



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 28 OF 2012

BETWEEN

GEDION MASERA COSMOS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal against the judgment of the High Court of Kenya at Malindi (Meoli, J.)*

*dated 15<sup>th</sup> February, 2012*

in

H.C.Cr. A. No. 127 of 2010)

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JUDGMENT OF THE COURT

[1] **Gedion Masera Cosmos** who is the appellant before us was tried before the Resident Magistrate's Court at Garsen for the offence of defilement of a girl contrary **to Section 8(3)** of the Sexual Offences Act (No. 3 of 2006). He was alleged to have defiled one PTB a girl aged 15 years. He was convicted of the offence of defilement "*contrary to section 8(1) as read with section 8(3) of the Sexual*", and sentenced to serve 20 years imprisonment. His appeal to the High Court against conviction and sentence was dismissed by **Meoli J.**

[2] The appellant has now lodged a further appeal to this court. In his original memorandum of appeal he raised five grounds to which he later added five supplementary grounds of appeal. In addition the appellant filed written submissions which he fully relied upon during the hearing of the appeal. In brief, the appellant argued firstly, that the two lower courts erred in their findings as the charge preferred against him was fatally defective there having been no reference in the charge to **Section 8(1)** of the Sexual Offences Act which creates the offence alleged against him. Secondly that the age of the PTB having been established to be 15 years, the appellant ought to have been tried under **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act under which the minimum sentence was 15 years as opposed to the minimum sentence of twenty years provided under **Section 8(3)** of the Sexual Offences Act.

[3] Thirdly, the appellant argued that the two lower courts failed to take into account **Section 8(7)** of the

Sexual offences Act as read together with **Section 73 (b)** of the Children's Act 2001, in that the evidence concerning the appellant's age was not considered with the result that the trial court did not consider sentencing the appellant under the provisions of the Borstal Institutions Act and the Children's Act 2001. Further, the appellant maintained that although medical evidence was adduced to confirm the presence of spermatozoa in the PTB's vagina, there was no scientific evidence such as DNA to establish the origin of the spermatozoa or to link the appellant with the spermatozoa. Finally, the appellant contended that the evidence adduced in support of the charge was not sufficient to prove the charge and that his defence which remained unchallenged was not considered.

[4] **Mr. Wohoro** Senior Assistant Deputy Public Prosecutor who responded to the appeal on behalf of the state opposed the appeal against both conviction and sentence. He maintained that the evidence adduced by the prosecution confirmed that the PTB was 15 years of age and that there was spermatozoa found in her genitalia, and this was sufficient to prove the charge as the DNA testing was not necessary. Mr. Wohoro conceded that although the sentence imposed of 20 years was the minimum mandatory sentence, the court's discretion should not have been taken away by the Sexual Offences Act. He further conceded that the assessment of the appellant's age at 18 years having been made two months after the commission of the offence, was vague, and the court ought to have given the appellant the benefit of doubt and considered a sentence under the Borstal Institution Act.

[5] This being a second appeal, our jurisdiction is under **Section 361** of the Criminal Procedure Code limited to considering issues of law only. The appellant questioned the propriety of the charge against him, and this is no doubt an issue of law. It is clear from the charge sheet that the appellant was charged under **Section 8(3)** of the Sexual Offences Act and that there was no mention of **Section 8(1)** of the Sexual Offences Act in the charge sheet. We note that both the High Court and the trial court took note of the fact that **Section 8(1)** of the Sexual Offences Act though not included in the charge was relevant to the charge against the appellant. The learned High Court judge exhaustively addressed this issue as follows:

*" The statement of the offence should also have included the section that created the offence namely, section 8(1) of the Sexual offences Act. The trial magistrate was seemingly alive to this omission and in his judgment carefully entered a conviction for defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The question is whether the appellant was prejudiced by the error in the charge sheet. The purpose of a charge is to provide the accused with information on the charge facing him. From the proceedings, the appellant was well aware of the charges facing him...hence the appellant had full information of the charge and was not in my view prejudiced at all by the error in the charge sheet. "*

[6] We fully concur with the learned judge that there was no prejudice caused to the appellant by the apparent omission of **Section 8(1)** as the appellant was well aware of the charge facing him. The error arising from the omission to include **Section 8(1)** in the charge sheet was not fatal but was a curable omission under **Section 382** of the Criminal Procedure Code. Nothing therefore turns on this ground.

[7] As regards the evidence, the record of appeal reveals that the learned judge properly re-evaluated the evidence and came to her own independent conclusion. In our view the conclusions of the learned judge cannot be faulted. The evidence adduced against the appellant was overwhelmingly in support of the concurrent findings of the two lower courts that sexual intercourse did take place between the appellant and PTB. Indeed, this was a consensual sexual encounter between two teenagers who were lovers. The issue of DNA testing to confirm the origin of the spermatozoa found on the PTB's genitalia did not arise as there was ample evidence to confirm the identity of the culprit. Unfortunately for the appellant he chose a girl who was underage and therefore her consent cannot absolve the appellant from liability. The appellant's contention that he ought to have been charged under **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act cannot hold as such a charge would only apply where the complainant is between sixteen and eighteen years old. In this case, there was ample evidence regarding the PTB's age from her father and the age assessment by the clinical officer which confirmed that PTB was fifteen years old, thus the clinical ingredients of the charge were not established.

[8] Of concern to us, is the issue of the age of the appellant which does not appear to have been properly

addressed. On the 3<sup>rd</sup> August 2010, following a guilty plea that was preferred by the appellant (but which was later retracted), the trial magistrate directed that the appellant who claimed to be seventeen years old be escorted to Malindi Hospital for age assessment. On 6<sup>th</sup> August 2010, the appellant appeared in court where the magistrate recorded that he had noted the age assessment report which says the accused is eighteen years old. This report was not part of the record of appeal that was availed to us. That notwithstanding, we find that the age assessment as noted by the trial magistrate was rather vague as it left a doubt as to whether the appellant was exactly eighteen years or some days or weeks shy of eighteen years, or well over eighteen years. Since the report was not produced in court by a medical officer, this issue was not addressed. The accuracy in the age of the appellant was a crucial issue as it determined whether the appellant was a minor, subject to the special proceedings under the Children's Act (**Chapter 141**), and eligible to the benefit of **Section 190 and 191** of the Children's Act in sentencing. This means that there is a possibility that the hands of the learned magistrate may not, as he thought, have been tied to imposing the minimum sentence of twenty years. With this doubt, it would be unfair and unjust to uphold the minimum sentence of 20 years imposed on the appellant on 29<sup>th</sup> October 2010, under **Section 8(3)** of the Sexual Offences Act. In the circumstances of this case, the appropriate sentence for the appellant ought to have been committal to a Borstal Institution, however, we realize that the appellant is now over twenty years old and therefore such an order would not be appropriate. Moreover, the appellant has already served about three and a half years imprisonment. In the circumstances, the order which commends itself to us is an order of unconditional discharge under **Section 35(1)** of the Penal Code as read with **Section 191** (a) of the Children's Act.

[9] We note that under **Section 8(3)** of the Sexual offences Act a sentence of twenty years is provided as the minimum sentence. The wording of the section leaves no doubt that the legislature deliberately limited the discretion of the court in sentencing. Sentencing is a judicial function and it is arguable whether the legislature has the powers to limit the discretion of the court in sentencing. We do not however find it necessary to delve into this debate in this judgment. as we have found that **Section 8(3)** of the Sexual Offences Act may not have been applicable to the appellant.

[10] The upshot of the above is that we find no substance in the appellant's appeal against conviction and dismiss the same. We allow the appeal against sentence to the extent of setting aside the term of imprisonment of twenty years and substituting thereof an order unconditionally discharging the appellant under **Section 35(1)** of the Penal Code. The appellant shall therefore be released forthwith unless otherwise lawfully held.

***Dated and delivered at Malindi this 16<sup>th</sup> day of July, 2014.***

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**