



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 42 OF 2015
(CORAM: J.A. MAKAU – J.)

DENIS OKOTH AMOLO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence dated 5.10.2011, in Criminal Case No. 376 of 2010 in Siaya Law Court before Hon. S.O. TEMU – R.M.)

JUDGMENT

1. The Appellant **DENNIS OKOTH AMOLO** faced a charge of **Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**, the particulars of the offence are that between 22nd March 2010 and 29th March 2010 in Siaya District within Nyanza Province intentionally and unlawfully caused his penis to penetrate the vagina of PAO a child aged 14 years.

2. The Appellant faced an alternative charge of **Committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that between 22nd day of March 2010 and 29th day of March 2010 in Siaya District within Nyanza Province, willfully and intentionally touched the vagina of PAO a girl aged 14 years with his penis.

3. The Appellant was found guilty and convicted and sentenced to serve 20 years imprisonment. Aggrieved by sentence the Appellant lodged petition of appeal setting out mitigation on the following grounds:-

(a) That the Appellant did not plead guilty to charge and that the Honourable court to allow him to mitigate as far as the sentence is concerned.

(b) That the Appellant requests the Honourable Court to have leniency on him and reduce the long term sentence to a short period of time as his health has markedly deteriorated due to severe illness such as the currently acute ulcers but lack proper medical care.

(c) That he urges the Court to have leniency on him owing to the fact that he has undergone both vocational training and spiritual transformation through the prison's rehabilitation and correctional policies of reforms hence ready to abide by the rules of law if accorded an opportunity back to the society.

(d) That through rehabilitation program, has trained and attained Grade Test III & II in

Carpentry/Joinery hence ready to use the acquired skills in building the nation if granted the opportunity back to the society as a resourceful citizen.

(e) That the Appellant is the sole breadwinner in his family and caretaker of some orphans who have adversely suffered in his absence hence pray for a resolution of the sentence and substitute with a non-custodial sentence to enable him cater for his dependants.

(f) That the Appellant humbly begs the Honourable Court to have leniency and allow him join back the society as currently has undergone rehabilitation, reformation and is ready to abide by the rule of law in the society.

(g) That this Honourable Court humbly consider his plea for leniency over the long term sentence as far as the aforementioned mitigation factors are concerned.

(h) That the mitigating factors are true to the best of his knowledge, information and belief.

4. The Appellant appeared in person at the hearing of the appeal, whereas M/s. Odumba Learned State Counsel, appeared for the State.

5. The brief facts of the prosecution case are that, PW1, PAO a school dropout left her home on 3.3.2010 and went to stay with the Appellant, her boyfriend for one week during which period they had sexual intercourse. PW1 testified she was not forced to have sex but did it voluntarily. That the Chief of the area went to the Appellant's home arrested him and took him to Siaya Police Station. PW1 and the Appellant were taken to Siaya District Hospital, examined, P3 forms for both of them were filled. That on 21.5.2010, PW1 was taken to Siaya District Hospital for age assessment. PW1 identified her P3 form as MFI – P1, that of the Appellant as MFI – P2, laboratory Reports as MFI – P3 and Appellant's MFI – P4, PW1's age assessment as MFI – P6.

6. The Appellant in his unsworn statement denied the charge, and stated that he went with his brother to complainant's elder sister and told her he wanted to be a boyfriend to the complainant and that he left for his home. That the complainant followed the Appellant to his home and she refused to go back home staying at the Appellant's home for one week. That after one week the complainant and the Appellant were arrested by the Assistant-Chief.

7. The Appellant in his appeal urged that he is not challenging the conviction but the sentence. He relies on the grounds in his petition urging that he has undergone vocational training and spiritual transformation. That the complainant was his girlfriend aged at about 17 years and not as stated in the charge sheet, thus 14 years. He prayed for leniency.

8. M/s. Odumba, Learned State Counsel opposed the appeal. On conviction she urged the Appellant did not challenge the same, she urged the necessary ingredients of the offence of defilement were proved as the Appellant was well known to the complainant as his girlfriend, hence identified, that penetration was proved through evidence of PW1 and the Doctor, that age was proved through age assessment, though exhibit P4 on age assessment was clearly altered from 16 years to read 14 years, that remains the victim was under 18 years and for which sentenced of 20 years could not be said to be proper.

9. I have very carefully perused the proceedings and evidence in support of the offence of defilement. PW1 in her evidence testified that she was a girlfriend to the Appellant and that she stayed with the Appellant for one week, during which period they had sex every day. PW3, a Clinical Officer, who examined PW1 and completed P3 form exhibit P1, noted that the hymen was absent, evidencing that there was penetration. The age assessment reveal that the complainant as per exhibit P3 she was 14 years old. The Appellant did not challenge or contradict the evidence of PW1 on her having known him, nor of having stayed with her for 1 week and of having stayed with, but in his appeal he urged that he believed the complainant was over 14 years and aged 17 years. The Appellant urged he was not challenging the conviction. I therefore find that the three main ingredients of defilement, thus, identification or recognition of the assailant, penetration and age below 18 years was proved, I therefore find that the

conviction was proper. The Appellant in this appeal do not challenge the conviction but the sentence.

10. I will now turn to sentence meted against the appellant. The question for consideration is whether the sentence imposed against the Appellant is proper and in accordance with the relevant provisions of **The Sexual Offences Act**? The complainant in this case PW1 did not produce Birth Certificate or any document in support of her age, save that on 31.5.2010 she was referred to the hospital for age assessment. She testified the age Assessment Report of 3.5.2010 is marked MFI P6. PW3 testified PW1 was taken to the hospital for age assessment and found to be 14 years. The Appellant in the appeal urged the complainant was his girlfriend and that he believed she was 17 years. I have very carefully perused the age assessment Report MFI P6 showing the age of the complainant to be 14 years, however, exhibit P3 Laboratory requests and Report form show that the age of PW1 to have been 16 years which was subsequently altered to 14 years without any countersigning. The letter from school show that the complainant was admitted to school on 8.1.2003 but do not show her age at the time of admission. In view of the foregoing and in absence of Birth Certificate and the alteration of exhibit P3 it cannot certainly be said the complainant's age as of the time of the commission of the offence was 14 years. PW1 did not in her evidence state her actual age nor did PW2, PW1's mother produce Birth Certificate but stated the daughter, was born in 1996 without stating the date of birth.

11. On the disparity between the age, in age Assessment Report as 14 years, the Laboratory records and Report form and the age as given in the charge sheet, and as stated by the Appellant in his submission in appeal, I find that the failure to reconcile the same by the trial court prejudiced the Appellant as **Section 8 (1) (2) (3) and (4) of the Sexual Offence Act No. 3 of 2006**, pegs the severity of the sentence of an offender on the age of the victim.

12. In the case of **Daniel Mugambi V R CRA No. 37 of 2014 (Nyeri)** the Court of Appeal addressed itself thus:-

“It is our view that in the absence of a birth certificate in circumstances where no explanation was given as toward unavailabilitys, the appellant's complaint that the complainant may very well have been sixteen (16) years as at the time of the commission of the alleged offence was sound and it should not have been brushed aside. The disparity ought to have been considered for purposes of sentencing. It is our own view that had the learned Judge revisited the issue as requested by the Appellant, he would have found, as we hereof do, that in the absence of production of a birth certificate to confirm the exact date of birth of D, the possibility of her having been sixteen (16) years of age as at commission of the offence could not be ruled out. Such a doubt if established could have been resolved in favour of the Appellant. The Appellant therefore suffered prejudice as the correct sentence fall under Section 8 (4) of the Act.”

13. In view of the above and failure of production of Birth Certificate and the Appellant's belief that the complainant was 17 years old, may well have been true that the complainant was seventeen (17) years old as of the time of the commission of the offence. I note that there was also disparity of age of the complainant from the Age Assessment Report and the Laboratory request and Report form, which the trial Court did not consider. The disparity should have been considered for the purposes of sentencing. It is my view therefore the complainant might have as well have been seventeen (17) years old at the time of the commission of the offence. The benefit of doubt should have been accorded to the Appellant.

14. The upshot is that the conviction being unchallenged is upheld, on the sentence in view of my finding that there was a considerable doubt as complainant's age who may have well been seventeen (17) years as at the time of the commission of the offence, the trial court ought to have substituted the appellant's conviction for the offence under Section 8 (4) of the Sexual Offences Act as opposed to Section 8 (3) of the Sexual Offences Act. In this regard, I find it prudent to interfere with the said conviction and sentence on account of its legality. I therefore set aside the sentence of 20 years imprisonment and substitute therefore a sentence of 15 years imprisonment effective from the date of conviction by the trial court.

DATED AND SIGNED AT SIAYA THIS 3RD DAY OF NOVEMBER, 2016.

J.A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Appellant present in person.

M/s. M. Odumba for State.

C.A.1. K. Odhiambo

2. L. Atika

J. A. MAKAU

JUDGE