REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 49 OF 2016

DAVID KAMAU NG'ANG'A........APPELLANT

VERSUS

REPUBLIC…………....…..…….RESPONDENT

(Being an appeal from the original conviction and sentence in ***Gatundu Senior Resident Magistrate's Court Criminal Case No. 528 of 2012*** *by* ***D. M. Ndungi R M on 24/12/13)***

JUDGMENT

1. The Appellant, **David Kamau Ng'ang'a,** was charged with the offence of **Defilement of an Imbecile,** contrary to **Section 146** of the **Penal Code.**

2. The brief facts giving rise to the charge were that on the **15th June, 2012, MW,** the Complainant was alone at home when the Appellant, her grandmother's herdsman defiled her. When her grandmother and guardian, PW3 **JWG** returned home she informed her. The Appellant was arrested. The Complainant was subjected to medical examination where it was established that, the Complainant, a **15 years old** minor was sexually assaulted. She had a broken hymen and abrasions on the labia minora. There was evidence of penetration into her genitalia. The trial Court on being satisfied that the Complainant was defiled, convicted the Appellant and sentenced him to serve **fourteen (14) years imprisonment.**

3. Being dissatisfied with the conviction and sentence the Appellant appealed.

4. At the hearing of the Appeal, the Appellant abandoned the Appeal on conviction. With leave of the Court, he presented written grounds of Appeal that contained mitigating circumstances thus:

- Being a first offender the sentence imposed was harsh and excessive.
- The period he spent in custody was not considered by Court. His mitigation in the Lower Court was not considered.
- Prior to his arrest and subsequent incarceration he was a young man living with his sickly father after the demise of his mother, who now depends on well wishers.
- He has learnt values; has undertaken vocational training and is ready to start a family and build the nation.

5. The State through learned State Counsel, **Ms. Mutheu** opposing the Appeal stated that the offence committed attracts not less than **fourteen (14) years imprisonment** therefore noerror was occasioned.

6. It is my duty to reconsider what is on record bearing in mind that I did not hear the Appellant mitigate on sentence in the Lower Court and come up with my own determination.

7. Principles of interfering with the Lower Court Judgment were stated in the case of **Wangema vs. Republic (1970) EA 494** thus:

> ***"……Appellate court should not interfere with the discretion which the trial court exercised as to the sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

8. Section 146 of the **Penal Code** provides thus:

> ***"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."***

9. A Court derives the power to sentence an offender to shorter than the maximum sentence provided by statute from **Section 26** of the **Penal Code.** In particular **Section 26(2)** of the **Penal Code** provides thus:

> ***"Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."***

Taking the above provision into consideration it is apparent that the learned trial Magistrate had discretion to sentence the Appellant to a term upto **fourteen (14) years imprisonment** as the statute did not prescribe either a minimum or a maximum sentence. However, the sentence meted out should have been proportionate to the crime committed.

10. The learned Magistrate has been faulted for not taking into consideration the time the Appellant spent in custody prior to being sentenced.

11. Section 333(2) of the **Criminal Procedure Code** provides thus:

> ***"(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

The learned Magistrate having been seized of the discretion to impose a shorter sentence, he was obligated to take into consideration time spent in custody prior to the Judgment being pronounced.

12. Looking at the circumstances in which the offence was committed, the Appellant was an employee of the Complainant's guardian. The fact that she was an unintelligent person was within his knowledge.

13. The Complainant was a minor and the Appellant abused the trust bestowed upon him by his employer. In the circumstances the sentence cannot be said to have been harsh or excessive. The Appellant was in custody for six (6) months prior to the sentence being passed. The case was heard expeditiously. Since the Court was obligated to take into consideration the time spent in custody, the Appeal is meritorious on that ground. Consequently, I allow the Appeal by setting aside the sentence imposed of **14 years imprisonment** and substitute it with **ten (10) years imprisonment** which will run from the date of conviction.

14. It is so ordered.

Dated, Signed at **Kitui** this **20th** day of **April,** 20**17.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Kiambu** this **12th** day of **June ,** 20**17.**

PROF. J. NGUGI

JUDGE