REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 109 OF 2012

D O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1). The appellant **D O O** was charged at the Principal Magistrate's court at Bondo with two counts of defilement contrary to section 8(1) as read with 8(2) of the Sexual offences Act. Particulars of the offences were that the appellant intentionally caused his penis to penetrate the vagina and anus of R A O (the complainant) between 3rd November 2010 to 7th April 2011 at [particulars withheld] Sub Location in Rarienda District within Siaya County. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The matter was heard by Resident Magistrate D. Wangechi who convicted the appellant and sentenced him to life imprisonment. Those findings provoked this first appeal.

2). It is thus this court's duty to re-evaluate the evidence and make its own conclusion. In the often cited case of **Okeno v Republic [1972] EA 32** at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

It is therefore necessary to re-evaluate the evidence and reach a conclusion bearing in mind that this court has not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.

3). The prosecution case is that the appellant had defiled the complainant on several occasions. On one such day, the appellant called the complainant(PW1) into their grandmother, R's house. While they were inside, he locked the door and pulled down the complainant's pants. He also removed his own clothing laid her on R's bed and penetrated her through the vagina. He later gave her Kshs. 10/- and warned her against informing anybody. She feared that if she did the appellant would beat her up. On another occasion, there were visitors at R's house. She therefore directed the appellant to spend the night at the complainant's house. In the middle of the night, the appellant left the sitting room where they were

sleeping with the complainant's brother, C (PW6). He went to the bedroom where the complainant was sleeping with other girls and again penetrated her this time through the anus. The complainant was awoken by pain and she began screaming. PW6 was awakened by the noise, he turned and found that the appellant was not in his place of sleep. He woke and headed to where the girls were sleeping at the door, he met with the appellant who pushed him and ordered him to go back to bed. On the following morning, PW6 enquired from the girls what had been happening the night before and the complainant informed him that the Appellant had penetrated her through the anus. C did not report for fear of D who was older than him.

4). After the two incidences, PW1 started experiencing some pain in her private parts and she was taken for treatment at Kabanawaya Dispensary where she was treated for malaria. Yet on another occasion, while the complainant had been sent to go and fetch a saw and jerry can from R's house, she was accosted by the complainant who locked the door and ordered her to take off her clothes. When she declined, he pushed her on to a bed blocked her eyes and again penetrated her through the vagina. when this was ongoing, she heard her brother asking the complainant what he was doing. Sadly, the children did not inform their parents what had been happening.

5). It is after the pain became unbearable for the complainant that she told her mother what had happened. Her mother (PW5) took her to Kombewa District Hospital and later to New Nyanza Provincial General Hospital for further treatment. There she was diagnosed with peristalsis secondary to Sexual assault leading to inability to open bowels. Dr. Matilda Auma (PW4) testified for the prosecution that following such diagnosis the complainant was taken to the operation theatre under general anaesthesia where she was operated on and later managed on antibiotics before being discharged from hospital.

6). Later, the PW5 reported the matter to Ndori Police station.PW7, Police constable force No. 82332 recorded her statement and referred her to hospital where A p3 report was filed and produced as an exhibit by Dr. Adera Oigo(PW2) a medical officer at New Nyanza Provincial General Hospital. PW7 later recorded the statement of the complainant and charged the appellant on 25th May 2011. That was as far as the prosecution case went and upon its closure it was found that a case had been made out which the appellant should answer.

7). The appellant in a sworn statement testified in his defence on 3rd November 2011, he was at his grandmother's house and unwell when police officers came and arrested him. He denied ever defiling the complainant.

8). The learned trial magistrate considered the prosecution case and that of the defence and on believing that the case had been proved to the required standard convicted the appellant.

9). The appellant filed his petition of appeal on 29th October 2012 and later filed a supplementary grounds of appeal. The appeal came up for hearing on 15th September 2014. The appellant told the court that when he was arrested and charged with the offence of defilement, he was underage yet he was sentenced to life imprisonment. He stated that he was born in the year 1994 and as such he could possibly not have been of majority age at the time of his arrest. Under the circumstances, he argued that the sentence was extremely excessive.

10). Mr. Sirtui, the learned state counsel, supported both conviction and sentence. He argued that during trial, the court took into account the age factor. An age assessment was carried out and it was determined that he was an adult of 20 years of age.

11). From the evidence as presented by the prosecution I am convinced that the minors gave graphic description of the events. The appellant was well known to the complainant and they were relative. The medical history as produced by the prosecution clearly showed the ordeal suffered by the victim. In essence the appellant took advantage of the minor by virtue of her age and by extention threatening C her brother.

12). After the submissions this Honourable court ordered a separate age assessment on the appellant.

The outcome was that the appellant was aged 20 years as at 30th December 2014. Going by that report, it is therefore apparent that the appellant was a minor at the time of commission of the offence. Under Section 8 (7) of the Sexual Offences Act and Section 191 (1) of the Children's Act, an imprisonment penalty for a child offender is not recommended.

13). Section 8 (7) of the Sexual Offences Act provides that;

"Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the

Children' s Act."

14). Whereas Section 191 (1) of the Children's Act provides;

*"**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;**
b. **by discharging the offender on his entering into a recognisance, with or without sureties;**
c. **by making a probation order against the offender underthe provisions of the Probation of Offenders Act;**
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,**
f. **by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;**
g. **by ordering the offender to pay a fine, compensation or costs, or any or all of them;**
h. **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;**
i. **by placing the offender under the care of a qualified counsellor;**
j. **by ordering him to be placed in an educational institutionor a vocational training programme;**
k. **by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;**
l. **by making a community service order; or**
m. **in any other lawful manner. "**

15). In the present case, the appellant is now 20 years old, this indicates that at the time he committed the offence he was a minor. In J **W M v Republic [2014] eKLR** the court held that:

"Record shows that the Appellant availed to court an age assessment report which indicated he was eighteen (18) years old at the date of conviction. He thus committed the offence when he was seventeen (17) years old but which factor the trial court ignored.

In the result, I uphold the conviction. I however set aside the twenty (20) years imprisonment jail term. Given that the Appellant has already served two years jail term which he ought not to have, I will consider it as sufficient punishment so far. I order that he be forthwith set free unless he is otherwise lawfully held".

16). It would appear that there is a lacuna and the law fails to provide a way forward where the accused commits the offence while he is a minor but is an adult at the time of sentencing. However, it is clear that the sexual offences Act did not intend that those who committed the offence as minors be treated and the

same punishment be meted to them as in adults.

17). Section 6(1) of the Borstal Institution provides that:

"Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years".

18). The maximum sentence that can be imposed if the child is above 16 years is 3 years. Taking into consideration that the appellant is now 20 years, it appears that he committed the offence when he was about 16 years or thereabouts.

I do note that he has been in custody since May 2011 and has served so far two years of the life sentence. In the premises I shall set aside the life sentence meted out by the trial court and order that he be set free unless lawfully held.

Dated, signed and delivered at Kisumu this 22nd day of January, 2015.

H.K. CHEMITEI

JUDGE