



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. 155 OF 2017

JMM.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with offence of defilement contrary to section 89(1) as read with section 8(4) Sexual Offences Act No 3 of 2006.

2. Particulars being that on 17.1.2015 at [Particulars Withheld] Trading Centre within Laikipia County internationally caused his penis to penetrate the genital organ namely vagina of G.W.M a girl aged 17 years. Pleaded not guilty and matter went into trial.

3. The appellant was found guilty and was sentenced to serve 15 years imprisonment being aggrieved. The appellant has lodged appeal namely;

I. THAT the learned trial magistrate erred in law and in fact in rejecting the complainant's application to withdraw the charges against the appellant.

II. THAT the learned trial magistrate erred in law and in fact in failing to treat the appellant as a minor throughout the proceedings and for violating his right as a minor in conflict with the law.

III. THAT the learned trial magistrate erred in law and in fact in failing to find that the complainant who was aged 17 ½ years old behaved like an adult and she deceived the Appellant in believing that she was an adult.

IV. THAT the learned trial Magistrate erred in law and in fact in failing that both the Appellant and the complainant were minors and the complainant slightly older than the appellant and they both needed guidance and counseling and charging the Appellant alone amount to discrimination.

V. THAT the learned trial magistrate errand in law and in fact finding that the medical evidence on record supported a case of defilement.

VI. THAT the learned trial magistrate erred in law and in fact in sentencing the Appellant who was charged while aged 16 years 10 months old like an adult.

VII. THAT the learned trial Magistrate erred in law and in fact in failing to request for a pre-sentencing report on the appellant before sentencing him.

VIII. THAT the learned trial Magistrate erred in law and in fact in sentencing the Appellant to fifteen years in prison.

4. The state has conceded the appeal as the trial court argued the fact that the appellant was a minor and continued to try him as an adult and in fact convicted and sentenced him to serve 15 years imprisonment contrary to the law.

5. The appellant via his counsel has did file and served submissions to canvass the appeal.

6. After going through the proceedings and the submissions on record, I find the issues are; *whether the trial violated constitutional, legal and procedural provisions thus a nullity" If above in negative, was case proved beyond reasonable doubt" and was sentence meted out legal"*

7. The court observes from the record that, when the matter came up for hearing on 23/4/2015 the state through the Office of the Director of Public Prosecution informed the Honourable Court that they had instructions to withdraw the matter under Section 87 (a) of the Criminal Procedure Code and as read with Section 40 of the S.O.A for reasons that there was no sufficient evidence in the matter and the complainant had approached their office and even written a letter requesting to withdraw the matter.

8. The application was denied by the court and the matter was ordered to proceed for full hearing.

9. The prosecution called a total of 5 witnesses and the appellant was put on his defence on the 8/4/16.

10. The appellant gave sworn evidence and vide a judgment delivered on the 18.5.2016, the appellant was convicted of the main count of defilement and sentenced to serve 15 years imprisonment.

11. Leave to appeal out of time was granted on 4.6.2020.

12. The appellant was accused of defiling a girl aged 17 years on the 17.1.2015. when the matter came up for hearing on the 23.4.2015 the court was informed by the prosecution that the appellant was aged 16 years old.

13. The court had previously treated the appellant as an adult as discerned from the proceedings of 19/1/2015 when plea was taken, 23.1.15, 27.1.2015, 5.2.15, and 23.4.15 where the appellant was described as an accused instead of a subject in the proceedings.

14. The proceedings do not indicate that prior to his release on bond, there was an order for the appellant to be detained at a police station as required of minors on conflict with the law

15. After it was brought to the court's attention that the appellant was 16 years old, the trial court did not make any inquiry as to the age of the appellant as required of it under Section 143 (1) of the Children Act.

16. The Appellant was thereafter treated as an adult and strict provisions of the law which guarantees protection of a child in conflict of the law were overlooked through the trial. The provisions found in part XIII of the Children act were not complied with and the appellant was thus denied a fair trial as such rights as the right to legal representation given the gravity of the offence that the appellant was facing were not observed.

17. The typed proceedings do not indicate that the proceedings were conducted in camera thus the trial in open court violated the appellant's right to privacy as provided for under section 186(g) of the Children Act.

18. The violations were gross and they infringed the appellant's right to a fair trial and thus the conviction thereof ipso facto is a nullity. In the case of JMG V R HIGH COURT OF KENYA AT NYERI CRIMINAL APPEAL NO 227 of 2010 where similar violations were raised on appeal the court held:-

“In the face of these violations of the law, it is not difficult to conclude that the trial of the appellant was invalid, it was a mistrial at the very least and in such circumstances the appellant’s conviction cannot be sustained.”

19. The appellant’s age was indeed confirmed through a birth certificate which was supplied to the trial court. (see page 35 of the Record of Appeal.)

20. The birth certificate indicates that the Appellant was born on the 2/11/1998 which places his age at 16 years 3 months at the time of commission of the alleged offence. The complainant was older than him by 1 year 4 months. The question that arises from this evidence is, who between the two committed defilement”

21. The complainant voluntarily escorted herself to the appellant’s house where she stayed overnight and they had sex according to her evidence. She was not forced into sex and they indeed did it twice.

22. The complainant could as well have defiled the appellant. In her Exam in Chief page 13 lines 18 of the Record of Appeal, she stated that she had pleasure from the act which can be interpreted to mean that she indeed enjoyed herself.

23. The two were arrested in the morning and the boy child was discriminated against and arraigned in Court to face charges of defilement whereas the girl child was treated as a victim and complainant.

24. The complainant had no complains at all to whatever happened in the night of 17/1/2015 and her mother and the police were more or less the aggrieved parties and the complainant’s request to withdraw the matter and which request was consented to by the Office of the Director of Public Prosecution was denied by the Court.

25. In the case of POO (a minor) V DPP & Ano. (2017)eKLR , the Court had this to say faced with a similar case:-

“Does a boy under 18 years have the legal capacity to consent to sex “Haven’t” both children defiled themselves” shouldn’t both then be charged or better said shouldn’t the Children’s Officer be involved and preferably a file for a Child in need of care and protection ought to be opened for both of them.”

26. Article 27 of the Constitution of Kenya guarantees the right from discrimination by the state either directly or indirectly against any person on any ground including sex. Protection of a child from discrimination on the ground of sex is provided for under Article 2 (5) of the United Nations Convention of the Rights of the Child.

27. Thus it is apparent that the appellant was discriminated against on the basis of sex and the conviction cannot stand.

28. A similar position was arrived at in the case of MARTIN CHARO V R HIGH COURT AT MALINDI CRIMINAL APPEAL NO. 32 OF 2015.

29. The sentence contravenes Section 190 of the Children Act which provides that: - No Child shall be ordered to imprisonment or to be placed in a detention camp.

30. The words conviction and sentence were used by the trial Court in relation to the appellant contrary to mandatory provisions of Section 189 of the Children Act.

31. In the case of GO V R HIGH COURT AT SIAYA CRIMINAL APPEAL NO. 155 OF 2016, the Court held that:-

“In the instant case, I find that at time of the commission of the offence, both the appellant and the complainant were minors; I find indeed the complainant was senior to the appellant and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complaint and the appellant, and both being minors, they need protecting against harmful sexual activities and none should have been sent to prison.”

32. The appellant was sentenced on the 19/5/2016 and he has been in prison for more than 4 years now whereas the complainant who admitted to having had pleasure from the act that drove the appellant to prison is out there enjoying her life.

33. In the Court of Appeal decision of SIMON AMOAH V R COA AT KISUMU CRIMINAL APPEAL NO. 171 OF 2009 where court faced with similar facts the Court held that:-

“Because of his present age, we cannot, for instance, send him to a Borstal institution. Apparently he was in prison custody throughout his trial. That means that he has been in prison for over four years. In our view, that is sufficient punishment taking into account the circumstances of his case”.

34. Even without looking at other grounds, the finds that the violations noted above vitiates the trial court conviction and sentence. Thus taking to account the appellant has been serving an invalid sentence since conviction, I make the following orders ;

- (i) The conviction is quashed and the sentence set aside.
- (ii) The appellant shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 17th day of December, 2020.

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CHARLES KARIUKI

JUDGE

PRESENT:

W. Muriithi for Appellant

Rugut for Respondent



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