years old or younger, the perpetrator would be sentenced to Life Imprisonment.
5. **Sub-section (3)** stipulates that if the child was between 12 and 15 years, the perpetrator would be liable to imprisonment for a term of not less than 20 years.
6. And pursuant to **Sub-section (4)**, if the child was between 15 and 18 years, the perpetrator would be liable to imprisonment for a term of not less than 15 years.
7. Considering that the victim in this case was said to have been 10 years old, at the time when she was defiled, he ought to have been imprisoned for Life.
8. In the circumstances, as he was jailed for 20 years, the Appellant expressed the view that he cannot therefore have been guilty of defiling a child who was 10 years old.
9. I do share the view expressed by the Appellant, to the effect that if the Appellant was guilty of having defiled a child who was 10 years old, the learned trial magistrate ought to have sentenced the Appellant to Life Imprisonment.
10. Nonetheless, I am also equally alive to the recent developments in jurisprudence governing mandatory sentences in Kenya.
11. The Supreme Court has made it crystal clear that when a statutory provision stipulates a mandatory death penalty, such a provision purports to take away the discretion of the trial court, and also deprives the person who had been convicted of an opportunity to give reasons which could be useful in the process of ascertaining an appropriate sentence.
12. In effect, mitigation cannot be taken away from a convict by virtue of a sentence which purports to be mandatory.

13. In this case, the Appellant was given an opportunity for mitigation. Therefore, the learned trial magistrate cannot be accused of blindly imposing a mandatory sentence.

14. On the other hand, the Appellant appears to have a legitimate concern about the sentence. I so find because the court said the following in regard to the Appellant's mitigation;

“I consider that the accused has not preferred anything in mitigation, rather he is raising grounds which can only be considered on an appeal.”

15. Once the trial court came to the conclusion that the Appellant had made no grounds which could warrant a reduction in the prescribed sentence, it would have been expected that the court would hand down the prescribed sentence.

16. The charge sheet indicated that the child was 10 years old. Therefore, if the trial court went in accordance with the provisions of **Section 8(2) of the Sexual Offences Act**, the appropriate sentence was Life Imprisonment.

17. But the trial court gave consideration to;

“..... the law under which he was charged and considering the age assessment report on record”

18. Mr. Muya, learned State Counsel has submitted that the trial court had invoked **Section 382 of the Criminal Procedure Code**, when handing down the sentence.

19. A perusal of the record of proceedings reveals that there was no direct reference to **Section 382 of the Criminal Procedure Code** when the trial court was sentencing the Appellant.

20. The said **Section 382** reads as follows:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

21. In my understanding, that statutory provision is only available to the court which was handling either an appeal or a revision. Therefore, the trial court cannot have invoked it.

22. I will now examine the evidence tendered in relation to the age of the child.

23. The P3 Form indicated that the child was 10 years old. That is the age cited by the police officer who was requesting the medical personnel to examine the child.

24. After Dr. Omondi Mboya had examined the child, the age assessment cited on Part C of the P3 Form was also 10 years.

25. That information was inserted onto the P3 Form in August 2015.

26. A simple calculation shows that if the child was 10 years old in 2015, she was born in 2005.

267. However, the child's mother told the court that the child was born in 2008.

28. That discrepancy of 3 years was never explained.

29. Meanwhile, an Age Assessment Report dated 14th July, 2016 indicated that the child's Dental Age was between 13 and 14 years.

30. If the child was between 13 and 14 years old as at July 2016, that implies that she was born between 2002 and 2003.

31. In the circumstances, the evidence adduced by the prosecution, about the age of the child, was not consistent.

32. Nonetheless, all the evidence indicated that the victim was a child.

33. I have re-evaluated all the evidence on record, and I have been satisfied that the child was defiled.

34. The medical evidence confirmed the said defilement.

35. Secondly, there was no doubt about the identity of the person who defiled the child. It is the Appellant, who was a well-known neighbour who defiled the child.

36. Even the Appellant confirmed, in his evidence, that the Complainant was a minor.

37. As the offence of defilement is committed by a person who causes penetration with a child, the fact that the Complainant was defiled by the Appellant cannot be overlooked, even in the face of the discrepancies on the evidence about the age of the child.

38. It would have been a totally different offence if the evidence adduced showed that the Complainant was an adult. But provided that the Complainant was a child, the offence remained that of defilement.

39. I find no merit in the Appellant's contention, that he was caused to face a new charge at the time of judgment.

40. As regards the sentence handed down, I find that the learned trial magistrate took into account the Dental Age Assessment, which stated that the child was between 13 and 14 years old.

41. Pursuant to **Section 8(3)** a person who defiles a child whose age was between 12 and 15 was liable to imprisonment for a term of not less than 20 years.

42. That is the sentence which the trial court handed down.

43. If the said trial court had sentenced the Appellant to Life Imprisonment, that could have been prejudicial to the Appellant, considering the varying pieces of evidence about the age of the child.

44. But the trial court gave the "benefit" to the Appellant by basing the sentence on the statutory provision which exposed the Appellant to a lower sentence. Pursuant to **Section 382** of the **Criminal Procedure Code**, I find no reason to warrant a reversal or alteration of the sentence as the sentence handed down did not occasion any injustice to the Appellant.

45. In the result, the appeal has no merit: I uphold both the conviction and sentence.

DATED, SIGNED and DELIVERED at KISUMU this 17TH day of SEPTEMBER 2018.

FRED A. OCHIENG

JUDGE