REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 156 OF 2014

PETER LEBOI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable R. Amwayi, Resident Magistrate, delivered on 14th July, 2014 in Nakuru Chief Magistrate's Court Criminal Case No. 101 of 2014)

JUDGMENT

1. The Appellant, Peter Leboi, has preferred this appeal from the judgment and sentence from ***Nakuru Chief Magistrate's Criminal Case No. 101 of 2014***. In that case, the Appellant was charged with a single count of defilement of a child contrary to section 8(1) as read together with section 8(1) of the Sexual Offences Act. He was convicted and sentenced to thirty years imprisonment. The particulars of the offence as contained in the charge sheet were that that on diverse dates between 17/04/2014 and 09/05/2014, at [particulars withheld] Village within Narok County, the Appellant is alleged to have intentionally and unlawfully caused his penis to penetrate the vagina of M W I, a child of 15 years.

2. In the alternative, the Appellant was alleged to have committed an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were on diverse dates between 17/04/2014 and 09/05/2014, at [particulars withheld] Village within Narok County, the Appellant is alleged to have intentionally and unlawfully caused his penis to come into contact with the vagina of M W I, a child of 15 years.

3. The conviction and sentence came after a trial in which the Prosecution called six witnesses and the Appellant gave an unsworn statement.

4. The Appellant is dissatisfied and filed the present appeal. In his appeal, the Appellant has focused on two grounds:

> a. First, he says there was no sufficient medical evidence to convict him of the offence of defilement. In particular, he says that failure of the doctor to find "masculine discharge" in the genital organs of the Complainant should have led to the conclusion that the charges were not proved beyond reasonable doubt.
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> b. Second, the Appellant argues that the age of the Complainant was not proved beyond reasonable doubt. This is because, he argues, the Complainant testified that she was born in 1998 yet the Birth Certificate presented indicated that she was born in 1999. I understood the Appellant to argue that the discrepancy should have been led to the conclusion that the age of the Complainant was not proved beyond reasonable doubt.

5. The Appeal was opposed by the State. Mr. Motende, Learned State Counsel, appeared for the State and made oral submissions in support of the conviction and sentence. He argued that the birth of the Complainant was conclusive proof of the age of the Accused Person. He also argued that the medical evidence produced coupled with the oral testimony of the Complainant as well as the Complainant's mother and the arresting officer established the fact of penetration. Finally, Mr. Motende argued that the circumstances of the arrest made identification fool proof.

6. I have now re-evaluated the entire Trial Court record and evidence as I am required to do as a first appellate Court. As I did so, I reminded myself that I neither saw nor heard the witnesses as they testified and, therefore, made an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

7. The evidence that emerged from the trial was straightforward. The Complainant had run away from home and was taken by her mother to Elementaita Police Station. She escaped from the Police Station together with another girl she met there. The Complainant testified as PW1 while that other girl, P N N, testified as PW5. When they escaped, they went to Narok with another accomplice, a David Mbugua who was still at large at the time of the trial. In Narok, the Complainant lived with the Appellant in his house as his wife and engaged in sexual activities every night on the dates indicated in the charge sheet. PW5 did the same with David Mbugua. The extended defilement only

stopped when PC James Mrego (who testified as PW3) stormed into the house of the Appellant on 09/05/2014 following a tip and found both the Complainant and the Appellant in bed, naked and in the act of having sex.

8. The Complainant's mother confirmed the narrative as did PC James Mrego and P N, the other minor. The only other witness was Dr. Moses Rakwacho, a medical doctor. He examined the Complainant at Gilgil District Hospital on 16/05/2014 and filled the P3 form. A PRC Form had earlier been filled. In his examination, he confirmed that the Complainant's hymen was broken but he did not find any discharges or bruising on the vagina. His conclusion was that the Complainant had been defiled.

9. When put on his defence, the Appellant offered a plain denial: on the day he was arrested he went home late. While asleep at around 1:00 am, he says he heard some noise and then someone knocked on his door. He was ordered to get out and when he did, he found some Police Officers in the company of two girls – one M W and the other, N. The Appellant says that the Police asked him if he knew the girls and said he did not. He was then arrested and charged with the offence of defilement.

10. The Prosecution was obligated to prove three elements beyond reasonable doubt to obtain a verdict of guilt. These are:

a. That the Complainant was under-age – in this case thirteen years old (See section 8(1) of the Sexual Offences Act);

b. That there was a partial or complete insertion of the genital organs of the Appellant into the genital organs of the Complainant ("penetration")(*see* section 2 of the Sexual Offences Act); and

c. That it was the Appellant who caused the penetration. (See ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*****)**

11. A close examination of the Trial Court record yields the conclusion that the Prosecution proved its case beyond reasonable doubt.

12. The Complainant's mother, who testified as PW2, produced a Birth Certificate. It provided that the Complainant was born on 22/04/1999 which made her fifteen at the time of the alleged defilement. The mother also orally testified that she gave birth to the Appellant on that date. It is true that the Complainant said in oral testimony that she was born in 1998. However, this is not a material discrepancy at all to warrant a finding that age was not proved beyond reasonable doubt. Indeed, it is immaterial in the face of the unchallenged documentary evidence in the form of the Birth Certificate as well as the oral testimony of the birth mother of the Complainant. So goes the Appellant's first ground of appeal.

13. The Appellant's second ground of appeal is aimed at the second element of defilement: penetration. In this case, penetration was established in three mutually reinforcing pieces of evidence: the testimony of the Complainant who said that she had sex severally with the Appellant; the testimony of the arresting officer who testified that he found the Appellant and the Complainant in bed, naked, and in the presumed act of having sext; and, lastly, the evidence of the Medical Doctor who found evidence that the Complainant had been defiled.

14. The Appellant complains that no "masculine discharge" was found on the minor and he argues that this should be enough reasonable doubt that there was no defilement. That argument easily fails: defilement is proved through evidence – and here there was enough evidence to prove it. There is no requirement that spermatozoa be found in a minor for defilement to be proved. See ***AML v Republic [2012] eKLR.***

15. Finally, there is no question that the person who defiled the Complainant is the Appellant. Evidence showed that he was arrested in the company of the Complainant – and in the act of having sex in his house. Three witnesses testified to this fact: PW1; PW3 and PW5. Their testimonies remained un-impeached on cross-examination. The Learned Trial Magistrate found their testimonies credible. I have no reason to doubt that assessment.

16. In similar fashion, I have no reason to impugn the Learned Trial Magistrate's conclusion that the Appellant's proffered defence was so patently untrue as to unable to raise any reasonable doubts in the mind of a reasonable tribunal that it had any inherent possibility that it was plausibly true.

17. For these reasons, I conclude that there is sufficient evidence to affirm the Learned Trial Magistrate's findings on conviction.

18. Turning to the sentence, the Learned Trial Magistrate imposed a sentence of thirty years. She said that she had taken into consideration the nature of the offence and the age of the Appellant.

19. The Complainant was born on 22/04/1999. That made her fifteen years and 17 days when the offence was committed. That means the conviction under section 8(2) of the Sexual Offences Act was proper. That section provides for a minimum sentence of twenty years imprisonment. Absent any aggravating circumstances, this should be the sentence imposed on a person convicted under that section. In the present case, the record does not disclose any aggravating circumstances. The State Counsel concedes that the sentence was excessive in the circumstances. Consequently, I would reduce the sentence to twenty years.

20. **The upshot is that the appeal against conviction is dismissed. However, the appeal against sentence has succeeded. The sentence is reduced from thirty years imprisonment to twenty years imprisonment.**

21. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018

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(PROF). J. NGUGI

JUDGE