REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 125 Of 2016.

BETWEEN

K K D.....APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence in the

Children's Court at Nairobi Children Case No. 49 of 2014

delivered by Hon. H. M. Mbati on 20th July 2016).

JUDGMENT.

Background.

1. The Appellant herein was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 22nd January, 2014 within Nairobi County, intentionally and unlawfully committed an act which caused penetration of his male genital organ, penis, into the female genital organ, vagina, of IAO, a girl aged 6 years. He was charged in the alternative with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this charge were that on 22nd January, 2014 within Nairobi County, intentionally and unlawfully committed an indecent act with IAO by touching her private parts namely, vagina.

2. The Appellant was arraigned before court and at the conclusion of his trial found guilty of the main offence and sentenced to be detained during the President's pleasure. The current appeal is against the sentence only. It is hinged on a Petition of Appeal filed on 19th September, 2016. The grounds of appeal set out therein are that; (i)the learned magistrate erred when she imposed a very harsh and improper sentence in the circumstances of the case, (ii)the trial magistrate erred in failing to take into account the fact that the Appellant was a student pursuing secondary education and (iii)the learned magistrate failed to take into account the probation officer's report before sentencing.

Submissions.

3. Learned counsel, Mr. Omari for the Appellant submitted that the Appellant was 17 years old when he was convicted and committed to a Borstal institution which had no vacancy due to his age. The court therefore sentenced him to be detained at the President's pleasure for an indefinite period. He submitted that in Petition No. 570 of 2017 Mativo J. held that the provisions of Section 25(2) and (3) of the Penal Code were unconstitutional as they violated Article 53(1)(f) and (j) of the Constitution. The court in that Petition ordered that some of the Petitioners be released on the basis that at the time of the sentence they were minors. He therefore urged the court to order that the Appellant be set free.

4. Learned State Counsel, Ms. Sigei for the Respondent opposed the appeal. She submitted that the Appellant was sentenced to serve three years in a Borstal institution but he had already reached the age of the majority and could therefore not gain admission to the institutions which only caters to minors. She submitted that Section 190(1) of the Children's Act provides for ways a child offender can be sentenced. That the Appellant was therefore sentenced at the President's pleasure which sentence has since been declared unconstitutional by the High Court. She urged the court to impose a form of sentence so that the interests of the victim child could be met. She pointed out that the victim had to undergo a surgery to repair her private parts and that releasing the Appellant shall not be in the best interest of the victim and society

at large. She urged for a custodial sentence with the request that prison authorities should be given time to secure a place to detain the Appellant. She urged the court to order that a probation report be filed. She invited the court to take into account that the Appellant's life may be in danger if he was released.

5. In reply, Mr. Omari insisted that the sentence imposed was illegal. He urged the court to give effect to Article 53 of the Constitution which provides that the detention of a child is illegal and where it is done it must be for the shortest time possible. He submitted that the proceedings of 6th July, 2016 before the trial court confirmed that there was a probation officer's report provided and urged the court to sentence on the basis of known law. Regarding any likely danger to the Appellant's life, he submitted that this was based by an afterthought on the part of the Respondent and in any case, the Appellant could not be held arbitrarily so as to satisfy some speculative interests. He submitted that sentence takes effect as at the date of the commission of the offence and urged that the Appellant be set free.

Determination.

This court's task is simple, to determine whether the sentence imposed on the Appellant was legal. The trial magistrate termed it as " *held at the President's pleasure*". There is no doubt that as at the time the Appellant was charged he was a minor. A Birth Certificate was produced in court on 7th February, 2014 which showed his birth date as 3rd March, 1998. The plea was taken on 28th January, 1998 thus placing his age then at fifteen years. It is trite that sentencing attaches to the date of the commission of the offence. The Appellant was already an adult at the time the sentence was passed. Therefore, he had to be sentenced as a minor.

6. The Children's Act does not provide for sentence of detention during the President's pleasure. Such sentence is only found at Section 25(2) and (3) of the Penal Code. The same however only applies to instances where the offence is punishable by death. For avoidance of doubt, the provisions read as follows;

> ***"(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.***
>
> ***(3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make."***

No doubt then the sentence imposed by the learned trial magistrate was illegal.

7. The court is also alive to the judgment of the learned Mativo, J in **H.C. Constitutional Petition No. 570 of 2015- A.O.O& 6 Others v Attorney General & Another [2017]eKLR** which declared the sentence of holding a convicted person during the President's pleasure as unconstitutional. He held that it violated Articles 53(1)(f)(i)&(ii), 53(2) and 160(1) of the Constitution. The Articles relate to the rights of children and the manner by which judicial authority should be exercised. I need not restate them here as they were well articulated in that judgment.

8. That said though, the Petition related to instances in which the Petitioners were convicted of capital offence where death sentence was the mandatory penalty as opposed to the instant case. In such circumstances a minor offender would be sentenced in accordance with Section 25(2) and (3) of the Penal Code which is detention during the President's pleasure. I entirely concur with the learned judge in that a sentence to detention during the President's pleasure does not only amount to indeterminate sentence but implies that an accused remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the courts. Simply stated, it amounts to abdicating judicial authority to the executive. In buttressing this view Mativo, J cited **S v Tcoeib 1996(1) SACR 390 (NmS), 1996(7) BCLR 996 (NmS)** in which it was held;

> ***"It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and unpredictable to retain for the prisoner a sufficient residue of dignity which is left un invaded."***

9. Back to the instant case, the sentencing scope available under the Children's Act is to be found at Section 191 which must be read with Section 190 of the statute. Under Section 191(1) the court had the option of imposing any of the following sentences (i)to discharge him under section 35(1) of the Penal Code, (ii)to discharge him upon the entry of cognizance with or without witnesses, (iii)make a probation order, (iv)commit him to the care of a fit person, (iv)order him to pay a fine, compensation or costs, (v)place him under the care of a qualified counselor, (vi)order that he be placed in an educational institution or a vocational training program, (vii)order that he placed in a probation hostel, (viii)make a community service order, or lastly (ix) in any other lawful manner. Section 190(1) provides that no child shall be ordered to imprisonment or to be placed in a detention camp. Needless to say then, the trial magistrate misdirected herself in passing the sentence she did.

10. Accordingly, this court has no alternative but to invoke the powers conferred on it pursuant to Section 354(3)(b) of the Criminal Procedure Code which provides for powers of the High Court whilst sitting on an appeal. Where the appeal is against the sentence, the court may,

> ***"increase or reduce the sentence or alter the nature of the sentence."***

11. The Appellant was sentenced on 20th July, 2016 and has thus far been serving an illegal custodial sentence for one year, 8 months and 14 days. He was on bail throughout the trial. Justice to the law can then only be served if the Appellant is set free.

12. On my part, I think I would not do justice to this judgment before I make one or two observations. This is a case in which the victim child was so viciously sexually attacked that she had to undergo a surgery to repair the vaginal tear. She was a minor then only aged six years. I think the law this far in so as imposition of sentence to minor offenders of this nature is concerned may not be serving justice. I do not think that the Sexual Offences Act envisaged a situation in which where minors who are not of tender age if they defiled so young children as in the instant case (children of tender age), should go unpunished without having to serve a custodial sentence. I pose the question, how will the victim, her family and the society at large view the court after the release of the Appellant? They definitely will conclude that justice has either not been served or it has been compromised. Yet, this is a case obtaining of a person who deliberately sets out to commit such a heinous offence so as to satisfy bodily lust. On the other hand the minor victim will not only have to live with grave physical injuries but the psychological trauma for the rest of her life. In my humble opinion the non-custodial sentence cannot and is not commensurate with the pain and injuries suffered by the minors.

13. On the part of the Appellant, in as much as he will be set free, he too well knows that justice has not been meted against the heinous act he committed. I think there is need to re-look at the law on sentencing so that it provides some exemptions for the lenient sentences to minors in cases of defilement within a certain age bracket.

14. The totality of my findings is that I set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 11th day of April, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Wambui h/b for Omari for the Appellant.*

2. *Miss Sigei for the Respondent*