



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, AZANGALALA, KANTAI JJ.A)

CRIMINAL APPEAL NO. 243 OF 2012

BETWEEN

P O M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at

Kakamega (Kimaru, J.) dated 21st June, 2012

in

H.C.C.A. No. 11 of 2010)

JUDGMENT OF THE COURT

The appellant was convicted by the Resident Magistrate, Butere of **Defilement of a Child** contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act - No. 3 of 2006** and sentenced to 30 years imprisonment. The particulars of the charge stated that he unlawfully had carnal knowledge of **A A** a girl aged 14 years.

It is not necessary to narrate the evidence adduced against the appellant at the trial because the appeal both in the High Court and in this Court is against the sentence only. It is sufficient to say that the appellant who is HIV positive and whose wife had died defiled the complainant who was a primary school pupil.

The appellant appealed to the High Court against the sentence. The High Court appreciated that **section 8(3)** of the Sexual Offences Act prescribed a minimum sentence of twenty years for a person who defiles a child aged between 12 and 15 years. However, the High Court considered that the trial magistrate did not take into account the fact that the appellant was a first offender and reduced the sentence to the statutory minimum of 20 years imprisonment.

By a memorandum of appeal filed on 24th July 2012, the appellant appealed to this Court against conviction and sentence. However on the hearing date of the appeal, the appellant filed a supplementary

memorandum of appeal appealing only against the sentence of 20 years imprisonment. When the appeal was called for hearing the appellant withdrew the original memorandum of appeal with the leave of the Court. He also withdrew ground (iii) of the supplementary memorandum of appeal which stated:

"On age assessment from the doctor's report....said the girl was 13-16 years whereby the magistrate did not know the exact figure of years of the girl since there was no birth certificate produced in court as evidence and also a letter from the school headmaster to show in court. The magistrate did not ask for the 2 things (birth certificate to clarify the age of the girl and a letter from headmaster of the school to prove that the girl was a student)".

Thus the appellant withdrew the ground relating to the proof of age of the complainant and relied on the general ground that the sentence was manifestly harsh.

However, **Mr. Abele** the learned State Counsel referred to the evidence of **Robert Wanyonyi**, the Clinical Officer who examined the child and who indicated the age of the child as between 13 and 16 years, and submitted that where the age is not clear, the uncertainty should be resolved in favour of an appellant. He further submitted that if the age is interpreted in favour of the appellant, the victim would fall under the age category in S.8(4) of the Sexual Offences Act of between the age of 16 and 18 years where the prescribed minimum sentence is 15 years.

We agree with Mr. Abele that where the court is satisfied that the offence of defilement has been committed (that is, where it is proved that the victim was below the age of 18 years), but the court entertains doubt whether or not the victim falls within any of the stipulated age brackets, in S.8(2), 8(3) and 8(4) of the Sexual Offences Act respectively, both the High Court and this Court has power to pass a sentence which is favourable to the appellant and which corresponds with the apparent age of the victim.

In **Tumaini Maasai Mwanva v. Republic - Criminal Appeal No. 364 of 2010 (Mombasa)** this Court said in part:

"In case of doubt about the categorization of age, the High Court on first appeal has power under section 354(3) (a) (of Criminal Procedure Code) to alter the finding and reduce the sentence in favour of the offender to correspond with the apparent age of the victim.

Similarly, on second appeal, the Court has power under section 361(2) to make an order including passing the appropriate sentence which the subordinate court should have made. An appellate court should follow that course particularly where it considers that no substantial injustice will be caused to the appellant".

It is true that Mr. Robert Wanyonyi - the Clinical Officer formed the opinion that the victim was between 12 and 16 years of age. He nevertheless filled the police Medical Examination Report (P3 form) indicating that the estimated age of the victim was 14 years. **Douglas Maonga**, another Clinical Officer formed the opinion that the victim was 14 years old. The victim testified that she was 14 years old. The trial magistrate made a finding that the victim was 14 years old. The Sexual Offences Act adopts the definition of a child in the Children's Act and by s. 2 of the Children Act "age" is defined:

"where actual age is not known means the apparent age".

So the actual age does not have to be proved. It is sufficient if the apparent age is proved. In this case there was overwhelming evidence that the apparent age of the victim was 14 years.

Furthermore, the appellant was convicted of defilement of a girl aged 14 years. The appeal is not against conviction and the appellant has withdrawn the ground of appeal relating to the proof of age of the victim. Thus there is no basis for altering the age category of the victim.

Even if the age category in s.8(4) applied, the sentence of 20 years imprisonment passed under age

category in s. 8(3) would still be legal because the sentence of 15 years imprisonment under the category in s.8(4) is the minimum sentence. The Court has the discretion to pass the sentence of more than 15 years imprisonment.

Ultimately the appellant's appeal is against the severity of sentence and not against the legality of the sentence. Under section 361(1) (a) of the Criminal Procedure Code, this Court has no power to entertain an appeal against the severity of the sentence.

For those reasons, the appeal is dismissed as incompetent.

Dated at Kisumu this 23rd day of October 2014

EM GITHINJI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

SANKALE ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR