Defilement of a girl under the age of 11 years c/s 8 (1) and (2) of Sexual Offences Act sentenced to 20 years; whether 20 years is life imprisonment as provided under S8(2) of the Act.

Appeal Against sentence; whether court can interfere with the sentence.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU CRIMINAL

APPEAL NO.59 OF 2008

LESIIT, J.

STANLEY NKUNJA…….....
……..APPELLANT
VERSUS

REPUBLIC …….....
……RESPONDENT

(From Original Conviction & Sentence of SPM's Case No. 477
Maua: J.N. Nyaga, P.M.)

JUDGEMENT

The appellant was convicted and sentenced to 20 years imprisonment by Meru CM's Court for the offence of Defilement of a girl under the age of 11 years contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act.

The appellant in his initial oral submissions stated that he was appealing against the sentence only. However he later changed and submitted that the charge was a fabrication by his step – brother and that the motive was to take away the share of his land. The appellant explained that the harassment of his family began soon after their father's death in 1984.

The state was represented by Mr.Musau, learned state counsel. In His submission the state Counsel stated that the sentence for defiling a child aged below 11 years was life imprisonment. Mr.Musau urged the court to increase the sentence meted out by the lower court to life imprisonment in order to correct it in line with the law.

I have considered the evidence which was adduced before the court and subjected it to fresh analysis and evaluation as required of this court as a first appellate court. **In OKENO VS REPUBLIC** the court observed:

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA 336) AND TO THE APPELLATE

Court's own decision on the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic (1957) EA 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 Peter v. Sunday Post, (1958) EA 424)".

I am aware that the appellant stated that he was appealing against the conviction only. However I have decided to go through the entire record of the lower court to satisfy myself that the correct conclusion was arrived at by the learned trial magistrate.

The evidence against the appellant was by the child complainant who was aged nine years at the time. Her evidence was clear direct and simple. The learned trial complaint who was aged nine years at the time. Her evidence was clear, direct and simple. The learned trial magistrate conducted a voice dire examination before taking her evidence on oath. Her evidence was that her mother, PW2 sent her to their hotel near home to get a sufuria. That she met the Appellant, a tenant at the hotel. She testified that he grabbed her, took her to his room, held her mouth, removed her pant, and inserted his male organ into her before releasing her.

The complainant met with her mother PW2 as she left the appellant's room. PW2'S testimony was that she met the appellant coming out of the hotel followed by the complainant. The complainant immediately told her whether appellant had done to her. The complaint's mother went immediately reported to the sub-Area, PW3, who had the appellant arrested.

The Clinical Officer, who examined the complaint that there was incomplete penetration, bruises on right labia minora and partially broken hymen. Under S 2 of the sexual Offences Act penetration is defined as the partial or complete insertion of a genital organ of a person into the genital organs of another person. Given the suffered by the complaint in this case penetration was clearly proved beyond any reasonable doubt.

The appellant denied the offence and stated that the landlord had threatened him with dire consequences because of demanding to be paid ksh.490/= for harvesting miraa.

The complainant's evidence did not need corroboration so long as the trial court found her to be truthful. S.124 of Evidence Act in the Proviso therefore takes away any requirement for corroboration of the evidence of a child victim involving sexual offence so long as the court believes such evidence of her mother PW2 and the clinical officer PW4.

I am satisfied from the evaluation of the evidence that the complaint's evidence was corroborated in every material particular. PW2, her mother, saw accused leaving the hotel with the complainant following him.

There was no one else there. The complainant had gone for a short time, if anything happened to the complaint it is very clear that the appellant had to be the culprit. The complainant's evidence was consistent that it was the appellant who defiled her. The appellant was well known to her. There is no chance that the complainant would be mistaking the appellant's identity.

The second corroboration was by the clinical officer who examined the complainant. The clinical officer notes were reduced by PW4 Ali Gebaba on behalf of his colleague Bania Mutile. The examination revealed that the complaint had been defiled. The injuries found on the complainant meets the requirements of s 8(1) and S 2 of the sexual offences act.

The conviction entered against the appellant was correct. The evidence against the appellant was overwhelming.

As regards the sentence S.8 of Sexual Offences Act provides for a sentence of life imprisonment for defilement of a girl who is below the age of 11years.

The appellant was sentenced to 20 years imprisonment.

The issue is whether court has jurisdiction to interfere with that sentence.

Mr. Musau has urged the court to enhance the sentence as 20 years' imprisonment does not in his view meet the requirements of S8 (2) of the Act.

S354 (3) (b) of the CPC provides;

"The court may then, if it considers that there is no sufficient ground for interfering, dismiss appeal
(a)……..
(b) in an appeal against the sentence, increase or reduce the sentence alter the nature of the sentence
Or
And in any case may make any amendment or any consequential or incidental order that may appear just or proper."

Under the provisions of the CPC has power to either increase or reduce the sentence of an appellant who has appealed against the sentence in the case of **FATEHALI V REPUBLIC (1972) EA 158** the court of Appeal for Eastern Africa, the predecessor of the current court of Appeal held;

(i) The High Court has power to revise a sentence which is inadequate in view of the seriousness of the offence;
(ii) The Court of Appeal has no jurisdiction to interfere with such revision;
(iii) Care should be taken not to discriminate between two accused persons where all the circumstances and facts are the same: this was not the case here;
(iv) The sentence could be increased beyond the magistrate's jurisdiction. Observation of the court that imprisonment for a first offence appeared unduly severe.

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An issue has risen in this court whether 20 years imprisonment meets the sentence as provided under S 8 (2) of the Sexual Offences Act. In order to answer the question one has to see the spirit of the legislature within the Act. Under S 8 of the act minimum sentences are provided for defilement of children of different ages. The younger the child victim, the severer the sentence.

Subsection (3) provides for a minimum sentence of 20 years for a person convicted of defiling a child aged between 12 years and 15 years. Defiling children victims above the age of 15years. Going by the provisions of this section, 20 years imprisonment is not a legal sentence for a person convicted of defiling a child below 11 years of age. That being so, the sentence meted against the appellant was an illegal sentence. I will enhance the same to life imprisonment in order to meet the provision of S8 (2) of the Act. The appellant's appeal against sentence concluded by enhancement of the sentence from 20 years imprisonment to life imprisonment for the reasons given in the circumstances
……the appeal fails.

Dated at Meru the 9th day of December 2010.

LESIIT, J.
JUDGE

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