



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.114 OF 2013**

**L A J.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 4892 of 2010 delivered by Hon. D. O. Onyango P.M., on 24<sup>th</sup> August, 2012)*

**JUDGMENT**

L A J was charged with the offence of Committing an Indecent Act with a Child Contrary to **Section 11(1) of the Sexual offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between the months of August, 2010 and September, 2010 in Kajiado County, intentionally and unlawfully touched male genital organ (penis) of R B L , a child aged 13 years.

After the trial, she was convicted accordingly and sentenced to serve 10 years imprisonment. In his grounds of appeal filed on 11<sup>th</sup> July, 2016, she appealed against both the conviction and sentence. However, when the appeal came up for hearing on the same date 11<sup>th</sup> July, 2016, she submitted that she would only be appealing against the sentence. She submitted that she had been in jail since the year 2010 and that out of the 10 years jail term, she had already served 4 years. Further that she had reformed and had learnt several courses while in prison that would help her earn a living once released. In addition, she informed the court that she was HIV positive and that it was difficult to get good diet in jail. Finally, she told the court that she was the first born in her family which entirely relied on her for support.

Learned State Counsel Ms. Kimiri opposed the appeal. She submitted that under **Section 11(1) of Sexual offences Act** the penalty provided is mandatory. The same should not be of less than 10 years which is what the learned magistrate imposed. She urged the court to dismiss the appeal.

I have considered the appeal and the respective submissions. **Section 11(1) of the Sexual offences Act** provides that:

***“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than 10 years.”***

This provision is couched to mandatory terms such that the minimum sentence provided is of not less than ten years. The learned trial magistrate was reasonable in that he only imposed the minimum sentence. I have also looked at the facts of the case which are regrettable. From the evidence of PW1 who was the victim, the Appellant used to visit their house and have sex with him. Between the months of August and September, 2010, she had had sex with him three times. She began by enticing him into sex through touching his chest buttocks and penis. There were 4 witnesses who testified but unfortunately none was a medical expert. Of course, the evidence of PW2 and 3 corroborated that of PW1 to the extent that the Appellant was known to have been visiting PW1 as a result of which an intimate relationship ensued. Strangely, there was a house help in the house who alerted PW2, the mother to PW1 of a visit of a stranger in the house. As it turned out, the stranger was the Appellant who used to come to sexually

assault PW1. From those facts, my view is that the Appellant ought to have been charged with defilement. Unfortunately, it appears that the investigation was not keen to unearth all the facts surrounding the case. This led to the omission of taking PW1 to hospital for medical examination.

Be that as it may, it is important to note that by her own admission, the Appellant is HIV Positive which would lead the court to conclude that she deliberately wanted to pass the virus to PW1. For the reasons firstly, that no medical evidence exists to show that PW1 was infected with the virus, and secondly, for lack of notice of enhancement of the sentence, I would have been inclined to enhance the sentence imposed. This is an appeal devoid of any merit. The minimum sentences provided under the Sexual Offences Act are intended to deter sexual assault offenders. The trial court had no option but to adhere to the law. In that regard, this appeal is dismissed in its entirety.

**DATED and DELIVERED** in Nairobi this **28<sup>th</sup>** day of **JULY, 2016**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person
2. Ms. Tum for the Respondent