



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 49 OF 2015

NICHOLAS MWENDA .. APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.1204 of 2014 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **NICHOLAS MWENDA**, was Charged with an Offence of defilement contrary to section 8 (1) (3) (sic) of the Sexual Offences Act No.3 of 2006. He was alternatively charged with an offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 16th day of December 2014 at **[particulars withheld]**, in Imenti Central District of Meru County intentionally caused his penis to penetrate the vagina of **J K** a child aged 12 years. Alternatively, he unlawfully and intentionally touched the complainant's vagina with his penis.

The appellant was tried and was convicted in the substantive charge and sentenced to 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant raised four grounds of appeal which address the issue of insufficiency of evidence. I will address the grounds together for consistency and good flow of arguments.

The state opposed the appeal and was represented by M/s Muriithi, the learned counsel.

The facts of the case are briefly as follows:

The appellant and the complainant were attending a youth camp. The former seduced the latter to go to his house. While in his house he had sexual intercourse with her. When the church leadership went looking for them, they found the complainant hiding in a toilet.

On his part the appellant contended that he was falsely implicated by the bishop. He said the complainant was found in a toilet outside his house.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32**.

Before I address the grounds raised by the appellant, I wish to comment on the way the charge was drafted. It is incorrect to cite a nonexistent section. In the substantive charge he was accused of offending section "...8(1) (3) " The charge ought to have been contrary to **section 8(1)**... and if the drafter wanted to include the definition section then it ought to have read "... **contrary to section 8(1) as read with section 8(3)**..." Since there was no prejudice to the appellant I will say no more. The trial court has a duty to ensure that charges are correctly drafted before reading the same to accused persons.

We shall begin our journey at the church. While the complainant was in the church at about 9 pm, she was informed that someone was calling her outside. When she went out, she found the appellant who managed to convince her to accompany him to his house. When they reached his house, the appellant went back to the church and locked her in the house. He returned at about 10 pm and forced her to have sex. When the bishop went and knocked at the appellant's door, he went and hid her in the toilets behind the house. This is where she was found. It was confirmed by H K (PW3), the bishop and M K (PW4). These two ladies went to the house of the appellant after enquiries on discovering that both were not at the church and yet they were expected to be there.

When S M K (PW6) examined the complainant she found evidence of sexual intercourse due to presence of spermatozoa. However there was no evidence of force. She formed an opinion that the complainant was active sexually prior to this incident.

I concur with this medical finding for she never resisted nor did she talk of any pain. Were it not for the vigilance of the bishop, this could not have come to the fore.

There is overwhelming evidence that the appellant had sexual intercourse with the complainant. It is also abundantly clear that it was consensual. However, since the complainant is a minor she lacked capacity to give consent. The conviction by the learned trial magistrate cannot be faulted.

The appellant was sentenced to serve 20 years imprisonment. Section 8(3) of the Sexual Offences Act provide as follows:

(3) 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.

The appellant was sentenced to the minimum sentence. I cannot interfere with it for doing so will amount to an illegality.

From the foregoing analysis of the evidence on record I find that the appeal cannot stand the same is dismissed. The appellant shall serve the sentence meted out by the trial court.

DATED at Meru 11th day of May 2016

KIARIE WAWERU KIARIE

JUDGE