



REPUBLIC OF KENYA
IN THE COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 95 OF 2015
M O O APPELLANT
VERSUS
REPUBLIC RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 30.09.2015 in Criminal Case No. 894 of 2015 in Bondo Law Court before Hon. M. Obiero – P.M.)

J U D G M E N T

1. The Appellant **M O O**. faced a charge of **Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 27.8.2015 at around 10.00 hrs at [Particulars Withheld], within Siaya County intentionally caused his penis to penetrate the vagina of C A O. a child aged 8 years. The Appellant also faced an alternative charge of **Committing an Indecent Act with a Child Contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the day, same time, same place intentionally touched the vagina of C A O a child aged 8 year with his penis.

2. That upon the charge being read and explained to the Appellant in Kiswahili language which he understands, the Appellant admitted the charge and the Court entered the plea of guilty. The facts of the case upon being given, the Appellant admitted the facts were true. The Court consequently convicted the Appellant on his own plea of guilty.

3. Aggrieved by both the conviction and sentence the Appellant preferred an appeal through the firm of M/s. Olel, Onyango, Ingutia and Company Advocates, setting out six (6) grounds of appeal being as follows:-

a. The Learned Trial Magistrate erred in law in finding the appellants guilty yet his plea of guilt was not unequivocal.

b. The Learned Trial Magistrate erred in law in convicting the appellant based on a defective charge sheet.

c. The Learned Trial Magistrate erred in law, in convicting the accused persons, yet key ingredients of the charge was not proved by the prosecution as required under the sexual offences Act No. 3 of 2006.

d. The Learned Trial Magistrate erred in law in convicting the appellant based on uncorroborated evidence, which was unreliable.

e. The judgment is contrary to provision of the Criminal Procedure Code and provisions of the Evidence Act.

f. The sentence handed down was excessive in the circumstances of this case.

4. That before the appeal could be heard, the Appellant withdrew instructions from his advocates and prayed that he acts in person. The prayer was granted on 28.11.2016.

5. The Appellant in urging his appeal urged the appeal only against sentence and did not challenge the conviction, he stated that at the time of the commission of the offence he was a minor prompting the Court to order the Appellant to be taken to Siaya County Referral Hospital for the Age assessment. That following the Court's order on Age Assessment for the Appellant the hospital filed age assessment Report for M O O OP/NO. [Particulars Withheld] dated 4th January 2017 by Dr. Cyprian Onegi stating as follows:

“RE: AGE ASSESSMENT FOR M O O OP/NO.[Particulars Withheld]

The bearer is aged 17 years. This is due to the incomplete eruption of the last molars in the oral cavity. Radiological examination shows open apices of all the last molars.”

6. The Court noted the report by Dr. Cyprian Onegi dated 4th January 2017 was indirect conflict with the information given on the back of the trial Courts order of 28.9.2015 in which the trial Court had sought Age Assessment of the Appellant from Bondo District Hospital. At the back of the said order which purported to assess the age of the Appellant, it is recorded as follows:-

“AGE ASSESSMENT

Fully erupted 18,28 46, 58) presence of 17, 27, 37, 47

“Wisdom teeth very present.

Above 18 years (2, 20)

Dated 30.9.2015”

7. Due to the conflicting report on the age of the Appellant as to whether he is a minor or not, the doctors were summoned to give evidence and clarify on the actual age of the Appellant.

8. PW2, John Odhiambo Wadhier, from Bondo Sub-District Dental Clinic, a graduate from The University of Nairobi in 1992, with Bachelor of Science in Dental Surgery, with 25 years experience, testified that he examined the Appellant and assessed his age as requested by the Lower Court. He stated that he examined the Appellant by looking at his mouth, testified the molars erupt when one is 18 years and above. He stated he assessed the age of the Appellant to be 20 years. He urged that it is not possible for the teeth to erupt before one is 18 years. He further, added that not all teeth erupt at 18 years, stating further, the age can certainly be assessed by taking an X-ray.

9. PW3, Dr. Cyprian Onegi, of Siaya County Referral Hospital, a graduate from The University of Nairobi, a Dentist, who graduated with Bachelor of Science in Dental Surgery, with 6 years experience, testified that he examined the Appellant and ascertained that he is now 17 years old due to incomplete eruption of the last Molars in the oral cavity. He also carried out Radiological examination, which showed open apices of all the last molars. He stated on examination of the Appellant, he noted the last molars had not completely erupted. He then send the patient for X-ray to see the level of eruption and upon getting the X-ray Report, he gave the estimated age of the Appellant to be 17 years old. He urged the closing of apices starts from the age of 17 years to 21 years. He stated in the Appellant's case the apices were completely open and had not started closing. As per the X-ray, Report he stated the Appellant's age is 17 years. He added at the age of 18 years the apices would have started to close. He

stated according to his examination of the Appellant, he could not have been 18 years and above. He urged if one would have stated the Appellant was above 18 years, two years ago, he would have been wrong, urging that may be the person, only counted the teeth and failed to take X-ray to confirm the age assessment. He urged incase of teeth extraction, the X-ray would show the socket and in this case he did not note any socket.

10. I have very carefully considered the evidence of PW2 and PW3, as well as the submission by M/s. Odumba, the Learned Counsel, on the age assessment of the Appellant. PW2, it should be noted in his roughly prepared age assessment report, he did not, as he admitted, take any clinical notes, but he stated he used a machine to look into the mouth cavity of the Appellant and further admitted there is no evidence on what machine he used. He did not have any X-ray done on the Appellant. PW3 on his part, he examined the Appellant, had X-ray done on the Appellant, that when he examined the Appellant he found the age of the Appellant, to be 17 years. He further stated if there was any extraction of the molars of the Appellant, that would have been revealed by socket, being seen in the X-ray taken. I therefore find contrary to PW2 assertion, that the appellant could have extracted the molars, to be not supported by any scientific evidence. I find the explanation given by PW3 and the examination carried out on the Appellant, by PW3 to be more reliable, accurate and convincing as regards the status of the eruption of the teeth of the Appellant. I therefore, in view of the evidence adduced by PW3, I find and hold that as of the time of the commission of the offence, the Appellant was below the age of 18 years hence a minor, then and now. The Appellant on being sentenced, he ought to have been treated as a minor and sentenced in accordance with either the provisions of **Section 8 (7) of the Sexual Offences Act or Section 191 of the Children Act.**

11. Section 8 (7) of the Sexual Offences Act provides as follows:-

“Section 8(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act.”

12. Section 191 by the Children Act provides as follows:-

“191. (1) In spite of the provisions of any other law and subject to Methods of dealing this Act, where a child is tried for an offence, and the court is satisfied with offenders. 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 recognisance, 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 a 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

(l) in any other lawful manner.

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

13. The upshot is that the conviction is upheld, sentence set aside and substituted with non-custodial sentence. The Appellant is placed under Probation for a period of 2years, under the supervision of the Probation Office, Siaya County.

DATED AND SIGNED AT SIAYA THIS 12TH DAY OF APRIL 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

Appellant: in person, present

M/S Odumba: for State

J.A. MAKAU

JUDGE