REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.21 OF 2012

BETWEEN

JARED OMONDI OPIYO ….....APPELLANT

AND

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in criminal

case No.583 of 2010 in Rongo PM's court, Hon. Z.J. Nyakundi, PM)

JUDGMENT

1. The appellant herein Jared Omondi Opiyo was the accused in the SRM's court at Rongo in criminal case No.583 of 2010. He was charged with the offence of sexual exploitation contrary to **Section 15** as read with **Section 20** of the **Sexual Offences Act No.3 of 2006 Laws of Kenya**.

2. The particulars of the offence were that on diverse dates between September 2009 and May 2010 in Rongo District within Nyanza Province, he unlawfully took (subjected) IAO for the purpose of Sexual exploitation a girl aged 16 years.

3. He pleaded not guilty to the charge and trial ensued.

4. PW1 was the complainant IAO. She told the court that she was aged 14 years, was a pupil at [Particulars Withheld] Primary School and in class 4. That between September 2007 and May 2010 the appellant defiled her by force in his house on several occasions between the stated dates. She informed her sister CA and later on the appellant assaulted her. She however did not inform anybody else.

5. Later, the issue was reported to the police and appellant was arrested. The complainant was later taken to hospital, a P3 form was filled which was marked **MF1-1**. In addition she was also given treatment notes at the hospital.

6. As a result of the repeated defilement, she became pregnant and delivered a baby boy on 26th September, 2010. She further stated that the child belonged to the appellant and confirmed that prior to her being pregnant, she had been defiled only by the appellant. That the appellant was not related to her save that he was husband to her sister, a fact she confirmed on cross-examination. In concluding her examination in chief, she reiterated that the appellant used to defile her by force.

7. PW2 was Jemima Adhiambo an administrator at [Particulars Withheld] primary School. She told the court that on 26th March 2010, the complainant (PW1) who was disabled was brought to the school from [Particulars Withheld] primary because she was an orphan staying with her sister but she had problems. She was taken to [Particulars Withheld] Primary school, which was a school for the disabled.

8. PW2 stated that when she saw the complainant, she realized she was pregnant. On taking her to the doctor, the complainant was found to be about 7 months pregnant.

9. On confronting her, the complainant told PW2 that it was the appellant who was responsible for the pregnancy. Furthermore, she told her that on Saturdays when her sister was away, the appellant would send the other children away and then defile her. She also confirmed that Pw1 (complainant) gave birth to a baby boy on 27th September 2010.

10. PW3 was Kennedy Kiribwa a District Children's Officer at Rongo. He informed the court that on 23rd June 2010, a case was reported to his office where PW1 a pupil at [Particulars Withheld] primary was said to be pregnant. He got the information from a member of the Advisory Council.

11. PW1 was then interviewed and taken to hospital for treatment. PW1 had implicated the appellant as the person responsible for the pregnancy. He then requested the area chief to bring the appellant. PW1 then confirmed in the presence of the appellant that indeed the appellant was responsible for the pregnancy. After the appellant responded that it was the work of the devil, he jumped over the fence and disappeared.

12. Later, they took PW1 to hospital where it was confirmed she was pregnant and had other infections. Afterwards PW1 was released to Kodero Kwoyo in the custody of PW2; the matter was taken to the police. Later the appellant was arrested and taken to Kamagambo police station.

13. PW4 was NO.85067 PC David Mutegi attached to Kamagambo police station performing general duties and the investigating officer in this case. He recalled that on 30th June 2010, he was at the station when appellant and complainant were brought to the station by the assistant chief of Kodero sub location who explained to him what had happened between the two. He booked the report and started his investigation.

14. He recorded statements from PW3, PW1 and PW2 and took the complainant to Rongo District Hospital where the doctor confirmed PW1 was pregnant. After the P3 form was filled PW4 was convinced that the appellant committed the offence.

15. PW5 was John Kirui, a clinical officer based at Nyatike District Hospital but previously working at Rongo hospital. He produced the P3 form in respect of PW1 as **Exhibit 1**. He stated that on 1st July 2010 the complainant who was then aged 14 years was brought by police from Kamagambo police station on allegation of sexual assault in the company of PW2. By then, she was about 6 months pregnant.

16. On examining her, he found she had body numbness, tenderness on the public area and soiled pants. He treated her and introduced her to anti-natal care to prepare her for delivery.

17. He then filled the P3 form on 1st July 2010 and also the post rape form which he produced as **Exhibit 2**.

18. In his defence, the appellant denied the charges facing him. In his judgment, the trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. Upon conviction, the appellant was sentenced to life imprisonment.

19. The appellant being aggrieved by both conviction and sentence preferred an appeal to this court. In his self drawn petition of appeal, the appellant has advanced grounds, ***inter alia***:-

1. That he pleaded not guilty to the charge of sexual exploitation contrary to section 20 of the

Sexual Offences Act.

2. That the honourable magistrate erred in both law and facts by drawing his ruling and judgment based on the version of the prosecution which was devoid of a firm basis.

3. That the honourable magistrate erred in both law and facts by sentencing him to life imprisonment irrespective of the overwhelming discrepancy of statements and reports in the police O.B journal and court file.

4. That the honourable magistrate erred in both law and facts for as much as the prosecutor did not explain before the court why the investigating officer did not use appellant's semen or blood samples to facilitate a comprehensive investigation.

5. That the honourable magistrate erred in both law and facts in that none of the victim's relatives including his (appellant's) wife advanced any corroborating testimonies before the court.

6. That the honourable magistrate erred in both law and facts since he resolutely refused to listen, comprehend and analyze the circumstances under which the victim (his sister in-law) was putting up with appellant in the same house.

7. That the honourable magistrate erred in both law and facts by relying on the testimony of the children officer who arm twisted the mentally impaired victim to testify in favour of the prosecution side.

8. That appellant earnestly prayed that the appeal be allowed, conviction quashed and sentence imposed on him be set aside because as the sentence is overly harsh.

20. During the hearing of the appeal, the appellant filed his written submissions. He reiterated the points raised in the petition of appeal and added that the age of the complainant was never proved as the charge sheet stated that she was 16 years old while the evidence adduced by witnesses stated that she was 14 years. Thus the age of the complainant was never really proved.

21. Miss Mbelete for the State opposed the appeal and submitted that all the prosecution witnesses proved the prosecution's case beyond any reasonable doubt that the appellant who was the complainant's brother in-law repeatedly defiled her and made her pregnant and this was sexual exploitation. Furthermore, that the appellant took advantage of the fact that PW1 was disabled to sexually exploit her. She urged court to uphold both conviction and sentence and dismiss the appeal.

22. The appellant in reply submitted that in the charge sheet the complainant was said to be 16 years old while the doctor said she was 14 years. That in any event, there was no proof of the exact age of the complainant.

23. The appellant also submitted that he ran away initially because he was being forced to admit that he had impregnated the complainant and he only came back home after villagers' anger came down.

24. The duty of this court as the first appellate court in criminal cases is to re-examine and re-evaluate the evidence adduced before the trial magistrate with a view to reaching its own conclusions in the matter. The court is also required to weigh the conflicting evidence and draw its own conclusions bearing in mind always that it neither saw nor heard the witnesses and to make due allowance for this fact. See **Okeno - vs- Republic [1972] E.A 32**.

25. In the instant case, The issues for determination, touch on:-

- *The charges facing the appellant;*
- *The complainant's age.*

26. With regard to the first issue as clearly indicated in the charge sheet the appellant faced the following charges:-

"Sexual exploitation contrary to **Section 15** as read with **Section 20** of the **Sexual Offence Act No.3 of 2006 Laws of Kenya**." A look at Section 15 of the Sexual Offences Act gives an array of different types of child prostitution. The drafters of the charge never specified the kind of sexual exploitation the appellant was said to have committed since Section 15 lists 7 different types of sexual exploitation.

In **Essentials of Criminal Procedure Law Africa Vol 1 at page 75** the learned author stated the following:-

"The offence charged should be disclosed and stated in a concise, clear and unambiguous manner in ordinary language that eschews legalese so that the accused may be able to understand it and plead thereto from a point of knowledge. It will also enable an accused person to prepare his defence to the charge. This principle was restated in Sigilai and another -vs- Republic [2004] 2 KLR 480**."**

In my humble view therefore the offence the appellant was charged with under Section 15 was not concise or clear since it did not specify which of the 7 sub sections he was charged under and the appellant would clearly be prejudiced in giving his defence without the specifics. In the case of **Kilome -vs- Republic [1990] KLR 337** it was held that:-

"The paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge."

In this case, the charge against the appellant under **Section 15** of the **Sexual Offences Act** was ambiguous, and therefore prejudicial to him.

Secondly, with regard to the issue of age, **Section 20** of the **Sexual Offences Act** which deals with incest by male persons stipulates that:-

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:-

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

In the instant case, tit does not appear to me that the relationship between the complainant and the appellant falls within any of the categories of relatives mentioned above.

On the issue of age, the charge sheet stated that the complainant was aged 16 years. However, the evidence of the complainant and that of the clinical officer states that the complainant was 14 years old. No age assessment report was filed and neither did the complainant produce a birth certificate or a baptismal card to confirm her exact age.

In the case of **Hillary Nyongesa -vs- Republic (ELD) Criminal Appeal No.123 of 2009**, Mwilu J (as she then was) held as follows:-

"Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

In **Faustine Mghanga -vs- Republic [2012] e KLR** Nzioka J, relying on the holding in the the case of **Mangungu -vs- Republic** observed that:-

"Age may be proved by a birth certificate or particularly in the case of Africans by the evidence of a person present at the birth."

Also in **Francis Omurom -vs- Uganda, Court of Appeal Criminal Appeal No.2 of 2000** it was held:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

In the instant case, I agree with the submission by appellant that indeed the age of the complainant was never established. From the facts of the case, it seems that the complainant lived with her sister and appellant (brother in-law) since her parents were dead. However, her sister could have been called (as a guardian to the complainant) to establish her age and if she had declined to do this, the prosecution had the option of carrying out an age assessment test on the complainant to establish her exact age.

Due to this omission by the prosecution, the age of the complainant was not established beyond reasonable doubt and to my mind this means that the appellant gets the benefit of the doubt. In the circumstances, and for the reasons herein above stated, the appeal is allowed. The conviction is quashed and sentence is set aside. The appellant is set free unless he is otherwise held lawfully.

Orders accordingly.

Delivered, dated and signed at Kisii this 6th day of August, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Present in person for Appellant

Mr. Ochieng (present) for Respondent

Mr. Kasera (interpreting)- Court Assistant