REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 28 OF 2015

E M M...APPELLANT

VERSUS

REPUBLIC.......................................RESPONDENT

(**From original conviction and sentence in Criminal Case**

Number 407of 2014 in the Principal Magistrate's Court at Wundanyi

delivered by Hon S.M. Wahome (SPM) on 10th September 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, E M M, was convicted,on his own plea of guilty, by Hon S.M. Wahome, Senior Principal Magistrate on two (2) Counts. Count I related to the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006 while Count II was in respect of the offence of deliberate transmission of HIV contrary to Section 26(1)(b) of the said Act. He had also been charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the said Act. He was sentenced to serve fifteen (15) years' imprisonment on each of the two (2) main Counts.

2. The particulars of the two (2) Counts and the alternative charge were as follows:-

COUNT I

"On the 24thday of March 2014 at around 11.00 an at Msau Dispensary in Ronge Location within Taita Taveta County, intentionally and unlawfully caused his penis to be penetrated by the penis of J M a child aged 17 years."

COUNT II

"On the 24th Day of March 2014 at Msau Dispensary in Ronge Location within Taita Taveta County, having actual knowledge that he was HIV infected, knowingly and wilfully caused his penis to be penetrated by the penis of J M S being infected with HIV."

ALTERNATIVE CHARGE

"On the 24th Day of March 2014 at Msau Dispensary in Ronge Location within Taita Taveta County, intentionally and unlawfully caused his anus to be touched by the penis of J M S a child aged 17 years."

3. Being dissatisfied with the said judgment, on 7th March 2015, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

1. **THAT the learned trial magistrate erred in law and fact by convicting him without considering that the age of the victim herein was not proved beyond any reasonable doubt hence the sentence of 30 years slapped on him was unlawful.**

2. **THAT the learned trial magistrate erred in law and fact by convicting him without considering that the prosecution case was not proved beyond reasonable doubt hence the sentence that was imposed on him was unsafe.**

3. **THAT the learned trial magistrate erred in law and fact by failing to see article 50 of the constitution was not put into consideration.**

4. He filed Written Submissions and Amended Grounds of Appeal on 15th December 2016. The Amended Grounds of Appeal were as follows:-

1. **THAT the learned trial magistrate erred in law and fact by relying on the facts of the charge to convict him without seeing that the anger caused him not to have knowledge of the consequences of the case in his sentencing** (sic).

2. **THAT the honourable trial magistrate erred in law and fact as the first offender, innocent citizen plead** (sic)**guilty without the prosecution witnesses to testify their truth** (sic).

3. **THAT the learned trial magistrate erred in law and fact by not considering that he was treated with unfair trial that he had known the consequences of the matter for fresh start** (sic)**.**

4. **THAT the learned trial magistrate erred in law and facts by not considering that he was not awarded** (sic)**his rights as the Constitution as the case was a serious case** (sic)**that needed thorough investigations for the evidence on record**(sic).

5. The State was to file its Written Submissions by 20th December 2016. However, when the matter came up on 15th February 2017, counsel for the State indicated that the State had opted not to file its Written Submissions because despite the Appellant having pleaded guilty to the two (2) Counts, it was conceding to the Appeal herein.

6. It submitted that from its observation, there was nothing to show that the Prosecution proved the said two (2) Counts. It stated that this was because there was no proof of defilement of Complainant, J M S (hereinafter referred to as "PW 1")in the P3 Form the Prosecution had relied upon and further there was no medical evidence to prove that the Appellant herein was HIV positive.

7. It pointed out that PW 1wasexamined after a three (3) months' window period and it was found that "she" was HIV negative. This court assumed PW 1 was "he" because the charge had indicated that the victim had penetrated the Appellant herein. He could not therefore have been female and counsel for the State may erroneously referred to him as a "she" in her oral submissions to this court.

LEGAL ANAYSIS

8. Despite the State conceding to an appeal, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even when where the State has conceded to an appeal to establish if such a concession should be granted.

9. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR,** the Court of Appeal made a similar observation when it stated as follows:-

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(*See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).*"**

10. This court therefore carefully perused the proceedings of the Trial Court and noted that once the Appellant pleaded guilty to the aforesaid Counts, it could only enquire into the legality and extent of the sentence. It could not re-open the case to analyse the evidence that was adduced in evidence in the Trial Court as the Appellant had sought to do when he raised issues of fact in his Amended Grounds of Appeal and Written Submissions.

11. Notably, Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

12. Section 2 (1) of the Sexual Offences Act defines **"penetration as the partial or complete or complete insertion of the genital organs of a person into the genital organs of another person."**

13. Section 8(1) of the Sexual Offences Act therefore provides as follows:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

14. The penalty for committing the offence of defilement is given in Section 8(4) of the Sexual Offences Act. The same stipulates as follows:-

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

15. Having pleaded guilty Count I, the Learned Trial Magistrate acted correctly when he meted upon the Appellant a sentence of fifteen (15) years as that was the minimum sentence that he could have imposed on him. This court went a notch higher to enquire whether or not the sentence he imposed on the Appellant was legal.

16. The facts in respect of Count I were as follows:-

> **"… He instructed a boy who is a boy aged 17 years to penetrate his anus. The complainant penetrated the accused's anus and later went home…"**

17. In an offence of defilement, the facts must demonstrate that the act by the offender causes penetration of a child. Evidently, the facts that were read to the Appellant did not disclose the ingredients of the offence of defilement. They did not show any penetration of PW 1 by the Appellant. Instead, it indicated that it was PW 1 who penetrated the Appellant.

18. As the offence of defilement does not envisage penetration of a person by a child but rather the

penetration must of a child by a person, the State was therefore correct in having submitted that the Prosecution did not prove that the Appellant herein was guilty of the offence of defilement.

19. It was the finding and holding of this court that the Learned Trial Magistrate misapprehended the law when he convicted and sentenced the Appellant for the offence of defilement. This sentence was clearly illegal and had no legal basis.

20. However, if the Prosecution had proven the ingredients of the said offence of defilement, the penalty the Learned Trial Magistrate meted out to the Appellant would have been proper as that was the minimum sentence stipulated in Section 8(4) of the Sexual Offences Act.

21. Turning to Count II, Section 26(1)(b) of the Sexual Offences Act provides as follows:-

> **"Any person who, having knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know-**
>
> a. **will infect another person with HIV or any other life threatening sexually transmitted disease;**
>
> b. **is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;**
>
> c. **will infect another person with any other sexually transmitted disease,**
>
> **shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less than fifteen years which may be (sic) for life."**

22. A perusal of the P3 Form that the Prosecution adduced in evidence showed that there was no notable injury to PW 1's penis. This may have been because he was examined six (6) months after the alleged defilement. It also indicated that PW 1 tested HIV negative. The Prosecution did not, however, present any documentary evidence to prove that the Appellant was HIV positive.

23. The facts merely as follows:-

> **"The accused is well known HIV patient who is on ARVs as he is HIV positive and in constantly on medication."**

24. In the absence of any evidence to prove that the Appellant was HIV positive, this court was persuaded by the State's submissions that the Prosecution failed to prove to the required standard, the ingredients of Count II. That notwithstanding, this court formed the opinion that as the Appellant admitted that PW 1 penetrated his anus, the elements of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act existed and as a result, this court would have convicted him accordingly.

25. In analysing the ingredients of committing an indecent act with a child, this court had due regard to Section 2(1) of the Sexual Offences Act. The same defines an **"indecent act"** as-

> **"an unlawful intentional act which causes-**
>
> a. **any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include an act that causes penetration.**
>
> b. **Exposure or display of any pornographic material to any person against his or her will."**

26. The penalty of the said offence is spelt out in Section 11(1) that stipulates as follows:-

> **"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

27. Notably, while hearing an appeal, the High Court has power under Section 354(3)(ii) of the Criminal Procedure Code Cap 75 (Laws of Kenya) to alter the nature of the sentence. The said Section provides as follows:-

> a. **The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—**
>
> > **(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence**(emphasis court)**;**

28. Having said so, this court found that it could not alter the nature of the offence for the reason that PW 1's age was not proven to bring him within the definition of a child and thus support the offence of committing an indecent act with a child as provided in Section 2 of the Children Act No 8 of 2001. The said Section provides that " a child":-

> **"means any human being under the age of eighteen years."**

29. Appreciably, as the Appellant pleaded guilty to the Counts, no oral evidence was adduced in the Trial Court. Had the matter proceeded to trial, he would have had an opportunity of cross-examining PW 1 regarding his age.

30. Once the Appellant pleaded guilty to both Counts, it was incumbent on the Prosecution to adduce documentary evidence to prove PW 1's age. This is because the penalty for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act is more severe than that of committing an indecent act with an adult under Section 11A of the Sexual Offences Act where the penalty is five (5) years or a fine of fifty thousand (Kshs 50,000/- or to both.

31. The Prosecution therefore ought to have furnished the Trial Court with documentary proof of PW 1's age. Such proof could have been a Birth Certificate of an Age Assessment Report. In the absence of any Cross-examination in the Trial Court by the Appellant of PW 1's age, this court found that the P3 Form was not adequate or sufficient evidence of PW 1's age. This hampered this court's power to alter the nature of the offence against the Appellant herein as envisaged in Section 354(3)(ii) of the Criminal Procedure Code.

32. In the case of **Mwanguo Gwede Mwarua v Republic**(Supra), the Court of Appeal pronounced itself on the weight of a P3 Form in proving the age of a victim in sexual offences. It rendered itself as follows:-

> **"In the circumstances of this case no credible evidence of the complainant's age was adduced save the bare statement during the *voire dire* examination. Although her father testified, he did not testify to the complainant's age at all. Her age as indicated in the P3 Form was mere estimate by the police officer who filled that form. PW5's evidence did not help matters as he estimated the complainant's age to be between 10 to14 years thus straddling two age brackets under Section 8(2)** and **(3) of the Sexual Offences Act."**

33. Accordingly, having considered the State's concession and the grounds it relied upon and as well as the challenge this court faced when considering if it could alter the nature of the offence against the Appellant to one of committing an indecent with a child, this court found and held that the said concession was merited and the same is hereby allowed.

DISPOSITION

34. The upshot of this court's decision was that the Appellant's Appeal that was lodged on 7th March 2015 is hereby allowed. For the foregoing reasons, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

35. It is so ordered.

DATED and **DELIVERED** at **VOI** this **2ND** day of **MARCH** 2017

J. KAMAU

JUDGE

In the presence of:-

E M M.. Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk