



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 198 OF 2006

CLINTON OMONDI OKWANY APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Warsame J) dated 26th July, 2006

in

H.C.CR.A. NO. 242 OF 2005)

JUDGMENT OF THE COURT

The appellant, *Clinton Omondi Okwany*, was convicted on his own plea of guilty to a charge of defilement of a girl under the age of 16 years contrary to *section 145 (1)* of the Penal Code.

The facts as narrated before the learned Principal Magistrate Kisumu (K. W. Kiarie, Esq.) on 23rd June, 2005 were as follows:

On the 21st June, 2005 at about 7.30 p.m. the complainant alighted at Kisumu bus stage from Suba District. The complainant, a young girl aged 12 years old, was looking for her brother and in the process met the appellant and a colleague who offered to take her to [*particulars withheld*] Estate to where her brother was. Instead of the two taking the young girl to her brother they took her to their house where they defiled her in turns until the following morning. The following day they took her to the bus stage where they abandoned her. She, however, managed to trace her brother to whom she reported what had befallen her. The matter was reported to the police who took her to the hospital. Investigations commenced leading to the arrest of the appellant who was subsequently jointly charged with his colleague. The appellant's co-accused however died before his appeal could be heard by High Court.

The appellant admitted the facts as true and correct. He was accordingly convicted. In sentencing the appellant, the learned Principal Magistrate stated:

“I have considered each accused is a first offender. The offence committed on the young girl was horrendous. Even animals know better than this. This court has a duty to protect the girl child from amorous men of the ilk of the accused persons. The offence carries a penalty of life imprisonment

with hard labour.

I therefore sentence each to serve twenty-five (25) years imprisonment with hard labour”.

Being dissatisfied by that sentence of 25 years imprisonment, the appellant opted to exercise his right of appeal to the High Court. His appeal came up before Warsame J. on 26th July, 2006 when the appellant addressed the superior court as follows:

“I ask the court to assist me as this is my first offence. I am a first offender.

I committed the offence while I was drunk”.

The learned Judge considered the appeal before him and came to the conclusion that he had no reason to interfere with the sentence imposed by the subordinate court. He accordingly dismissed the appellant’s appeal before that court. In dismissing the appellant’s appeal, the learned Judge said:

“The appellant has not offered any reasons to enable me interfere with the valid and legal sentence imposed by the trial court. The appellant took advantage of a small girl who apparently lost her way to her relatives. The appellant deserves no discretion and there is no justification for me to interfere with the sentence.

In my view the taking of Alcohol cannot be a reason or justification to commit horrendous acts against innocent girls. The appellant should have known that his acts of defiling a girl of 12 years would attract commensurate punishment. I think the sentence is well merited and the appeal is dismissed”.

Pursuant to that dismissal of his appeal to the High Court the appellant now comes to this Court by way of second and final appeal. When the appellant addressed us on 28th November, 2006 he merely urged us to assist him so that he may come out of prison.

Mr. Musau, the learned Senior Principal State Counsel reminded us that we were dealing with a second appeal and as the severity of sentence was a matter of fact and not law this appeal ought to be dismissed.

As we have endeavoured to show by the foregoing, the appellant’s journey to this Court started in the Principal Magistrate’s court at Kisumu before whom the appellant pleaded guilty to a charge of defilement of a girl under 16 years contrary to **section 145 (1)** of the Penal Code which provides:

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life”.

The appellant, as already stated was convicted on his own plea of guilty and sentenced to 25 years imprisonment. His appeal was dismissed by the High Court. He is now before us by way of second appeal. That being so, this Court will not interfere with the sentence passed by the subordinate court and confirmed by the High Court in view of **section 361 (1)** CPC which provides:

“(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”.

Subsection (8) referred to above is not relevant in this matter.

In view of the foregoing, we cannot interfere with a lawful sentence imposed by the subordinate court and

confirmed by the High Court. We must therefore bring to an end the appellant's journey to this Court by declaring that his appeal be and is hereby dismissed.

Dated and delivered at Kisumu this 1st day of December, 2006.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR