REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E004 OF 2021

SIMON CHACHA CHACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A. N. Karimi, in the Principal

Magistrate's Court at Kehancha CMCR No. 45 of 2020 delivered on 13th January, 2021)

JUDGMENT

The appellant, **Simon Chacha Chacha** who is aged about eight (80) years was convicted by Hon. Mesa, Kehancha Principal Magistrate's Court for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between May and June, 2020 at Nyamaranya in Kuria West Sub County, Migori County, intentionally caused his penis to penetrate the vagina of **JM** a child aged sixteen (16) years old. In the alternative, he was charged with the offence of committing an Indecent Act contrary to Section 11(1) of the Sexual Offences Act.

At first, he denied the offence and after two witnesses testified he changed his plea to one of guilty and was convicted and sentenced to five (5) years imprisonment.

Though the firm of Muniko Advocate, had filed this appeal relying on seven (7) grounds of appeal which can be condensed into the following grounds:-

1) **Whether the appellant has right of appeal;**

2) Whether the facts disclosed the offence of defilement;

3) Whether the sentence of five (5) years is excessive.

Mr. Muniko filed his submissions on 28/9/2020 in which he reiterated the grounds of appeal and argued that the appellant was not accorded a fair hearing; that he is partially deaf and dumb and his sight is failing; that the court was harsh in sentencing him to five (5) years imprisonment; that there was no medical evidence to prove that the complainant was sixteen (16) years old; that no birth certificate was produced and that the medical documents were produced in court unprocedurally as the author did not produce them.

The appeal was opposed by **Mr. Kimanthi, the Senior Assistant Director DPP.** In his submissions filed in court on 21/9/2021, counsel urged that the appellant pleaded guilty after two witnesses had testified; that the plea was taken in accordance with Section 207 (2) and (3) of the Criminal Procedure Code. On 11/1/2021; that having been convicted on his own plea, Section 348 Civil Procedure Code bars an appellant from appealing on conviction save on the extent and legality of the sentence. He urged that the appeal is unmerited.

As regards sentence, counsel urged that under Section 8 (3) of the Sexual Offences Act, upon conviction, one is liable to be sentenced to not less than fifteen (15) years imprisonment and therefore the sentence of five (5) is lawful and is manifestly lenient.

I have considered the grounds of appeal and rival submissions. There is no doubt that the appellant was convicted on his own plea of guilty. The appellant's counsel did not seem to appreciate that the appellant pleaded guilty to the charge. Section 348 Criminal Procedure Code provides as follows:-

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a

subordinate court, except as to the extent or legality of the sentence"

The above Section bars an appeal on conviction upon a plea of guilty. One can however appeal on the extent and legality of the sentence.

In the case of **Olal =vs= Republic 9(1989) KLR 444**, the Court emphasized the above position when it said "**where a plea was unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code does not merely limit the right of appeal in such cases but bars it completely."**

Guided by Section 348 and the above decision, the court can interfere with a conviction of the plea was unequivocal. Section 207 (i) of the Criminal Procedure Code provides guidelines on how a plea should be taken. The decision of **Adan =vs= Republic (1973) E. A. 443** gave the above stated directions (Section 207) in detail as follows:-

> **" i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands;**
>
> **ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;**
>
> **iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered;**
>
> **v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.**"

After PW1 and PW2 had testified, the appellant requested the court to read to him the charge when he said **"I pray to be read to the charges afresh**".

After the charge was read in Kiswahili as translated into Kuria; he replied "**Ni kweli alikuwa mke wangu"(translated as, "it is true she was my wife"). Ni kweli tulilala nayeye. (It is true we had sex with her.)"**

The prosecution adopted the evidence of PW1 and PW2 on part of the facts and produced the treatment notes which indicated that the complainant was by then pregnant; post rape form and P3 Form were produced as exhibits. After the facts were read to him, he replied "***Hiyo yote ni ya kweli (all the facts are true)."***

PW1 in her statement narrated how the accused approached her twice and requested her to marry him. The third time, the appellant sent Gladys to get the complainant and she accepted to marry him. It was without her mother's consent. PW2 had learnt from PW1 learnt that the appellant had married a minor. He carried out investigations and on 13/6/2020, with the help of police officers, visited the appellants' home where they found the appellant and PW1.

Mr. Muniko submitted that the age of the complainant was not proved. In the case of **Francis Omuroni =vs= Uganda Court of Appeal No. 2 of 2000** the Court said as follows on proof of age of a victim.

> ***"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 be proved by birth certificate, the victims parents or guardian and by observation and common sense…"***

In this case, PW1 herself told the court that she was seventeen (17) years old. PW2, the Assistant Chief of the area, told the court that PW1 was sixteen (16) years old. I have looked at the medical reports and P3 report. All of them indicate that the complainant was about sixteen (16) years old. She was still a primary school student. If she was not a minor, PW2 would not have any excuse of going to remove her from marriage and I am satisfied that the age of the appellant was a minor from the medical evidence, observation and even common sense.

Counsel faulted the manner in which the medical evidence was produced. Since the appellant pleaded guilty it is the prosecution who tendered the documentary evidence to the court. The authors of the documents could only have been called if the case proceeded to full trial. I am satisfied that there was proof that PW1 was a minor of about sixteen to seventeen (16 – 17) years old. The documents were properly produced in court. Being a minor, PW1 had no capacity to engage in sexual activity leave alone to marry. I find that the plea was unequivocal when the appellant clearly admitted that he had married the complainant. PW1 had also testified to having married the appellant for weeks, and during the stay together, they had sex. The offence of defilement was therefore proved to the required standard. I am satisfied that the plea as recorded by the trial magistrate was unequivocal and the conviction is therefore well founded.

As regards sentence, the offence of defilement is a very serious one. It is meant to protect the child from men who prey on children and do not allow the children to grow enough to make their own decisions. In this case, the appellant who is eighty (80) years old unashamedly convinced PW1, a sixteen (16) years old, who could only be his grandchild, to enter into a sexual relationship with him. Her life is destroyed forever. Five years imprisonment was a slap on the wrist. However, taking into account the appellant's age, medical condition right now, because he is now blind, deaf and ailing, prison sentence is not condusive. Remaining in prison is inconvenient both to the appellant and to the prison workers. For that reason, I will set aside the sentence, release the appellant on probation for two years so that he is monitored and

rehabililated from outside prison. The appeal succeeds to that extend. The appellant is released on Probation forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 4TH DAY OF NOVEMBER, 2021

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

Muniko Advocate for the Appellant Absent

Appellant in person

Ms. Nyauke Court Assistant