



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 145 OF 2015

ALEXANDER MWANAIGHA MWANYESA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 686 of 2013 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 29th April 2014)

JUDGMENT

INTRODUCTION

1. The Appellant, Alexander Mwanaiha Mwanyses, was tried and convicted by E.M. Kadima, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment.

2. The particulars of the charge were as follows :-

“On the 14th day of September 2013 at about 6.00 pm in Taita Taveta County unlawfully and intentionally caused your penis to penetrate the vagina of E M a child aged 12 years.”

3. Being dissatisfied with the said judgment, on 23rd September 2014, the Appellant filed a Mitigation of Appeal which stated inter alia:-

1. THAT he was a first offender.

2. THAT he committed the offence due to lack of knowledge, in that during the arrest, he was underage.

3. THAT he was applying for probation so that he could pursue his education as he was arrested before he sat his KCSE.

4. THAT his sentence was too harsh and excessive in the circumstances.

4. His Amended Grounds of Appeal and his Written Submissions were filed on 16th September 2015. His grounds of appeal could be summarised as shown hereunder:-

1. THAT he was poor and had done the case without the assistance of any lawyer and

knowledge of the consequences of the charges that he was facing.

2. THAT twenty (20) years was too harsh and the court should take into account the suffering he had gone through which had made him drop out of school.

3. THAT his mitigation was due to his total confusion, physically and mentally from what he had gone through (sic).

4. THAT he had committed himself to a rehabilitation programme and now fully understood what was right to other people's lives(sic).

5. THAT he should be put in the hands of a Probation Officer with a view to being given a non-custodial sentence.

5. The State's Written Submissions were filed on 1st October 2015.

6. When the matter came up for the hearing of the appeal on 1st October 2015, both the Appellant and the State highlighted their respective Written Submissions.

LEGAL ANALYSIS

7. As can be seen from his Mitigation of Appeal filed on 23rd September 2014, the Appellant admitted to having committed the offence that he was charged with. No value then would be added in analysing the evidence that was adduced during trial.

8. The State rightly pointed out that the Appellant Grounds of Appeal appeared to have been mitigation grounds. However, in view of the fact that the Appellant did not have any legal representation at this appeal stage, the court deemed it proper to consider the Grounds of Appeal as an appeal against the sentence only for the completeness of the record. It was apparent that the Appellant was seeking a non-custodial sentence as it was his view that the twenty (20) years he was been handed down by the trial magistrate was too harsh.

9. The questions that this court was being asked to consider and determine is whether or not the Appellant having reformed, the fact of his non-representation by counsel during the trial or the fact of him being a student who the family was looking up to, were good reasons to persuade this court to set aside the aforesaid sentence and replace it with a non-custodial sentence and further, whether or not the sentence that was meted on him by the Learned Trial Magistrate was harsh in the circumstances of the case.

10. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

“I have many people who depend on me. My parents need me because I am their only educated son.”

11. The Learned Trial Magistrate then recorded the following:-

“I have considered the mitigation, (sic) the law provides for only one sentence, (sic) the accused is sentenced to imprisonment for 20 years. Right of appeal 14 days explained to the accused.”

12. The child who was defiled was aged twelve (12) years. This court noted that the evidence that was adduced by the Prosecution was overwhelming, consistent and proven beyond reasonable doubt and thus found itself in agreement with the State that in the circumstances of the case herein, the Learned Trial Magistrate could only give one (1) sentence.

13. The sentence for defiling such a child is given in Section 8(3) of the Sexual Offences Act Cap 62A (Laws of Kenya). The same provides as follows:-

“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.”

14. Accordingly, having considered the submissions by the Appellant and the State, the court found it was irrespective that the Appellant was a first offender or that he reformed or that he was not aware of the consequences of the charge when he acted in person or that he was a student and the only source of hope for his family as he had alleged as the said reasons could not be a basis for giving a non-custodial sentence.

15. The court’s hands were tied as the law provides one (1) sentence, a fact that was correctly elucidated by the Learned Trial Magistrate, and that it could not substitute the sentence prescribed by law with another as had been proposed by the Appellant herein.

DISPOSITION

16. As the Appellant’s guilt was unequivocal, having admitted to having committed the offence, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the trial court. The court hereby declines to quash and/or set aside the sentence that was meted upon the Appellant by the trial court as the same was lawful and fitting and instead affirms the said sentence that was imposed on him.

17. The upshot of this court’s judgment, therefore, is that the Appellant’s Appeal filed on 23rd September 2014 was not merited and the same is hereby dismissed.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of October 2015

J. KAMAU

JUDGE

In the presence of:-

Alexander Mwanaiha Mwanyesa..... Appellant

Miss Mukangu for State

Simon Tsehlo– Court Clerk