



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & M'INOTI, J.J.A)

CRIMINAL APPEAL NO. 251 OF 2010

BETWEEN

H M F.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Warsame, J.) dated 25th May, 2010

in

H.C. Cr. A. NO. 427 OF 2008)

JUDGMENT OF THE COURT

The appellant was convicted on his own plea of guilty for the offence of ***Defilement of a girl under the age of eleven years*** contrary to **section 8(2)** of the ***Sexual Offences Act*** and sentenced to life imprisonment.

The record of the court shows that there was an interpreter by name ***Halima*** and that after the charge and every element was stated by court to the appellant, the appellant replied in Somali language that the charge was true. The full facts constituting the offence were stated by the prosecutor thus:

“On 21/07/08 at 10.00 am the complainant in this case who is 6 years old was left at home by the mother sleeping on a mattress. The mother went to a nearby shop. The accused who is a cousin went to the house. He got hold of the complainant. He removed the trousers and pants. He put her apart, grabbed her by the neck and covered her mouth. He then defiled her. The complainant cried. Her brother A heard her cries. He rushed to the house. He found the accused person defiling the girl. He asked the accused why he was defiling the girl. The accused slapped the boy. He went and made a report to the mother. The mother took the girl to hospital where a report was also made to the police and the accused was arrested. The P3 filled by the doctor. It shows that the girl was defiled. The accused was later arrested in Wajir district and charged with the offence.”

The appellant is recorded to have answered:

“The facts are true. I defiled the girl. I did not hold her throat as the prosecutor said but I defiled her.”

After conviction the appellant stated in mitigation:

I admit the charge. I am a first offender. I pray that the case be settled in the traditional court system.”

The Senior Principal Magistrate sentenced the appellant to life imprisonment which is the minimum sentence for the offence.

The appellant filed a petition of appeal in the High Court on 9th December, 2008 containing four grounds of appeal namely:

“1. THAT the learned trial magistrate erred in law and fact by convicting and sentencing me to life imprisonment without considering that I did not understand the language used in court English and Swahili.

- 2. THAT the learned trial magistrate erred in law and fact by denying my right, by not serving me with a interpreter.**
- 3. THAT the learned trial magistrate erred in law and facts in failing to find out as to why I pleaded guilty.**
- 4. THAT the learned trial magistrate erred, in law and fact in failing to give due consideration to my mitigation.”**

There is a hand written document in the record of appeal headed

MITIGATION and another hand written document headed **AMMENDED GROUNDS OF APPEAL**. In both documents the appellant reiterates that he pleaded guilty to the offence and prays for forgiveness. There is also another hand written document headed **Submissions** in which the appellant stated:

“...Today I am 16 years. In year 2008 when the incident took place I was 15 years. Therefore I was a minor and I could not understand the consequences of the incident”.

At the hearing of the appeal in the High Court the appellant merely prayed for leniency. The State Counsel **Mrs. Gakobo** opposed the appeal after which the appellant stated:

“The whole thing is true but I pray for leniency.”

The High Court (**Warsame, J. as he then was**) reviewed the circumstances under which the plea was taken and made a finding that the plea was unequivocal because the facts were read in Somali language which is the language properly understood by the appellant. The court concluded that the appellant was properly convicted on his own plea of guilty.

On sentence, the court made a finding that the trial court had no option but to sentence the appellant to life imprisonment which is commensurate to the physical and mental trauma visited upon the complainant who was aged 6 years. In the end the High Court dismissed the appeal both against conviction and sentence.

The appellant filed supplementary grounds of appeal which impugne the conviction and sentence. On the same day, 15th January 2015, he filed an amended supplementary grounds of appeal in which he does not question the conviction but states in grounds 1, 2 and 3 thus:

“1. That, I pray for the age assessment in my respect before the final determination of this appeal.

2. That, the Hon. two courts below did not order for my age assessment before them passing their

judgments upon me thus, rendering a prejudice.

3. That, during the material date and time of the crime in question, I was a very young man aged below 18 years and thus therefore, there was a need for the trial court to comply with the provisions of the law under section 8(7) of the Sexual Offences Act No. 3 of 2006 for the interest of natural justice.”

Section 8(7) of the Sexual Offences Act referred by the appellant provides:

“Where a 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.”

At the hearing of the appeal, the appellant relied on the amended supplementary grounds of appeal. He submitted that he was 16 years old at the time of commission of the offence and that his age should have been assessed. He asked that his age be assessed.

On her part **Mrs. Murungi** the learned Senior Assistant Deputy Prosecution Counsel submitted that as the issue of age was raised in the appellant’s submissions in the High Court and has also been raised in this Court, the Court can suspend the sentence and order the assessment of age. She further stated that if that is not possible, then she would concede the appeal and ask that the appeal be remitted to High Court for re-hearing.

It is clear that the appellant pleaded guilty to the offence before the subordinate court and continued to admit the commission of the offence in the High Court. That being the case, by virtue of section 348 of the Criminal Procedure Code, (**Code**) the High Court could not allow the appeal against conviction except as to the extent or legality of the sentence.

As **section 350(1)** of the Code indicates, where the appeal to the High Court is against the severity or legality of the sentence, the appellant is required to set out the grounds of appeal in the petition. As **section 350(2)** provides, an appellant shall not be permitted at the hearing of the appeal to rely on a ground of appeal other than those set out in the petition of appeal. There are exceptions to that rule which do not apply in this case. Further, by section 358(1), in dealing with the appeal from the subordinate court, the High Court has power to take additional evidence if it thinks that additional evidence is necessary.

As **section 361(1)** of the Act provides, a second appeal to this Court is considered on a matter of law. The Court is prohibited from hearing an appeal on a matter of fact including severity of sentence except where the sentence has been enhanced by the High Court unless the subordinate court has no power under section 7 of the Code to pass the sentence. By section 7(1) (a), the Senior Principle Magistrate has power to pass any sentence authorized by law for any offence triable by that court.

The power of the Court on any appeal is spelt out by section 361(2) thus:

“On any such appeal, the court may if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on ground of a wrong decision on a question of law, make any order which the subordinate court would have made, or may remit the case together with its judgment or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such direction as the court of appeal may think necessary”

(emphasis added).

By Rule 29 of the Court of Appeal Rules, the Court has power to take additional evidence in its discretion on an appeal from the decision of the superior court in exercise of its original jurisdiction.

This appeal is essentially against the legality of sentence as the appellant states that he was a young person aged below 18 years. He states that the two courts below should have ordered for the assessment of his age and requests for such age assessment. If he was indeed aged below 18 years, the sentence of imprisonment would be illegal as section 190(1) of the Children's Act provides that no child shall be ordered to imprisonment or to be placed in a detention camp. But if he was over 18 years of age at the time of conviction, then the appeal against sentence would be incompetent as the Senior Principle Magistrate had power to pass a sentence of life imprisonment.

The age of the appellant at the time of conviction is a matter of fact. The appellant, although provided with a Somali interpreter, did not raise the issue of age at the trial. If the age of the appellant appeared to be below 18 years, it is doubtful that a high ranking magistrate who dealt with the trial could have failed to notice so and order the assessment of age. It is also doubtful that the officer in charge of prison would have admitted him to prison.

The appellant did not raise the issue of age in his petition or in the amended grounds of appeal as required by law. He did not also raise the issue of age in his written and oral submissions. It is only in a handwritten mitigation where he raised the issue of age. The High Court was not entitled to consider a ground of appeal which was not raised in the petition. The High Court had power to take additional evidence regarding the age of the appellant, if it thought that additional evidence was necessary. The appeal was heard by a Senior Judge. If it was apparent to the High Court that the appellant was below the age of 18 years it would have taken additional evidence on its own volition. The request by the appellant and by the learned State Counsel that the Court orders the age assessment of the appellant is tantamount to taking additional evidence. As this was not a first appeal from the decision of the High Court in exercise of original jurisdiction, the Court has no power to take additional evidence under Rule 29 aforesaid. Furthermore, since the age of the appellant had not been ascertained to have been below 18 years at the time of conviction, the High Court cannot be said to have reached a wrong decision on a question of law and the Court has no power under section 361(2) to remit the case to either the subordinate court or to the High Court as the learned State Counsel requests. In a nutshell, the law does not sanction the taking of the actions suggested by the appellant and the learned State Counsel.

The appellant has raised the issue of age too late in the day. Since the age of the appellant had not been determined to have been below eighteen years at the time of conviction, the sentence of imprisonment was legal. As section 382 of the Code provides, even if the failure by the trial court or the High Court to order the age assessment can be considered as omission or irregularity, the findings of the High Court cannot be altered unless such omission or irregularity has occasioned a failure of justice.

The issue of age assessment could have been raised at the earliest opportunity at the trial or in the High Court and the omission or irregularity, if any, could not therefore, have occasioned a failure of justice.

Lastly, as section 361 (5) provides, the Court may, notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has been occasioned. The appellant committed a serious offence. He is an adult. We do not think that failure by the two courts below to order age assessment has occasioned substantial miscarriage of justice.

For those reasons, the appeal is dismissed.

Dated and delivered at Nairobi this 3rd day of July, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR