IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 33 of 2008

CHARLES KAHIRO NG'ANG'A …….. APPELLANT

AND

REPUBLIC …….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J.) dated 14th February, 2008

in

H.C.CR.A. NO. 18 of 2007)

****

JUDGMENT OF THE COURT

Charles Kahiro Ng'ang'a, the appellant herein, was tried and convicted by a Principal Magistrate at Nakuru on a charge of defilement of a girl under the age of sixteen years contrary to the then **Section 145 (1)** of the Penal Code. The particulars contained in that charge were that on 16th October, 2003 at Mbaruk Estate in Nakuru District of the Rift Valley Province, the appellant unlawfully had carnal knowledge of GW K, a girl under the age of sixteen years. There were two other charges but it appears the appellant was acquitted on them. Upon his conviction on the defilement charge, the magistrate sentenced him to fourteen years imprisonment. He appealed to the High Court against the conviction and sentence but that court (Kimaru, J.) by its judgment dated 8th February, 2008 dismissed the appeal against the conviction and confirmed the sentence of fourteen years.

The appellant now comes to this Court by way of a second appeal and that being the position, the Court can only deal with issues of law - see **Section 361 (1)** of the Criminal Procedure Code which provides that:

"**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".

So that the parameters within which the Court of Appeal is entitled to hear a second appeal such as the

current one are well prescribed by the section. One cannot appeal to the Court of Appeal on a question of fact; if the issue be, for example, whether a witness "A" saw an accused person during the commission of an offence and the subordinate court has held that "A" saw the accused person and that holding is confirmed by the High Court on an appeal to it, one would not be entitled to appeal for a second time to the Court of Appeal by saying:

"**The two courts below erred by holding that witness "A" had seen the accused person during the commission of the offence".**

That would be appealing to the Court of Appeal on a question of fact which is not allowed under **Section 361**. Nor can one appeal to the Court of Appeal on the ground that the sentence imposed by the magistrate and confirmed by the High Court is too severe; that is not allowed by the section authorizing second appeals. As regards sentence, one can only appeal to the Court of Appeal where one alleges that the sentence imposed by the subordinate court and confirmed by the High Court is illegal, for example on the ground that the subordinate court did not have jurisdiction to impose it and the High Court wrongly confirmed it. So in the appeal before us, we must confine our consideration only to issues of law.

The first issue of law raised before us by Mr. Kurgat, learned counsel for the appellant, was the age of the appellant at the time of the offence charged against the appellant. As we have seen, the particulars contained in the charge sheet were that GW K, the victim of the defilement, was a girl under the age of sixteen years. Upto the year 2002, the section dealing with defilement, i.e. **Section 145 (1)** Penal Code, provided that the age of the victim of defilement had to be under fourteen years. But by *Act No. 5 of 2003*, namely, the Criminal Law (Amendment) Act, Parliament raised the age limit to be under sixteen years. The *Sexual Offences Act of 2006* repealed this section, amongst other sections, but that is not relevant for our purposes in this appeal. Mr. Kurgat submitted that the evidence regarding the age of G was uncertain. When cross-examined, G herself said she was sixteen years and she gave her date of birth as November, 1988. The offence against her was committed on 16th October, 2003 and if her evidence that she was born in November 1988 was correct it would mean that her age at the time of the offence was fifteen years.

But according to MWK (PW2), the mother of G, G was 16 years old though when cross-examined she said G was born "*in Ravine in 1986 or thereabout, I cannot recall the year"*. If it were to be accepted that G was born in 1986, then at the time of the commission of the offence in 2003, her age would have been seventeen years, which would have taken her outside the provisions of **Section 145 (1)** Penal Code. Mr. Kurgat submitted the charge of defilement was, therefore, not sustainable.

We appreciate the force of Mr. Kurgat's argument, but we think it is not borne out by the evidence. MWK was obviously not certain as to the actual year when Gwas born. In examination in chief, she stated as follows:

"**I know G W. She is my daughter. She is 16 years old. She was born in a year I cannot recall. She was in Standard 7 at E Primary School ……".**

The statement in cross-examination mentioned the year 1986 but was immediately qualified by the phrase "*…… or thereabout, I cannot recall the year"*.

So that it is incorrect to say MWK was positively asserting that her daughter was born in 1986; she was not sure of the year of her birth, but was certain that the daughter was sixteen years old.

But the prosecution did not leave the issue of G's age to G herself and the mother. The prosecution called Dr. Riro Muira (PW4) and having introduced himself, the Doctor's first sentence was "*I examined 16 year old G W K sent to me from Nakuru Police Station ……"*. Dr. Muira examined G on 18th June, 2004, some eight months after the alleged defilement. The examination could not, therefore, have been on the issue of whether Ghad in fact been defiled; no useful purpose would have been served by such an examination. In the words of Dr. Muira his brief:

"…… **was to examine her and also determine the age of the pregnancy".**

Dr. Muira found her to be sixteen years old and the age of her pregnancy was thirty-two weeks which would take the time when she became pregnant back to the time she said she had a sexual encounter with the appellant, i.e. 16th October, 2003.

On the issue of the age of G, which is a question of fact, there was evidence from G herself, her mother and Dr. Muira upon which the two courts below were entitled to come to the conclusion that she was under the age of sixteen years by 16th October, 2003. It would be wrong and unreasonable of us to now come to the conclusion that the evidence was of such a nature that no reasonable tribunal, properly directing itself, could have believed it. The evidence was clearly believable and there is no basis for our interfering with the conclusions of the two courts below on that aspect of the matter. Mr. Kurgat's contention that it was not proved that G was a girl under the age of sixteen years must accordingly fail.

The second issue of law raised by Mr. Kurgat was that the evidence of G was not corroborated. On the issue of whether G had had a sexual encounter, her evidence was corroborated by her pregnancy and the actual birth of a baby girl who would appear to have been shown to the magistrate as an exhibit. She could not have gotten the baby without a sexual encounter.

As to who had made her pregnant, she herself said it was the appellant. Of course, her story that the appellant had forcefully had sexual intercourse with her was hard to believe. She kept quiet about the whole thing until her pregnancy could no longer be hidden and even then she only revealed the name of the appellant under severe pressure from her mother and her brother Ammon Kamau Karanja (PW5). The appellant was their neighbour and operated a kiosk selling the kind of foodstuff, young people like G would be attracted to. On 11th November, 2004 when a new charge sheet was substituted and read out to the appellant, his answer to the charge was:

"**It is not true. She was my friend".**

Like the two courts below, we are satisfied the appellant and G had a sexual encounter on 16th October, 2003 as a result of which G became pregnant but unlike the two courts below, we think the sexual encounter was consensual and hence the appellant's unsolicited answer "*she was my friend"*.

That could not be a valid answer to a charge of defilement because the complainant, being under the age of sixteen years, could not legally consent to such an act. Taking into account all the circumstances, we are satisfied the appellant was rightly convicted on the charge of defilement and his appeal against the conviction must fail. The sentence imposed on him was lawful. The appeal fails in its entirety and we order that it be and is hereby dismissed.

Dated and delivered at Nakuru this 6th day of March, 2009.

J. E. GICHERU

……

CHIEF JUSTICE

R. S. C. OMOLO

……

JUDGE OF APPEAL

E. M. GITHINJI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR