REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.43 OF 2017

V L J .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from original conviction and sentence in Homa Bay CM's Court

Sexual Offences Act Case No.4 of 2056 - Hon. T. Obutu, SPM, dated 23rd May, 2017)

JUDGMENT

[1] The appellant, **V L J,** appeared before the Chief Magistrate at Homa Bay, charged with incest, contrary to **Section 21** read with **Section 20(1)** of the **Sexual Offences Act**, in that in the month of May on an unknown date in the year 2013, in Homa Bay County, he had carnal knowledge with **L A O**, a girl aged eight (8) years who was to his knowledge his niece.

[2] Alternatively, the appellant did commit an indecent act with the said child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment.

Being aggrieved by the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 29th September, 2017.

[3] Learned counsel, **MR. NYAUKE,** represented the appellant at the hearing of the appeal while the learned prosecution counsel, **MR. OLUOCH**, represented the State/Respondent.

In his submissions through MR. NYAUKE, the appellant relied on his petition of appeal and contended that the main grievance was on the issue of the complainant's age. That, the trial court conceded that there were contradiction in the age of the complainant. That, a birth certificate ought to have been produced to establish the age of the complainant.

That, although the age assessment done by a doctor was considered by the trial court, it went ahead to convict the appellant on the basis that the complainant was aged eight (8) years, yet she was actually thirteen (13) years. Learned counsel, urged this court to allow the appeal.

[4] On its part, the respondent through the learned prosecution counsel, submitted that the appeal was opposed and that the age of the complainant was assessed by a doctor whose evidence was never challenged. That, **Section 104** of the **Evidence Act** was correctly invoked by the trial court.

The learned prosecution counsel therefore, urged this court to dismiss the appeal.

[5] Upon due consideration of the appeal in the light of the supporting grounds and the rival submission by both the appellant and the respondent, this court re-considered the evidence adduced at the trial as was required of it as a first appellate court. In doing so, it bore in mind that the trial court had the advantage of seeing and hearing the witnesses. [See, **Okeno –vs- Republic (1972) EA 32]**.

In that regard, the evidence led against the appellant through the complainant **L A (PW1)**, her mother, **E A O (PW2)**, a doctor, **GEORGE KAHENYA KINUTHIA (PW3)** and the investigations officer, **PC RAHAB (PW4)**.

[6] Also considered by this court, was the appellant's evidence in defence. He denied the offence and contended that the case was a

fabrication against him after he declined to give consent to the complainant's parents to sell his father's land. He implied that the complainant's mother (PW2) was most influential in fabricating the case.

[7] The trial court after considering the evidence in its totality arrived at the conclusion that the case against the appellant had been proved beyond reasonable doubt against the appellant. He was thus convicted and sentenced accordingly.

This court's opinion on the evidence is that it remained undisputed with regard to the fact that the complainant (PW1) was a minor and was indeed defiled at the material time.

[8] This was confirmed by the complainant in her testimony in court as corroborated by that of the doctor (PW3) who produced the necessary medical report form (P3 form) which he prepared and signed after examining the complainant on the 21st May 2013.

The appellant's denial of the offence related not to its occurrence but rather to his involvement as the offender. He accepted that the complainant was a daughter to his sister in-law (PW2) but vehemently denied that he was the person responsible for defiling her.

[9] It was indicated in the charge that the complainant was at the material time of the offence aged eight (8) years. The doctor (PW3) placed her age at five (5) years while her mother (PW2) placed it at eight (8) years saying that she was born in the month of May, the year 2005.

The investigations Officer (PW4) indicated that the complainant's age was assessed by a doctor as nine (9) years. The age assessment report from a Doctor Ochieng of Homa Bay District Hospital confirms some notes dated 25th January 2016, indicating that the complainant was of the age of 13 years to 14 years. The report confirmed and established that she was in agreement, under eighteen (18) years.

[10] The importance of the complainant's age for the purposes of the charge was to establish that she was a minor or child at the material time of the offence. So, even if the prosecution was uncertain as to the exact age of the complainant it discharged its burden of proving beyond reasonable doubt that she was sexually offended while under the age of eighteen (18) years and therefore, a child as defined in **Section 2** of the **Children Act (Cap 141 Laws of Kenya**).

[11] The bone of contention was the identification of the appellant as the person responsible for defiling the complainant. Incidentally, the offence as indicated by the complainant was committed in broad daylight by a person very well known to her and whom she identified as her uncle, the appellant. She stated that the appellant met her at the material time and offered to escort her to a nearby river to wash utensils. At the river in a bush nearby, he told her to lie down, removed her underpants and proceeded to defile her. Thereafter, he proceeded with her to her home before he went to his own home nearby.

[12] The complainant reported the matter to her brother, **B**, who in turn reported it to their mother (PW2) who eventually reported to the police.

Although, the appellant contended in his defence that the charge was fabricated against him by the complainant's mother, the trial magistrate being alive to the provision of **Section 124** of the **Evidence Act**, believed the complainant's evidence and acted on it to convict the appellant notwithstanding that that evidence was the sole evidence of identification against the appellant.

This court would have no reason to alter that finding which was essentially based on the credibility of the witnesses and in particular, the complainant. Further, the complainant and the appellant were not strangers, the former was a niece to the later.

[13] From all the foregoing factors, it would follow that the appellant's grounds of appeal are unsustainable for this court to quash his conviction by the trial court.

As to the sentence, **Section 20 (1)** of the **Sexual Offences Act**, provides that a person who commits the offence of incest with a female person who is under the age of eighteen (18) years shall be liable to imprisonment for life.

[14] The sentence imposed upon the appellant by the trial court was therefore lawful. However, in the opinion of this court the words appearing in the sexual offences Act to wit **"shall be liable to imprisonment for life"** do not connote an automatic or mandatory life imprisonment sentence. In the context of **Section 20 (1)** of the **Sexual Offences Act**, it would mean that a person convicted of incest is liable to imprisonment for a term of not less than ten (10) years, but if the victim is under the age of eighteen (18) years, the offender may be handed a sentence of more than ten years or life imprisonment.

[15] If the intention of the legislature was to impose a mandatory life imprisonment sentence, then the words ought to have been **"shall be sentenced to life imprisonment or imprisonment for life".** The word **"liable"** extinguishes the presumed mandatory nature of the proviso to **section 20(1)** of the **Sexual Offences Act.**

In as much as the trial court acted on the said proviso to impose a life sentence upon the appellant, the same was rather excessive considering that the appellant was a first offender. Accordingly, this court must and hereby sets aside the sentence and substitutes it for a sentence of fifteen [15] years imprisonment.

Otherwise, this appeal is dismissed.

[Delivered and signed this **31st** day of **July, 2018**]

J.R. KARANJAH

JUDGE

31.07.2018