REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIM. APPEAL NO. 25 OF 2016

R K S.....PETITIONER

VERSUS

STATE.....RESPONDENT

(Being an appeal from the Judgment of Honourable H. M. Nyaga Senior Principal Magistrate, delivered on 27th May, 2013 in Molo Chief Magistrate's Court Criminal Case No. 2384 of 2010)

JUDGMENT

1. R K S is the Appellant in this case. He was arraigned before the Molo Chief Magistrate's Court charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act. The particulars were that the Appellant was alleged to have caused his penis to penetrate the vagina of J C, a girl aged 14 years on 25/09/2010 in Keringet Division of Molo District.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars are that on the same date and place he unlawfully and intentionally caused his penis to come into contact with the vagina of J C, a girl aged 14 years.

3. The Appellant denied the charges and the case proceeded to full hearing. The Prosecution called two witnesses: the Complainant and a Nursing Officer who examined the Complainant. The Appellant gave an unsworn statement when put to his defence.

4. At the conclusion of the trial, the Learned Trial Magistrate was persuaded that the main count was proved and convicted the Appellant. He proceeded to sentence him to twenty years imprisonment as dictated by the Sexual Offences Act.

5. The Appellant was originally dissatisfied by both the conviction and sentence and appealed against both. When the appeal came up for oral arguments, however, his counsel, Mr. Mairagia indicated to the Court that they wished to abandon the appeal against conviction and focus on the sentence. The singular argument was that the Appellant was a minor was a minor at the time of trial and conviction and he ought not to have been sentenced outside the confines of section 191 of the Children's Act.

6. The State conceded the Appeal to the extent of the sentence. It is important to point out that when the issue of the age was first raised, this Court made an order on 02/05/2017 that the Appellant be subjected to comprehensive radiography tests to determine his exact age. The results of that test came in the form of a letter dated 13/07/2017 by Dr. Kalande of the Provincial General Hospital, Nakuru. The radiological assessment showed that the Appellant was, at the time of the examination, over 18 years but below 21 years old.

7. The arraignment of the Appellant was in 2010 and the sentence was imposed in 2013. That means that the Appellant was, disturbingly, about 14 years old at the time of arraignment; and about 17 at the time the sentence was imposed. The circumstances become a lot more disturbing if one considers that the offence charged was a sexual offence – defiling a girl who was 14 years old. It is compounded by the fact that the sentence meted out was 20 years imprisonment.

8. There is no question that the sentence imposed on the Appellant at the time of his sentence was irregular to the extent that he was confined in an adult prison while he was still a minor. However, he is no longer a minor. What, then, should the Appellate Court do in such circumstances?

9. Both the State and Mr. Mairagia urged that in view of the irregularity of the sentence, the Court should adopt reasoning of the Court in ***R v Dennis Kirui Cheruiyot [2014] eKLR.*** In that case, the Appellant was aged 20 years at the time of sentencing but was 15 years old when the offence was committed. He was convicted of murder by the High Court. The Court sentenced him to life imprisonment. The Court of Appeal reduced the sentence to 10 years imprisonment after noting the dilemma a Court faces in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at the time of sentencing or at the time of an appeal.

10. In reaching its decision in the ***Dennis Kirui CHeruiyot Case (supra)***, the Court relied on ***JKK vs Republic (2013) eKLR.*** This is a

decision of the Court of Appeal sitting in Nyeri. In that case, a minor charged with murder was convicted and sentenced to death. The Court of Appeal found that the Appellant was under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The Court of Appeal reduced the sentenced from the death penalty to a custodial sentence of 12 years. The Court reasoned as follows:

> The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

11. In the ***Dennis Cheruiyot Case (Supra)***, the Court of Appeal expressed itself thus:

> Whatever the case, life imprisonment is not provided for under the *Children Act*, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.

12. In both the ***Dennis Cheruiyot Case*** and the ***JKK Case***, the Court of Appeal latched on to the omnibus proviso in section 191(1)(l) of the Children's Act to fashion a sentence that it deemed appropriate for the context and circumstances of the case at hand. Section 191 of the Children's Act provides as follows:

> (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—
>
> (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
>
> (b) by discharging the offender on his entering into a recognisance, with or without sureties;
>
> (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);
>
> (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
>
> (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
>
> (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;
>
> (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
>
> (h) by placing the offender under the care of a qualified counsellor;
>
> (i) by ordering him to be placed in an educational institution or a vocational training programme;
>
> (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);
>
> (k) by making a community service order; or
>
> (l) in any other lawful manner.

13. In the present case, the Appellant was a minor both at the time of committing the offence and the time of sentencing. This makes the situation a little different that was the case in the two cases cited above. The circumstances of the case and the offence also make this case strikingly different: the offence here is, while serious, non-violent sexual offence committed by a minor of roughly the same age as the victim of the crime. It requires no overdeveloped moral muscles to conclude that imprisonment for twenty years imposed on a minor for an offence he committed at thirteen or fourteen years of age in the circumstances the offence charged here is patently excessive.

14. In the current case, I am persuaded, in following the Court of Appeal in the ***Dennis Cheruiyot Case*** and the ***JKK Case***, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the Children's Act: to deal with the offender in question in any other lawful manner. In this case, I have followed these two precedents regarding the right approach to sentencing is such cases. In addition, I have taken into consideration the age of the Appellant at the time the offence was committed as well as the difference in age with the victim. I have also considered that the record of the trial suggests that there was a third party by the name Sharon involved in

arranging for the sexual liason between the Appellant and the Complainant. That person never testified and was, apparently, never charged. It appears that she was an adult from the facts emerging in the testimony of the Complainant. From the circumstances of the commission of this offence, it is probably not fair to say that the Appellant is a particularly vicious and dangerous criminal who poses great danger to the society. Rather, he was a child in need of care and protection.

15. The upshot is that the facts, context and circumstances of this case strongly suggest that the punishment suffered by the Appellant in this case for an offence committed when he was, at most, fourteen years old is already disproportionate to the offence. The only fair outcome is to revise the sentence to the time already served in prison. That is the order of the Court. The Appellant shall, therefore, be released from prison forthwith unless he is otherwise being lawfully held.

16. Orders accordingly.

Dated and delivered at Nakuru this 14th day of June, 2018.

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(PROF.) JOEL NGUGI

JUDGE