REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 96 OF 2015

MESHACK MACHARIA.................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the Judgment of Honourable J. Nthuku Senior

Resident Magistrate, delivered on 2nd April, 2015 in Nakuru

Chief Magistrate's Court Criminal Case No. 175 of 2011)

JUDGMENT

1. Meshack Macharia, the Appellant was arraigned in court for an offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The complainant was a child aged fifteen (15) years. The allegation was that he had unlawfully and intentionally committed an act that resulted into insertion of his male genital organ into her female genital organ which was penetration as envisaged by the law. Having denied the charge he was taken through trial, convicted and sentenced to twenty (20) years imprisonment.

2. Aggrieved by the decision of the court at the outset he filed a Petition of Appeal dated the 15the day of April, 2015. In his grounds of mitigation he urged the court to take into consideration Article 28 of the Constitution, to consider the limitations of rights and fundamental freedom as contemplated in Articles 24(1), 36, 39, 41 and 45(1)(2) and (3) of the Constitution.

3. Further, he stated that he is a young youth bound to commence a personal healthy life and building of the Nation; he is very remorseful; he has changed as he respects the principles and procedures of life, is committed to nurturing and protecting the wellbeing of individual communities and the Nation.

4. At the hearing of the Appeal he filed amended grounds of appeal where he pleaded with the court to consider that the trial court's decision was harsh and excessive and that in the course of incarceration he had reformed, and was rehabilitated having undergone spiritual transformation and vocational training.

5. He relied upon written submissions and highlighted the same. He basically urged that the sentence of twenty (20) years imprisonment was harsh and excessive taking into account that there was no remission of sentence; that being a first offender he was remorseful and had undergone rehabilitation. He had acquired technical skills in vocational training and has attained trade test certificates in carpentry and joinery grade III, and a certificate in psychological counselling and theological studies.

6. He concluded by stating that it was his first engagement in sexual intercourse and he was ignorant of the existence of the offence of defilement, having been brought up by his grandfather after the demise of his mother in the year 2002.

7. The State through learned Prosecuting Counsel. Mr. Kemo, opposed the appeal. He urged that evidence adduced was that the complainant a fifteen (15) year old had been sent to the shop when the Appellant took her to his house and slept with her. On her return home she was chastised and therefore returned to the house of the Appellant where she stayed for four (4) days. Prior to being found at the house. That the P3 form filled by the clinical officer who examined her proved that her hymen was broken.

8. Further, he submitted that per the defence raised the Appellant alleged that she said she was nineteen (19) years old and he believed her. That the issue was considered by the learned magistrate who had the opportunity of observing and examining the complainant and at the outset could tell she was minor. He urged that the Appellant and complainant lived in the same neigbourhood therefore he was aware she was minor. As such the child could not consent to the act and the sentence meted out was the minimum sentence.

9. This being the first appeal, I am duty bound to re-consider what transpired in the lower court and come up with my own conclusion.

10. It is admitted by the Appellant that he was engaged in coitus with the complainant. Looking at the defence, he alleged he was deceived by the complainant that she was an adult. A child health (Immunization) card was adduced in evidence that proved that the complainant was born on the 23rd May 1996. At the time of engaging in sexual intercourse she was fifteen (15) years old and a pupil in Standard 7. Section 8(5) of the Sexual Offences Act provides that

> ***"It is a defence to a charge under this section if***
>
> ***(a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) The accused reasonably believed that the child was over the age of eighteen years".***

11. If indeed an accused is deceived by the complainant into believing that she is an adult, it is a defence, but there is a qualification, the accused must have taken a step by making an effort to establish that the complainant is of the alleged age.

12. This means that each case must be treated according to its own circumstances. In this case the complainant gave a tale of having met the appellant and they went to his house where they had sex. On cross examination it was not suggested that she lied to him about her age. Her physical appearance as stated by the learned trial magistrate who had the opportunity of observing her clearly indicated that she was a child. Without any interrogation having been done in cross examination, raising the issue in his defence was an afterthought, therefore the learned trial magistrate did not fall into error by rejecting the defence.

13. The complainant having been a child had no legal capacity to consent to the act of Sexual Intercourse as she had no capacity of appreciating the nature of the act. In the premises the conviction is affirmed.

14. I have been urged to interfere with the sentence of the lower court for being harsh and excessive. It is a well-established principle of law that on appeal an appellate court will not easily interfere with the sentence unless it is manifestly excessive. The principle was well put in the case of **Ogola s/o Owoura Vs Republic (1954) 21 EALA 270**where the Eastern Court of Appeal pronounced itself thus;

> ***"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James Vs Republic (1950) 18 E.A.C.A 147, "it is evident that the Judge has acted upon some wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: Republic Vs Shershewsky, (1912) C.C.A 28 T.L.R 364"***

15. Section 8(3) of the Sexual Offences Act provides thus:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"***

16. The mandatory minimum sentence provided for the offence that the Appellant committed is twenty (20) years imprisonment. Therefore the trial court did not have the discretion of imposing a sentence of less than what was meted out. As a result the learned trial magistrate did not act upon some wrong principles of law. The sentence was not harsh or excessive as viewed by the Appellant.

17. From the foregoing I have no reason of interfering with the sentence. The appeal therefore lacks merit and is dismissed.

Dated and delivered in Nakuru this 7th day of November, 2018

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L. Mutende

Judge