



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 107 OF 2017

FORMERLY NAKURU HCCRA NO. 37 OF 2016

SAMWEL KIPTARUS ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in the Principal Magistrates

Court at Eldama Ravine Cr. Case No 95 of 2014 delivered on the 18th

day of February, 2016 by Hon. M. Kasera PM]

JUDGMENT

1. The appellant who was convicted of defilement contrary to section 8(1) and 8(3) of Sexual Offences Act and sentenced to imprisonment for a term of 24 years appealed on three principal grounds of defective charge sheet; violation of the appellant's constitutional rights; and that the age of the complainant an ingredient of the offence of defilement was not sufficiently proved.

2. The DPP relied on an age assessment report putting the complainant's age at 14 – 15 years and the DNA testing report establishing the appellant as father of the complainant's child as well as his Defence before the trial Court conceding the defilement in accepting that he had impregnated the child but maintaining that he had been given the complainant by her mother. The DPP urged that the sentence of 24 years imprisonment was fair in the circumstances of the case.

Particular complaints on appeal

3. Failure in the particulars of the charge to "include the wordings 'intentionally' and 'unlawfully' does not make the charge defective as in no way was the accused misled as to the particulars of offence that he was alleged to have committed. Section 134 of the Criminal Procedure Code only requires that –

"134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The appellant was sufficiently informed of the offences of defilement and indecent assault with a child that the Prosecution intended to prove against him. See also ***Ibrahim v. R*** (1983) KLR 596. Moreover, in terms of section 382 of the Criminal Procedure Code, no failure of justice is shown to have been occasioned.

4. On the allegation of breach of the 24 hour rule for presentation before court upon arrest under Article 49 (1) (f) of the Constitution, it is clear from the face of the charge that the appellant was arrested on 3/2/2014 and presented before the court on 5/2/2014, some 48 hours rather than 24 hours after arrest. It is, however, now settled that breach of the rule only entitles a person to a cause of action in damages and not to an automatic acquittal or discharge. See the Court of Appeal decision in ***Fappyton Mutuku Ngui v. R***, Court of Appeal at Nairobi Criminal Appeal No. 32 of 2013.

5. On the issue of the age of the complainant, the appellant's grievance that it would appear to have been tailored to fit the evidence and to afford corroboration appears meritorious in view of the fact that the assessment report only gives an "estimated age" and that the maker of the assessment was not called to testify as to what he considered in arriving at the age estimate.

6. The complainant testified that she was born in 1999. The complainant's mother stated that her daughter was 15 years and was born in September 2000. She said that the daughter had a clinic card but that was not produced. The Investigating Officer Sgt. Sarah Situma testified that she had taken the girl for age assessment which was given as 14 – 15 years. The purported age assessment report hereof states:

"AGE ASSESSMENT REPORT

F C who was brought by police for DNA sampling. Blood for the baby and mother recovered.

Estimated age is 14 – 15 years.

- Dr. Yator, 12/06/2014.

7. The purported age assessment is really an estimation of age as indicated. The person assessing did not describe how he went about assessing the age or the factors that he considered and observations that led to his assessment. In the circumstances where the complainant and the mother gave contradicting age and dates of birth, there was a risk of prejudice to the accused and his conviction for defilement contrary to section 8(3) of the Sexual Offence Act was unsafe. If, for instant, the complainant was just one year older than the assessed 15 years, the offence would fall under section 8(4) of the Sexual Offences Act and the accused would have been liable to imprisonment for not less than 15 years only and not the twenty years provided for the offence under section 8(3) of the Sexual Offences Act.

8. In his defence, the accused appellant accepted that he had impregnated the complainant after she had been given to him by the mother, as follows:

"DW1 UNSWORN STATEMENT IN KISWAHILI

*I am Samuel Kiptarus Rotich. I live in Kaptim. I am a herdsman. I was at home in August. I was herding cattle. I was working in that home. **The lady came with her daughter to sleep at my place because she had visitors. She left her child to sleep at my home. I told her to sleep in the other room and she insisted on sleeping on my bed. She told me she had given me the girl. She sent the girl so I agreed. On 3.2.2014 I saw the lady come with the child at 5.00pm. Chief said I impregnated the girl. I said the woman gave me her child. The lady then killed someone. They have been coming to court. I impregnated the child because of her mother.***

9. While the accused's sexual intercourse with complainant was proved by the prosecution by the evidence of the complainant PW1 herself, the Government Analyst PW2's evidence on DNA testing establishing the accused as the father of the complainant's child and the appellant's own admission of having impregnated the girl, the age of the girl having not been proved beyond reasonable doubt in view of the conflicting ages and dates of birth given by the complainant and her mother and failure to produce the Clinic Card which the mother said was available, the charge of defilement under section 8(3) which requires proof that the child is between the age of 12 and 15 years was not proved.

10. However, there was no question that the complainant was a child that is a person below the age of 18 years. The appellant indeed accepted impregnating the child and only excused his conduct on the ground that she was gifted to him by the mother.

11. Implicit in the appellant's defence is the understanding on the part of the accused that the complainant could be gifted to him by the parent according to any relevant custom of the area and that the complainant was of marriageable age. Although early marriages and practices of girl-gifting among some communities may be considered repugnant, the accused was entitled in law to a defence, both to the main charge of defilement and the alternative charge of indecent act with a child, on the grounds of reasonable relief that the child was over the age of 18 years. This defence was not taken, and the court abhors any form of child abuse as clearly present in the customary practice of early and arranged marriage of minors.

Conviction for the alternative charge

12. In the accused's proved and admitted conduct with a child the alternative charge of indecent act with a child is complete and the appellant is liable to be convicted, which I hereby do, for the offence of indecent act with a child under section 11(1) of the Sexual Offences Act.

13. The offence of indecent act with a child carries a penalty of imprisonment for term not less than 10 years.

Orders

14. Accordingly, for the reasons set out above, pursuant to section 354 (3) (a) of the Criminal Procedure Code, I quash the conviction of the appellant for defilement contrary to section 8(1) and 8(3) of the Sexual Offences Act and set aside the sentence of twenty four (24) years imprisonment imposed on him by the trial Court.

15. I substitute therefor conviction for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act and sentence the appellant to serve imprisonment for ten (10) years beginning the date of sentence before the trial Court.

DATED AND DELIVERED THIS 17TH OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia Ass. DPP for the Respondent.