



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJA)

CRIMINAL APPEAL NO. 535 OF 2010

BETWEEN

TUVU MUTISYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J) dated 14th June, 2010

In

H.C.CRA. No. 10 of 20078)

JUDGMENT OF THE COURT

The appellant pleaded guilty to the charge of defilement contrary to section 8(1) of the Sexual Offences Act, No. 3 of 2006 before Senior Resident Magistrate Kitui and was sentenced to 15 years imprisonment. He appealed to the High Court sitting at Machakos against the sentence contending that the sentence prescribed by section 145 (1) of the penal code was a maximum of 14 years imprisonment and that the sentence was harsh and manifestly excessive.

At the hearing of the appeal, the state counsel asked the superior court to enhance the sentence saying that the sentence imposed was illegal as the prescribed sentence was 20 years imprisonment. The appellant there upon applied to withdraw the appeal but the application was rejected on the ground that the sentence imposed by the trial court was illegal and that the superior court had a duty to correct the error. The superior court ultimately set aside the sentence of 15 years imprisonment and in substitution imposed a sentence of 20 years imprisonment.

The appellant now appeals against the sentence contending that the superior court erred in law in enhancing the sentence.

The particulars of the charge stated that the appellant had unlawful sexual intercourse with N.M, a girl aged 14 years. The facts which the appellant admitted were among other things, that the complainant who was aged 14 years old was on her way home from a shopping centre on the material date; that the appellant who was behind her hastened his steps and caught up with her; that the appellant pulled her to the bush, threatened her that he would kill her if she screamed and forcibly had unlawful sexual intercourse with her and that the complainant's hymen was broken. The Medical Examination Report indicated among other things that the estimated age of the complainant was 14 years and that her hymen

was broken.

The appellant was specifically charged with defilement contrary to section 8 (1) (3) of the Sexual Offences Act (Act). According to the charge the offence was committed on 3rd July 2007. The appellant was properly charged under the Sexual Offences Act as the date of commencement of the Act was 21st July 2006 and thus the offence was committed long after the commencement of the Act.

Section 8(3) of the Act provides:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

Since the complainant was aged 14 years the sentence of 15 years imprisonment was illegal. The appeal in the superior court was against sentence. The superior court had jurisdiction in such an appeal by virtue of Section 354 (3) (b) of Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence.

Furthermore, once the illegal sentence passed by the subordinate court came to the knowledge of the superior court either through the proceedings or through the state counsel the superior court could by virtue of Section 364 (1) (9) of the Criminal Procedure Code invoke its revisionary jurisdiction and enhance the sentence.

In the result we find no merit in the appeal and it is accordingly dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 14th DAY OF October, 2011

E. M. GITHINJI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR