



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 57 OF 2013

PASHUA BAKARI PASHUA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 380 of 2011 of the Senior Resident Magistrate's Court at Kwale – Hon. Aminga - SRM)

JUDGMENT

PASHUA BAKARI PASHUA hereinafter referred to as the Appellant was Convicted and Sentenced to ten (10) years imprisonment for the offence of indecent act with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006.

The appellant had been charged in the substantive charge with defilement contrary to section 8(1) as read with section 8(3) of the Sexual offences Act.

The matter proceeded to full hearing. The prosecution called five Witnesses.

This appeal is on Sentence only.

A perusal of the records of the lower Court shows that the Complainant was not desirous of proceeding with this matter.

At page 2 line 21 her father did tell the Court that his daughter had gone missing. When she later presented herself before the Court she stated that she did not know her age. This did not go well with the trial magistrate who noted that she was rather rude and indifferent. He further ordered that she be taken for age assessment.

On 5th July, 2011 the Court prosecutor informed the Court that he had obtained an age assessment report which gave the impression that the Complainant was an adult. The prosecutor was of the view that the Complainant was sixteen (16) years old or less and asked for another age assessment and the Complainant was remanded in police custody.

The second age assessment report showed the age of the Complainant as approximately sixteen (16) years old.

Its apparent from the Judgment of the trial magistrate that he did find the issue of age assessment unresolved. At page 1 line 22 he observes,

“As concerns the age which is a critical aspect of the prosecution case on apparent conspiracy to defeat Justice, her age was initially assessed at above eighteen (18) before being ascertained at sixteen (16) years. The Complainant was aged sixteen (16) years in 2011 although he did not have records relating to her birth.....”.

It is because of this anomaly that he proceeded to Convict the appellant on the alternative Count of Indecent act with a child contrary to section 11(1) of the Sexual offences Act.

I have carefully analysed the evidence on record and I do agree with the finding by the learned trial magistrate that the issue of age assessment was not resolved.

The Complainant herself did not want to testify against the appellant and absconded for some time before the police got hold of her. She denied knowledge of her age. I have perused the lower court file and I have noticed that there are two age assessment reports. One is dated 5th July, 2011 and is shown to be from Kwale District Hospital. The other is dated 7th July, 2011 is indicated to be from Msambweni District Hospital.

The first one shows the age as twenty (20) years whereas the later shows the age of the Complainant as sixteen (16) years.

It is however, not indicated who produced them as exhibits. It is noted that the investigating officer in this case was not called to testify. The clinical officer who testified as PW 4 did not touch on the evidence of age assessment.

The list of exhibits also does not show that the two age assessment reports were produced as exhibits.

Section 2 of the children Act defines a child as,

“Any human being under the age of eighteen (18) years”.

The trial magistrate Convicted the appellant in the alternative Count of indecent act with a child. The evidence was contradictory, it was not tested in cross-examination as it was not properly produced in Court. It was not proved whether the Complainant was below the age of eighteen (18) years so as to fall under the term ***“child”***.

The Conviction was therefore not safe. The Conviction is hereby quashed and the Sentence set aside. The appellant is

set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **5th** day of **March, 2014**.

.....

M. MUYA

JUDGE

5TH, MARCH, 2014

In the presence of:-

Learned State Counsel Miss Mutua

The appellant in person present

Court clerk Musundi