



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 9 OF 2013

(Appeal from conviction and sentence in Kigumo PM Criminal Case No 25 of 2013 – B. Khaemba, Ag. SPM)

SIMON PETER MAINA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

1. The Appellant, **Simon Peter Maina**, was charged in the lower court with **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. He pleaded not guilty. He was also charged in the alternative with committing an indecent act with a child contrary to section 11 (1) of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of this alternative charge that on diverse dates between 31st December 2012 and 10th January 2013 at **[particulars withheld] Village** within **Murang'a County**, he committed an indecent act with one **R W K**, a girl aged 16 years, by touching her private parts – breasts, buttocks and vagina.

2. The Appellant pleaded guilty to this alternative charge with the words, **It is true**. Facts were then given by the prosecution. These facts were that the complainant was coming from Thika and heading towards her home when she met the Appellant who is her neighbour; that he stopped her and started seducing her; that he then took her to his house and intentionally started touching her breasts, buttocks and vagina; that the following day the complainant requested the Appellant to allow her to go home but he told her that he wanted to marry her; that on 10/01/2013 the complainant's father spotted her in the Appellant's compound and reported the matter to **Gichocho AP Post**; and that the Appellant was then arrested, taken to the AP post and charged with the offence.

3. The Appellant admitted these facts with the words –

The facts are correct.

He was then convicted on his own plea. After mitigation he was sentenced to ten (10) years imprisonment. He has appealed against both conviction and sentence.

4. The Appellant's petition of appeal discloses the following grounds of appeal –

(i) That he “absolutely pleaded not guilty” to the charge.

(ii) That the learned trial magistrate “was so complicated in his language” that he (Appellant) ended up being confused.

(iii) That the trial court did not consider “the grudge that existed between the girl’s family and (his) family”.

(iv) That the trial court erred in not “sending the investigating officer who could have revealed the lies from the complainant’s side....”.

(v) That “the evidence given by the parents was full of contradiction....”.

(vi) That the sentence was “too harsh and excessive....”.

5. I have considered the Appellant's written submissions as well as the oral submissions of the learned Prosecution Counsel who supported the conviction and sentence. I have also read the record of the trial court.

6. As for the first two grounds of appeal, the record discloses that the charge was read to the Appellant in his language, Kikuyu. He not only pleaded guilty, but also admitted having been with the complainant at his home from about 11 days, and having intentionally touched her breasts, buttocks and vagina. I therefore cannot understand why he now complains that he “absolutely pleaded not guilty” and that the trial magistrate “was so complicated in his language” that he ended up being confused.

7. I am satisfied that the Appellant fully understood the charge in the alternative count; he freely pleaded guilty and admitted the facts given by the prosecution. Those facts clearly disclosed the offence charged.

8. Regarding the 3rd to 5th grounds of appeal, they do not make sense. There was no trial as the Appellant pleaded guilty. Ground 4 particularly – it is not the business of the trial court to send investigating officers to do more investigations. The trial court is a neutral arbiter which deals only with the evidence or matters placed before it.

9. I will now consider the sentence. Section 11 (1) of the Sexual Offences Act is in the following terms –

“11. (1) 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”.

10. The first thing to note is that for this offense a sentence of imprisonment is not mandatory – hence the use of the words **is liable .to....**”. But where the court decides to impose a custodial sentence, it must be for a term of not less than 10 years. If it was intended that imprisonment be mandatory for this offence, the legislature would have used the words **shall be sentenced to.....** See for instance **section 8(2)** of the same Act which states –

“8. (2) A person who commits the offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

(Emphasis supplied)

11. It means therefore that for the offence under section 11(1), and many other offences in the Act, the court may consider alternative punishment if it is not inclined to impose a custodial sentence.

12. In mitigation the Appellant stated that he had talked to the complainant and her mother, and that the mother knew that the complainant was with him. This echoes what the Appellant has stated in his written submissions – that he intended to marry her.

13. I am also concerned that no proof of the complainant's age was preferred by the prosecution when stating the facts of the case - notwithstanding the Appellant’s admission that she was 16 years old.

Age is an important ingredient in sexual offences involving children under the Sexual Offences Act, and the trial court should always insist on proof thereof, even where an accused pleads guilty. But in this case I am satisfied that no injustice was caused to the Appellant as he admitted that the complainant was 16 years old.

14. There is however nothing in the trial court's notes on sentencing to indicate that it awarded the custodial sentence as a mandatory legal requirement. For this reason I will not interfere with the sentence.

15. In the result, the appeal is dismissed in its entirety. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 12TH DAY OF JUNE 2015