



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 80 OF 2012

FORMERLY HIGH COURT OF KENYA AT NAIROBI CRIMINAL APPEAL NO. 131 OF 2012

IBRAHIM ABDI HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Ibrahim Abdi Hassan, the appellant, was charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act. It is alleged in the particulars that on 24th July 2010 at Dagahaley Refugee Camp in Lagdera District in the North Eastern Province, intentionally and unlawfully caused his penis to penetrate the vagina of M.Y.I (particulars withheld) a girl aged 13 years.

He was charged with an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. It is alleged that on the same date and place as in the main charge, he indecently assaulted M.Y.I (particulars withheld) a girl aged 13 years by touching her private parts.

The charges were read to the appellant on 9th August 2010 and the translation done in Somali language. He replied as follows:

“It is true. I did not force her. We had agreed and she accepted voluntarily to go with me. I had sex with her once.”

The appellant was convicted on his own plea of guilty and sentence to serve 15 years imprisonment with hard labour on the main charge. He was discharged on the alternative charge.

Petition and submissions

The appellant had prepared a petition of appeal and filed the same on 14th May 2012. In that appeal he had listed two grounds of appeal contesting the sentence as being harsh and excessive and challenging the sentence on its legality.

He however amended the petition with leave of this court and filed amended grounds on 7th November 2013. In the amended appeal, he has listed five grounds which are summarised here below as follows:

- i. That he was prejudiced by the trial court by failing to give him enough time to reflect on the

- charges and the consequences of the plea.
- ii. That the complainant's age was not proved.
 - iii. That he admitted to having married the complainant but not to her being a minor.
 - iv. That the dates of the offence differ in both the charge sheet and the facts.
 - v. That the sentence contravenes Article 25 (a) (b) and (c) of the Constitution.
 - vi. That he was coerced to admit the offence.

The appellant submitted in support of his appeal and pleaded ignorance of Kenyan Law. He submitted that he married the complainant according to their Somali culture and did not know that Kenyan law prohibits this; that there was no evidence to prove that the complainant was a minor and without age assessment the facts given to the trial court do not support the charge.

He submitted that the dates the offence was committed contradict; that while the charge reads that the offence was committed on 24th July 2010 the P3 Form and the facts given in court indicate that the offence was committed on 23rd July 2010.

He further submitted that the sentence is harsh and excessive and offends Article 25 of the constitution.

Submissions by respondent

The learned state counsel has opposed the appeal and submitted that the law bars an appellant from bringing an appeal after a plea of guilty and conviction; that the age of the complainant was assessed as 13 years and that following **Criminal Appeal No 348 of 2010 Fautine Mganga v. Republic [2012] eKLR** and **Keneth Kiplagat Rono v. Republic Criminal Appeal No 666 of 1999** age can be proved by evidence other than documentary evidence.

Counsel further submitted that section 7 of the Penal Code states that ignorance of the law is not an excuse and that the complainant lacked capacity to give consent to the alleged marriage; that the charge sheet is not defective and even if there are any defects, these are curable under section 382 of the Criminal Procedure Code.

On sentence, counsel submitted that the trial court meted out an illegal sentence that offends section 8 (1) read with (3). He urged the court to enhance the sentence in line with section 8(3) of the Sexual Offences Act.

Determination

I have keenly analyzed this matter. I have also considered the authorities relied on by the respondent. The case before the lower court did not proceed to full hearing. The appellant pleaded guilty to the charges and was convicted on own plea of guilty. Section 348 of the Criminal Procedure Code provides that:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

This provision bars the appellant from bringing this appeal insofar as other grounds of appeal save the grounds challenging the extent and legality of the sentence are concerned. Nevertheless, this court finds no merit in the claim that the appellant was not given adequate time to reflect on the charges; that he did not plead guilty to the issue that the complainant is a minor; that the age of the complainant was not proved and that the appellant had been coerced to admit the charges. The charges were read to the appellant in Somali language and his plea and the mitigation clearly demonstrate that he understood the charges. Whether the appellant knew or did not know that the complainant was a minor does not help the appellant at all. A minor under the Kenyan law cannot give consent to marriage or sexual intercourse.

On the issue of differing dates I have noted that the charge states that the offence was committed on 23rd July 2010 while the facts show that the complainant was abducted on 23rd July 2010 and found with the

appellant on 24th July 2010. The matter was reported to the police on 24th July 2010. I take the view that the appellant was not prejudiced at all given that he was with the complainant when her parents found her on 24th July 2010. The P3 Form confirms defilement took place.

Section 8 (3) of the Sexual Offences Act 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.”

The appellant was sentenced to fifteen years with hard labour! The trial magistrate misdirected himself on law and he is wrong. The section does not provide a sentence with hard labour! The sentence imposed is also below the minimum sentence allowed under the above section! The appellant is right in stating that the sentence imposed infringes on his rights. This is so when the hard labour component is taken into account. However, unbeknown to the appellant, the sentence imposed on him is lenient compared to what is provided under the law.

This court has powers to correct the sentencing error and I agree with the learned state counsel on this matter. My view is that this appeal has no merit save on the issue of sentence. The appeal succeeds only to the extent that the sentence imposed by the trial court is hereby set aside. The sentence is hereby substituted with imprisonment for twenty years. The appellant shall serve twenty years imprisonment which shall be calculated from the time he commenced serving the sentence. After completion of the sentence the appellant shall be released to the United High Commission for Refugees (UNHCR) or any organization performing similar functions. I make orders accordingly.

Dated, signed and delivered on this 10th day of February 2014.

S.N.MUTUKU

JUDGE