



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 6 OF 2014

(FORMERLY NYERI HC CRIMINAL APPEAL NO 13 OF 2014)

(Appeal against Conviction and Sentence in Kigumo SRM Criminal Case No 87 of 2009 - M W Mutuku, SRM)

PATRICK MWANGI MWAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **Patrick Mwangi Mwaura**, was convicted after trial of *defilement* contrary to **section 8 subsection (1)** as read with **subsection (4)** of the *Sexual Offences Act, No 3 of 2006*. He was sentenced to serve 12 years imprisonment. He appealed against both conviction and sentence. However, at the hearing of his appeal he withdrew the appeal against conviction and chose to proceed only with the appeal against sentence.

2. The learned Prosecution Counsel supports the conviction. I have read through the testimonies of the witnesses and the judgment of the lower court. The Appellant was convicted upon good and sound evidence. He attacked the complainant (PW1) in the morning as she was going to school. She had known him well before as a village-mate, and although he had attempted to disguise himself by covering his head with a sweater, she was still able to positively recognise him. He viciously attacked her and in the process almost strangled her to death. He put soil in her mouth to prevent her from screaming as he defiled her. I am satisfied that the Appellant was positively identified by the complainant. There was medical evidence of penetration. His conviction is safe.

3.As for the sentence imposed, an issue regarding the age of the Appellant arose during his trial and on 23/04/2008 the trial court ordered for him to be escorted to Murang'a District Hospital for age assessment. When the matter next came up on 30/04/2008, an age assessment report was before the court, and it noted that he was then aged 17 years. Nevertheless the trial court continued to remand him at **GK Prison Murang'a**, notwithstanding his complaints to the court that he was being harassed (no doubt sexually) by the adults there.

4. After convicting the Appellant, the trial court did not refer to his age at all before sentencing him. The conviction was on 14/04/2009. It will be recalled that on 30/04/2008 the court had noted that he was 17 years old. So, he had not yet turned 18 years when he was convicted and sentenced. Therefore the provisions of section 8(7) of the Sexual Offences Act applied to him. That sub section provides –

“Where the person charged with an offence under this Act is below the age of

eighteen years, the court may upon conviction sentenced the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act.”

The trial court did not refer to this provision at all. There is no indication that the trial court was aware of this provision, or whether it considered sentencing the Appellant under either of the two statutes referred to therein.

5. The Appellant was tried and convicted while he was below 18 years old, that is while he was a child. The provisions of section 191 of the Children Act, Cap 141 therefore applied to him. That section 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 recognizance, 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 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, or any or all of them;**
 - 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**
- **in any other lawful manner.**

(2) No child offender shall be subjected to corporal punishment.”

6. It is clear therefore that the discretion donated by section 8 (7) of the Sexual Offences Act has been taken away by section 191 of the Children Act. Where a person has been tried as a child and convicted, he must be sentenced in accordance with section 191 aforesaid. That section does not provide for imprisonment. The sentence of imprisonment imposed upon the Appellant was thus unlawful. It must be set aside. It is unfortunate that he has served more than six years of it.

7. In the result the Appellant’s appeal against sentence is allowed. The sentence of 12 years

imprisonment imposed upon him is hereby set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 2ND DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 3RD DAY OF JULY 2015