REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 101 OF 2018

ALI MASUDI NDEGWA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the conviction and sentence in Kwale CM CR. Case No. 80 of 2018

(Hon. B. Koech SRM) delivered on 9/8/18)

J U D G M E N T

1. **Ali Masudi Ndegwa ("the Appellant")** was charged with the offence of defilement contrary to ***section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006.*** It was alleged that on diverse dates between May, 2018 and 6th August, 2018 in Tsimba Location within Kwale County of Coast Region, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of MH a girl child aged 14 years.

2. The appellant pleaded guilty to the charge and was convicted and sentenced to 25 years. He has now appealed to this court against the conviction and sentence.

3. This being a first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and arrive at its own independent findings and conclusions. In so doing however, the court must have in mind the fact that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA.**

4. When the appellant was arraigned in court on 8/8/2018, the charges were read to him in Kiswahili language. He admitted the charge. The court noted that the charge facing the appellant was serious. It informed him of the sentence that was to be passed if he pleaded guilty to the charge and gave him time to reflect on the matter. The court then adjourned the plea to the following day.

5. On 9/8/2018, the appellant was once again produced in court and the charge was again read to him in Kiswahili. Again admitted the charge. A plea of guilt was entered against him and the facts were read to him. He indicated that the facts were correct whereupon he was convicted accordingly and sentenced to 25 years imprisonment.

6. Upon conviction and sentence, the appellant appealed to this court. He set out 3 grounds of appeal, namely, that the age of the complainant was not proved; that his defence was not considered and that the sentence was excessive.

7. It is clear from the record that when the appellant was first arraigned in court on 8th August, 2018 and admitted the charge, the court cautioned him and gave him time to reflect. He was warned of the consequences of his admitting the charge. When he was returned the following day, the charge and the facts were read and explained to him in Kiswahili language which language he understood, and he admitted the charge.

8. The facts that the appellant admitted were that after he had moved to live with the parents of the complainant in May, 2018, he started having sexual intercourse with the complainant. That on 5th May, 2018, he was found by the father of the complainant in the complainant's room at 2 am having sex with her. That she was at the time aged 14 years. A child health card was produced as Pexh.1 which showed that the complainant was born in June, 2004 to prove her age.

9. Having admitted all these facts, the appellant cannot now turn around and state that the age of the complainant had not been proved beyond reasonable doubt. The appellant not only gave an unequivocal plea of guilt, he did not challenge the Child Health card that showed the complainant to be 14 years.

10. ***Section 348 of the Criminal Procedure Code (CPC) Cap 75 Laws of Kenya*** provides:-

> ***"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".***

11. In interpreting this provision, the Court of Appeal stated in **Alexander Lukoye Malika v. Republic [2015]** as follows:-

> ***"A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged".***

12. I have carefully considered the record and I find that the appellant's case does not fall on any of those exceptions where a plea of guilty can be disturbed as set out above by the Court of Appeal.

13. On sentence, the appellant was sentenced to 25 years imprisonment. ***Section 8 (3) of the Sexual Offences Act*** provides for a sentence of not less than 20 years. The appellant has complained that 25 years is excessive.

14. The trial court considered the appellant's mitigation and that he was a first offender. The court did not mete out the minimum sentence because it found that the appellant was 22 years older than the complainant. I see no misdirection on the part of the trial court. There is therefore no reason to interfere with the trial court's exercise of discretion.

15. Accordingly, I find the appeal to be without merit and dismiss the same.

DATED and **DELIVERED** at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE