



**GO v Republic (Criminal Appeal 155 of 2016)
[2017] KEHC 6758 (KLR) (5 April 2017) (Judgment)**

G O v Republic [2017] eKLR

Neutral citation: [2017] KEHC 6758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 155 OF 2016**

JA MAKAU, J

APRIL 5, 2017

BETWEEN

GO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against both the Conviction and Sentence dated 24.10.2016 in
Criminal Case No. 642 of 2016 in Ukwala Law Court before Hon. G. Adhiambo - SRM)*

Preferring charges against a male child only for the offense of defilement of a girl who was older than him but still a child amounts to discrimination

The case related to the right to equality and freedom from discrimination. In this case, the court found that the trial court in sentencing the child offender to 15 years imprisonment, unlawfully discriminated against a child offender on the basis of sex. This was due to the fact that both the child offender and the complainant were minors and the complainant was actually older than the child offender.

Reported by Moses Rotich

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – children rights - right to equality and freedom from discrimination - where the appellant (a male child) was charged with the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act - where both the appellant and the complainant were minors – where the complainant was a child who was older than the appellant – whether preferring charges against a male child only for the offense of defilement of a girl who was older than him but still a child amounted to discrimination - Constitution of Kenya, articles 27 and 53(1)(f).

Constitutional Law - fundamental rights and freedoms – enforcement of fundamental rights and freedoms – children rights - right of a child not to be detained except as a measure of last resort – whether the imposition of a 15 years’ imprisonment sentence against a minor (male child) for the offense of defilement of a girl who was



older than him but still a child was unlawful - Constitution of Kenya, article 53(1)(f); Children Act, No 8 of 2001, section 190(1).

Brief facts

The appellant (a minor) was charged with the offence of defilement contrary to section 8(1) and 8(4) of the Sexual Offences Act, cap 63A. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The appellant pleaded guilty to the main charge of defilement, admitted facts of the charge and was convicted on his own plea of guilty. He was sentenced to serve 15 years imprisonment. Aggrieved by the decision of the trial court, the appellant filed an appeal against both conviction and sentence. The appellant contended that he was a minor at the time of commission of the alleged offence of defilement. Further, it was the appellant's case that he was compelled to admit the alleged offence without being warned of the dangers therein.

Issues

- i. Whether preferring charges against a male child only for the offence of defilement of a girl who was older than him but still a child amounted to discrimination.
- ii. Whether the imposition of a 15 years' imprisonment sentence against a minor (male child) for the offence of defilement of a girl who was older than him but still a child was unlawful.

Held

1. The sentence of 15 years imprisonment imposed by the trial court on the appellant was contrary to the Constitution of Kenya (the Constitution), the Children Act, No 8 of 2001 (Children Act) and the Sexual Offences Act. It was against the law hence unlawful. It was an illegal sentence and ought not to have been imposed against the appellant at all.
2. There was no justification by the trial court for imposing a sentence against the appellant to serve 15 years for an offence of defiling a girl who was older than the appellant. The trial court ought to have noted that both the appellant and the complainant were minors and both of them deserved to be placed under a care of a qualified counselor or the court ought to have found that the appellant needed guidance instead of ordering him to be imprisoned for 15 years.
3. The trial court erred in failing to note that the appellant was a minor and deserved to be sentenced as provided by law. The appellant was discriminated against on the basis of sex in that he was arrested and charged with the offence of defilement alone, instead of the prosecution charging both the complainant and the appellant for the offence of defilement.
4. Both the appellant and the complainant were minors at the time of commission of the offence. The complainant was senior in age to the appellant and the blame ought not to have been wholly shifted to the appellant but it ought to have been apportioned against both the complainant and the appellant. Given that both the appellant and the complainant were minors, they both needed protection against harmful activities and none of them ought to have been sent to prison.

Appeal allowed.

Orders

- i. *The sentence of 15 years' imprisonment meted on the appellant by the trial court was set aside.*
- ii. *The appellant was placed under probation for a period of six (6) months under the supervision of the probation office, Siaya County.*

Citations

Cases

None referred to

Statutes

Kenya

1. Children Act (cap 141) section 190(1) — (Interpreted)



2. Constitution of Kenya articles 27, 53(1)(f)(i)(ii) — (Interpreted)
3. Criminal Procedure Code (cap 75) section 191 — (Interpreted)
4. Penal Code (cap 63) section 35(1) — (Interpreted)
5. Probation of Offenders Act (cap 64) In general — (Cited)
6. Sexual Offences Act (cap 63A) sections 8(1)(4)(7); 11(1) — (Interpreted)

Advocates

M/S Odumba Learned State Counsel, for the respondent

JUDGMENT

1. The appellant GO was charged with an offence of defilement contrary to section 8(1) and 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge is that on the diverse dates between 18th and 21st day of October 2016, in Siaya County, unlawfully caused his penis to penetrate the vagina of CAA, child aged 17 years. He also faced alternative charge of committing an indecent act with a child contrary to section II(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the alternative charge are that on the same day, at the same place, the Appellant intentionally touched the vagina of CAA, a child aged 17 years with his penis.
2. The appellant pleaded guilty to the main count, admitted facts of the charge and was convicted on his own plea of guilty. He was sentenced to serve 15years imprisonment.
3. Aggrieved by the conviction and sentence the appellant filed this appeal setting out the grounds of appeal as follows: -
 - a) That the appellant was a minor by the time of the commission of the alleged offence.
 - b) That due to the injuries the appellant sustained, he was confused during time of reading the plea.
 - c) That the appellant was also compelled to admit the alleged offence without being warned of the dangers therein.
4. At the hearing of the appeal, the appellant appeared in person whereas *M/S Odumba*, Learned State Counsel, appeared for the state. The appellant abandoned his appeal against conviction urging his appeal against sentence.
5. The appellant urged that at the time of the commission of the offence, he was a minor and even now relying on his birth certificate No [Particulars Withheld] issued on December 21, 2016 showing he was born on August 10, 2000, therefore, as at the time of commission of the offence, on the dates between 18th and October 21, 2016, he was aged 16years 2 months. He urged that he was then a pupil at [Particulars Withheld] Primary School in Standard 7. He pleaded for leniency.
6. *M/S Odumba*, Learned State Counsel, concurred that at the time of the commission of the offence, the appellant was aged 16years and 2months in spite of the charge indicating the appellant's apparent age as 18 years. She conceded that appellant was a minor and should have been sentenced as provided under section 191 of the *Criminal Procedure Code*.
7. section 8(7) of the *Sexual Offence Act* No 3 of 2006 provides as follows: -

“ 8.



- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."

8. Article 53(1)(f)(i)(ii) of the [Constitution of Kenya, 2010](#) provides: -

" 53.

- (1) Every child has the right: -
- (f) not to be detained, except as a measure of last resort, and when detained, to be held: -
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age."

9. Under section 191(1)(a)-(l) of the [Criminal Procedure Code](#) provides: -

" 191.

- (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways –
- a) by discharging the offender under section 35(1) of the [Penal Code](#);
 - b) by discharging the offender on his entering into a recognisance, with or without sureties;
 - c) by making a probation order against the offender under the provisions of the [Probation of Offenders Act](#);
 - d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
 - e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
 - f) by ordering the offender to pay a fine, compensation or costs,
 - g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with



any Act which provides for the establishment and regulation of borstal institutions;

- h) by placing the offender under the care of a qualified counsellor;
- i) by ordering him to be placed in an educational institution or a vocational training programme;
- J) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- k) by making a community service order; or
- l) in any other lawful manner.”

10. section 190(1) of the Children Act provides: -

“ 190.

- (1) No child shall be ordered to imprisonment or to be placed in a detention camp.”

11. In the instant case, the sentence of a minimum sentence of 15 years imposed by the trial court against the appellant is contrary to the Constitution, the Children Act and the Sexual Offences Act. It is against the law hence unlawful. It is an illegal sentence, and should not have been imposed against the appellant at all. I find no justification of the trial court in imposing a sentence against the appellant to serve 15 years for an offence of defiling a girl who was older than the appellant as she was 17 years. In this case, the court should have noted that both the appellant and the complainant were minors and both deserved to be placed under the care of a qualified counselor or the court should have found the appellant needed guidance instead of ordering him to be imprisoned for 15 years. The court erred in failing to note that the appellant was a minor and deserved to be sentenced as provided by law. I find that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement (see article 27 of the Constitution of Kenya, 2010).
12. In the instant case, I find that at the time of the commission of the offence, both the appellant and the complainant were minors; I find indeed the complainant was senior to the appellant and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complainant and the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison.
13. Having said that much, I find the appellant’s appeal against the sentence to be meritorious. I uphold the conviction and set aside the sentence meted against the appellant and noting the appellant has been in custody and prison for 5 months, I shall place the appellant under probation for a period of six (6) months from today under supervision of the Probation Office, Siaya County.

DATED AND SIGNED AT SIAYA THIS 5TH DAY OF APRIL 2017

J.A. MAKAU

JUDGE

Delivered in open court.

In the presence of:



Court Assistants:

George Ngayo

Patience B. Ochieng

Sarah Ooro

Appellant: in person, present

M/S Odumba: for State

J.A. MAKAU

JUDGE

