REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 267 of 2008

M.K.K…… ..... APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Njagi, J) dated 30th October, 2008

in

H. C. CR. A. NO. 67 OF 2004
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JUDGMENT OF THE COURT

Mwalewa Kiboya Kalu, the appellant, was charged, tried and convicted upon trial for the main count of defilement of a girl under the age of 16 years contrary to *section 145 (1)* of the Penal Code, and was thereafter sentenced to 15 years imprisonment with hard labour. No finding was made on the alternative charge of indecent assault of a girl contrary to *section 144 (1)* of the Penal Code.

The complainant was U.W, a standard 7 girl aged 17 years. Before she testified the trial Magistrate, L. M. Mbatia, SRM, conducted a *voir dire* examination of her after which he formed the opinion that she possessed sufficient intelligence and that she understood "the importance of speaking the truth." He therefore directed that she be sworn before giving her evidence.

We pause there to consider when it is necessary to conduct a *voir dire* examination in a case where the court is called upon to receive the evidence of children. The trial Magistrate in the matter before us appears to have been of the view that any person who has not attained the age of majority is a child in respect of whom the court has to satisfy itself, firstly that he or she understands the meaning of an oath; secondly, if not, then whether he or she is possessed of sufficient intelligence to be allowed to testify either on oath or otherwise. As a general rule a *voir dire* examination becomes necessary in a case where a child or children are of tender age; children who may not, prima facie, understand the significance of an oath. It is the duty of the court, after observing the child, to decide whether the child, either understands the meaning of an oath in which case he may be sworn before testifying, but if not, whether she possesses reasonable intelligence to be allowed to testify. (*see Oloo s/o Gai vs. R. [1960] EA. 86, at p. 88).*

In the case before us, U.W, was about 17 years of age. She was in standard 7, and she believed she had reached the age of marriage, as we shall shortly show. In the circumstances of this case a *voir dire* examination was not necessary. Besides, the trial magistrate did not follow the correct procedure as set out, above.

The prosecution case, as can be gleaned from the evidence on record was short and straight forward. The appellant and the complainant were related by marriage. The complainant was the appellant's sister-in-law, the later having married the former's elder sister. The appellant's said wife died

leaving behind an infant child. The appellant is said to have approached the complainant and enticed her to have sexual intercourse with him with a promise that he would later marry her for her to bring up the sister's child. He also promised her that he would in addition give her a house in Likoni area of Mombasa which he said belonged to that child. The two had sexual intercourse on several instances. As a result the complainant conceived. The complainant later named the appellant as the person responsible for the pregnancy.

In her testimony the complainant's mother, M.W, stated that she confronted the appellant who admitted that he was responsible for the pregnancy. His explanation was that the devil had cheated him.

The appellant was at the material time a Baptist Pastor attached to B Baptist Church. In his defence he admitted he had sexual intercourse with the complainant and that he was responsible for the pregnancy she had. It was however, his case that the sexual intercourse was consensual, and that the two had agreed to get married. The complainant's mother did not however, think such a marriage was permissible under their custom as the complainant was the sister of the appellant's deceased wife.

The trial Magistrate, quite properly, held that the consent of the complainant to have sexual intercourse with the appellant was not a defence to a defilement charge. The superior court (Njagi, J) on first appeal, affirmed that holding and itself, said that the consent of a complainant in a defilement charge is immaterial if the evidence shows that she is under the age of 16 years.

It is noteworthy that in his petition of appeal to the superior court the appellant challenged his conviction on, amongst other grounds, that he had not voluntarily admitted having had sexual intercourse with the complainant but that he was cajoled to do so. In his memorandum of appeal, too, he appears to challenge the propriety of his conviction, on, among other grounds, that the evidence presented to the trial court was not sufficient to sustain his conviction for the charge of defilement of a girl under the age of 16 years. That notwithstanding, when this appeal came before us for hearing, the appellant indicated that he had filed a document which he has titled as "Mitigation Appeal" and he did not wish to say anything more. The document was filed about a week before the date the appeal came for hearing. As material, the appellant states therein, as follows:

"Your Lords it is clearly evident from the evidence of the complainant that I had not forced her into what transpired ....

Your Lords having been under this sentence for almost 7 years, I came to learn my mistake and am very remorseful. Your Lordship I also wish to inform you that I have not only learned my mistake but also attained grade iii in tailoring and 1 in carpentry. In addition to the technical skills my Lords I have completed several courses in theological studies and also attained certificates in short I have seen the light.

Your Lordships, I can assure you that all those years I have been but in good use of self-examination and analysis and only one word have come out of that examination – "TRANSFORMATION" ... I am begging for a second chance."

The appellant then went on to beg for a second chance arguing that he was the sole breadwinner of his family, and that he would like to put into full use the skills he had acquired in prison. The effect of the appellant's action is that he had abandoned his appeal against conviction and was pursuing an appeal against sentence only.

This is a second appeal. *Section 361 (1)* of the Criminal Procedure Code, as far as is material, provides as follows:

"361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a)on a matter of fact, and severity of sentence is a matter of fact; or

(b)against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

We have no doubt that the sentence of 15 years imprisonment imposed on the appellant is a lawful sentence. It may appear to be high. However, on a second appeal this Court has no jurisdiction to interfere with a sentence however high it may appear if it is a lawful sentence. While we sympathize with the

appellant, our hands are tied, and all we can do is to sympathize with him. He should however, be grateful that his imprisonment has not been in vain. He has learnt some trades and has through introspection become a better person spiritually.

All in all, we are of the view that the appellant's appeal is not based on any point of law, and for the reasons we have given it lacks merit. Accordingly we order that it be and it is hereby dismissed.

Dated and delivered at Mombasa this 22nd day of January 2010.

J. E. GICHERU
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CHIEF JUSTICE

S. E. O. BOSIRE
……..……..
JUDGE OF APPEAL

J. G. NYAMU
…….
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR