REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 81 of 2014

A P...……...…….....APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 6328 of 2011 delivered by Hon. Ochoi, Ag. SPM on 13th March, 2014).

JUDGMENT

Background

A P, herein the Appellant, was charged in the main count with the offence of defilement contrary to **Sections 8(1)(3) of the Sexual Offences Act**. The particulars of the offence were that on 19th October, 2011 at [particulars withheld] within Nairobi County unlawfully and intentionally committed a sexual offence act by inserting a male genital organ (penis) which caused penetration into the female genital organ (vagina) of LN, a child aged 15 years.

In the alternative, he was charged with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. The particulars of the offence were that on 19th October, 2011 at [particulars withheld] within Nairobi County unlawfully committed an indecent act by touching the female genital organ of LN, a child aged 15 years.

The Appellant was convicted in the main charge and sentenced to serve 20 years imprisonment. He was dissatisfied with both the conviction and he sentence as a result of which he preferred this appeal. In his Amended Grounds of Appeal filed on 3rd October, 2o17, he was dissatisfied that the charge sheet was defective, that the sentence imposed was harsh and excessive in the circumstances and that the sentence contravened Section 333(2) of the Criminal Procedure Code.

Submissions

The appellant filed written Submissions on 3rd October, 2017. On the issue of defective charge sheet, he submitted that the evidence adduced was at variance with the particulars of the offence. He took issue with the fact that the charge indicated he defiled a girl of 15 years yet the evidence on record was that the complainant was aged 20 years. Flowing from this submission, he submitted that the sentence of 20 years imprisonment was harsh and excessive in that the age of the complainant having been established at 16 years, he ought to have been sentenced to 15 years imprisonment pursuant to **Section 8(4) of the Sexual offences Act.** He added that no aggravating grounds were advanced to warrant enhancement of the sentence to 20 years imprisonment. Furthermore, the trial court failed to consider the period he had spent in remand before the sentence was passed to constitute a part of the sentence as required by **Section 333(2)** of the **Criminal Procedure Code** and the Sentencing Policy Guidelines. He submitted that the appeal was merited and urged the court to quash the conviction, set aside the sentence and order that he be set free.

Learned State Counsel, Miss Atina on the other hand conceded that the age of the complainant was established at 16 years and that therefore, the sentence ought to have been passed under **Section 8(4) of the Sexual Offences Act**. This

was in view of the fact that the complainant's birth card indicated that she was born on 17th June, 1995 which placed her age at sixteen as at the time of the offence. Her view was that this discrepancy as reflected in the particulars of the charge that the complainant's age was 15 years was technical and curable under Section 382 of the Criminal Procedure Code. On the whole, she was of the view that all other elements of the offence of defilement were established and urged the court to dismiss the appeal.

Evidence

The prosecution called a total of six witnesses. The complainant **LN** testified as. **PW1**She referred the appellant as her grandfather as she was an uncle to her mother PW2. This fact was not in contestation as PW2 INW confirmed that the appellant was her uncle. PW1's case was that on 19th October, 2011 at around 1.00 p.m., the appellant approached her from the gate to their house and asked her to accompany him somewhere to buy something for her. He led her to a house where he defiled her. He also warned her not to tell anyone what had happened. She obliged but things took a bad turn sometime in December, 2011 when she missed her monthly periods. Incidentally, her mother PW2 also became suspicious that PW1 could be pregnant. She prodded her to disclose if she was pregnant and she gave in. She disclosed that the person responsible for the pregnancy was the appellant. PW2 bought a pregnancy kit from a chemist, conducted a test on PW1 and confirmed that indeed PW1 was pregnant. She then confronted the appellant on the issue. The appellant conceded but offered to cater for cost of procuring an abortion. This approach did not work because when they went for the exercise the appellant was unable to meet the cost of Kshs. 5000 to procure the abortion. PW2 escalated this matter to the police after which the appellant was arrested and charged accordingly. PW1 was also taken to Nairobi Women's Hospital for examination and the pregnancy was confirmed.

Months later, he child was born and blood samples were taken from the appellant, PW1 and the child for purposes of conducting the DNA analysis. The same was done by **PW4, Lawrence Kinyua Muthuri** a government analyst who confirmed that indeed the appellant was the biological father of the infant, JS. He produced an analyst report dated 15th August, 2013.

PW5, Dr. Ingere Karani of Nairobi Women's Hospital produced a medical report prepared by a Dr. Thuo who had examined PW1 on 22nd December, 2011. The diagnosis was that she was pregnant as at the date of examination and had therefore been defiled. The hospital recommended counseling.

PW6, Dr. Kamau of police Surgery further examined PW1 on 29th December, 2011. His evidence was that as at this date, PW1 was 13 weeks pregnant and concluded that it was a case of defilement. He filled the medical examination form (P3) which he produced as an exhibit.

PW4, Police Woman Peris Indeche investigated the case. She summed up the evidence of the prosecution witnesses. She added that the appellant, PW1 and her child were escorted to the Government Chemist by her colleague for purposes of sampling the DNA analysis. She also preferred the charge against the appellant.

After the close of the prosecution case, the court ruled that the appellant had a case to answer and was therefore put on his defence. He gave an unsworn defence in which he denied committing the offence. He stated that he was arrested by two people on 22nd December, 2011 and charged seven days later. He also stated that he was framed by PW2 whom he had stopped supporting after he got married in the year 2011. PW2 had separated from her husband and the appellant had leased a house for her. He therefore said that this was a case of a personal grudge between himself and PW2.

Determination

This is the first appellant court whose duty is to re-evaluate the evidence and come up with its own independent finding. In so doing, the court must take into consideration that it has neither seen nor heard the witnesses and give due regard to that.

I have deduced the issues for determination to be whether the case was proved beyond a reasonable doubt and whether the sentence meted was legal. This being a case of defilement, the court is enjoined to determine that the key elements of the offence were established namely; the identification of the appellant, age of the victim and penetration. On identification, there is no contestation that PW1 and the appellant were related. In court, PW1 referred to the appellant as the grandfather. Needless to add, PW2 the mother to PW1 confirmed that the appellant was her uncle. Further, the issue of familiarity between the appellant and PW1's family was also not contested by the appellant who said he even had leased a house for PW2. The identification was therefore by way of recognition. What is in contestation is whether the appellant committed the offence.

PW1 gave a candid account of how the appellant lured her to an unknown house where he defiled her. This was corroborated by the testimonies of PW5 and 6 both of whom were medical doctors who confirmed that PW1 had been

defiled. By the time DNA test was done, a child had been born. However, the medical examinations by PW5 and 6 were done before the DNA analysis which evidence in my view was sufficient corroboration of PW1's testimony. The DNA report adduced by PW4 would then only be used as corroborative evidence to the evidence of PW1, 5 and 6. I then pose the question whether the DNA analysis was admissible evidence sufficient to corroborate the evidence of PW1, 5 and 6.

According to the government analyst PW3, he was presented with the blood samples of PW1, the appellant and the born child. The samples were reflected in an exhibit memo form filled by a PC Caroline Owino of Kabete Police Station. According to PW4, the investigating officer, PW1, the appellant and the child were escorted to the government chemist by a colleague. None of the two witnesses (PW3 or 4) indicated who escorted the persons from whom the samples were extracted to the government chemist. PW3 therefore only relied on information in the exhibit memo form to deduce from whom the samples came. As such, the only person who would have shed light that truly those samples belonged to the respective victims is the person who filled the exhibit memo form or escorted the victims to the government chemist. The absence of that crucial evidence means that the result of the DNA analysis could not be relied upon as sufficient evidence on which the appellant could be convicted. I say so because from this chronology, it was difficult to ascertain that indeed the samples that were tested belonged to the victims. Be that as it may, I have already ruled and found that the medical examinations done prior to the DNA analysis were conclusive evidence that PW1 had been defiled.

The age of PW1 was adequately established by a Health Card which showed that she was born on 16th June, 1995. That placed her age at 16 years as at the time of the offence. I do find that all elements of the offence of defilement were proved beyond a reasonable doubt.

On sentence, no doubt that the same is determined by the age of the victim. The age having been established at 16 years, the sentence lay under **Section 8(4) of the Sexual Offences Act**. The same provides for a minimum of fifteen years imprisonment. In his judgment, the learned trial magistrate found that the age of the victim had been established at 16 years. In sentencing however, he failed to recognize the most crucial aspect that the sentence would be imposed pursuant to **Section 8(4).** Instead, he sentenced the appellant to 20 years imprisonment and for the offence as charged. This of course was a misdirection on his part as the law is very clear under Section 8 that sentence must be guided by the age of the victim. With this in mind, the appellant was liable to a minimum sentence of 15 years imprisonment. However, the use of the word 'liable' gives the court a measure of discretion to enhance the sentence on considering any aggravating factors.

In the present case, although the appellant was a first offender, he was related by blood to the victim who called him her grandfather. This relationship was established by PW2, the mother to PW1 who confirmed that the appellant was her uncle. In that case, the appellant abdicated his role as a role model to the complainant and instead turned as a predator by sexually assaulting her. This is a case therefore on evaluating and balancing the circumstances of the case calls for this court to interfere with the minimum sentence provided by the law and enhance it. Furthermore, under **Section 354(3) (ii) of the Criminal Procedure Code**, in an appeal from a conviction, this court is vested with the powers upon upholding the conviction. **"without altering the finding, reduce or increase the sentence."** Although the sentence imposed is not the minimum provided by the law, this court must, as it has, address the fact that that sentence was not informed on the legal provision under which the offence was established. Considering the aggravating factors, I am of the view that the 20 years imprisonment imposed is a sufficient deterrence and I will not vary the same. In the result, this appeal fails and the same is hereby dismissed.

Pursuant to **Section 333 of the Criminal Procedure Code** and the Sentencing Policy Guidelines, the period that the appellant spent in remand during the trial of two years, two months and twelve days shall be taken into consideration as constituting a part of the sentence. Finally, I uphold both the conviction and the sentence. It is so ordered.

Dated and Delivered at Nairobi this 31st day of October, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person

2. M/s Sigei for the Respondent.