**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL APPEAL NO 148 OF 2014**

**JOSEPH KULIGHA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 284 of 2009 in the Senior Resident**

**Magistrate's Court at Wundanyi delivered by Hon F.K. Munyi (RM) on 17th June 2009)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant, Joseph Kuligha, was tried and convicted by Hon F.K. Munyi, Resident Magistrate for the offence of indecent assault contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment.

2. The particulars of the charge were as follows :-

> **"On the 10th day of June 2009 in Taita Taveta District within Coast Province unlawfully and indecently assaulted J M by inserting right hand fore finger into her private part namely vagina."**

3. Being dissatisfied with the said judgment, the Appellant filed Memorandum Grounds of Appeal which stated inter alia:-

> 1. **THAT the learned trial magistrate erred in law and fact by failing to consider that no birth certificate or an age assessment report was prepared and produced as exhibit to prove the age of the girl.**
>
> 2. **THAT the learned trial magistrate erred in law and fact by failing to consider that both the conviction and sentence were found on a defective charge sheet.**
>
> 3. **THAT the learned trial magistrate erred in law and fact by failing to consider that no age of the injuries was noted to connect the offence to the date when it was alleged to have been committed.**

4. **THAT the learned trial magistrate erred in law and fact by failing to consider that he was a first offender aged 78 years who might not finish attending to the 20 years sentence.**

5. **THAT the learned trial magistrate erred in law and fact by failing to consider that his evidence was not challenged by the prosecution.**

4. He filed his Amended Grounds of Appeal and his Written Submissions on 26th March 2016. He appeared to have abandoned Grounds Nos 2, 3, 4 and 5 of his initial Grounds of Appeal which did not bear a stamp from the court acknowledging receipt. However, leave to appeal out of time was granted by Kasango J on 3rd September 2014 when the appeal was deemed to have been duly filed.

5. In addition to Ground No 1 of the previous Grounds of Appeal in Paragraph 3 hereinabove, the Appellant relied on the following grounds:-

1. **THAT no medical evidence specifically a certified copy of a P3 Form was prepared, processed and produced as an exhibit by the prosecution to prove the nature of the offence and age of injuries before sentencing.**

2. **THAT the Resident Magistrate's court had no jurisdiction to impose twenty (20) years in 2009 as the Criminal Procedure Code was reviewed in 2012.**

3. **THAT he was a first offender with whom the trial court denied him the right** (sic) **to benefit to a less severe** (sic) **form of punishment in exercise of the discretion of the court.**

6. The State's undated Written Submissions were filed on 28th April 2016. When the matter came up in court on the same date, both the Appellant and the State requested the court to render its Judgment. The Judgment herein is therefore based on their respective Written Submissions.

## LEGAL ANALYSIS

7. As can be seen from Ground No 4 of his Amended Grounds of Appeal (indicated as Ground No 3 in Paragraph 5 hereinabove), the Appellant admitted to having committed the offence that he was charged with as he had indicated that he was a first offender. In addition, it was clear from the Trial Court proceedings that he admitted to the charge of indecent assault on the Complainant herein. As a result, no evidence was tendered in court.

8. However, as he had raised the issue in his appeal and the State had also responded to the same, the court found it proper to deal with the same under the separate heads shown hereinbelow.

### I. JURISDICTION OF THE TRIAL COURT

9. It was the Appellant's submission that as a resident magistrate's court could not impose a sentence of twenty (20) years imprisonment on the ground that Section 7 of the Criminal Procedure Code Cap 75 (Laws of Kenya) was reviewed in 2012, the said sentence that was imposed upon him was unlawful.

10. Section 7 (1)(b) of the Criminal Procedure Act provides as follows:-

**"a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006."**

11. Although the State had argued that this case was heard by a Senior Resident Magistrate who had jurisdiction to impose the said sentence, a perusal of the Trial Court proceedings shows that the matter was heard by a Resident Magistrate. Be that as it may, it was evident that a resident magistrate clearly had jurisdiction to hear and pass sentence for offences under the Sexual Offences Act, the insertion to Section 7(1)(b) of the Criminal Procedure Act having been made in the Statute Law (Miscellaneous Amendments), 2007.

12. Consequently, Ground No 3 of the Amended Grounds of Appeal was without merit and the same is hereby dismissed.

II. **AGE ASSESSMENTAND PRODUCTION OF THE P3 FORM**

13. The Appellant submitted that no birth certificate was prepared, processed or produced to prove the Complainant's age at the time of the alleged offence despite the Prosecution stating that she was aged fifteen (15) years. He contended that this rendered the conviction unsafe and vitiated the sentence.

14. He added that no medical evidence was prepared, processed or produced as an exhibit by the Prosecution to prove the nature and age of the injuries before sentencing him. It was his contention that the Trial Magistrate ought to have asked for the P3 Form before sentencing him and therefore she misdirected himself by not relying on such evidence before convicting him.

15. On its part, the State argued that the Charge was read to the Appellant who disputed that he never laid the Complainant on the bed but that when the Charge was read to him again, he pleaded guilty to the same. It relied on the provisions of Section 207 of the Criminal Procedure Act that provide as follows:-

> 1. **The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> 2. **If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

16. It was its argument that averred that the issue of whether or not there was a P3 Form or whether or not the Complainant's age was proven would amount to an injustice. It stated that the Prosecution read out the facts to the Appellant which indicated that the Complainant was aged fifteen (15) years which he admitted and that he himself had in his mitigation referred to her as a child.

17. The Trial Magistrate recorded the following:-

> **"…The Accused grabbed her (aged 15 years)…"**

18. It is not clear whether at the time the facts were read to the Accused, the age was given by the Prosecution as having been fifteen (15) years or if the Trial Magistrate wrote that on his own volition after enquiring the same from the Prosecutor. The ambiguity of the Complainant's age was borne by the fact that the same was put in brackets.

19. Be that as it may, it did come out clearly that the Complainant was a child. If she was not, then the Appellant admitted that she was indeed a child when he stated in his mitigation:-

> **"The child had been coming home late. I wanted to know whether she was doing that…"**

20. Once the Appellant pleaded guilty to the charge, the court's hands were thus tied as far as entertaining the Appeal herein on the issue of facts. The court therefore agreed with the State's submissions that once the Appellant had admitted to the facts of the case read to him, he could not now seek to introduce the evaluation of evidence afresh.

21. There was indeed no ambiguity in the manner the Appellant pleaded to the charge and in the manner the facts were read to him as the Charge and facts were read to him in a language that he understood.

22. This was in line with the holding in the case of **Kariuki vs Republic[1954] KLR 809** that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic[2012] Eklr** wherein it was held as follows:-

> **““2. The manner in which a plea of guilty should be recorded is:**
>
> **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
>
> **(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
>
> **(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445””.**

23. Consequently, Grounds Nos 1 and 2 of the Amended Grounds of Appeal were not merited and are hereby dismissed.

24. However, it is important to note that despite the Appellant having pleaded guilty to the charge which essentially meant that he could not introduce fresh evidence at this point, this court nonetheless addressed another aspect of such pleading in it decision hereinbelow.

III. **EXTENT AND LEGALITY OF THE SENTENCE**

25. Having said so, where an accused person pleaded guilty, the appellate court still has jurisdiction to look into the extent or legality of the sentence. Section 348 of the Criminal Procedure Code stipulates 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.”**

26. Section 11(1) of the Sexual Offences Act under which the Appellant was charged provides as follows:-

> **“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years”**

27. Evidently, the Learned Trial Magistrate exercised her discretion judiciously in sentencing the Appellant to twenty (20) years imprisonment. There was therefore no illegality in this respect. This court was therefore not persuaded to interfere with the discretion of the Trial Court on the legality of the said sentence as there was no illegality.

28. The above notwithstanding, as can be seen hereinabove, despite there having been no illegality where a person has pleaded guilty to a charge, an appellate court can still allow an appeal on the extent of a sentence. Having said so, the issue of the Appellant being released from prison for having been a first offender was not within the province of an appellate court as its mandate was only confined to analysing the facts and law in a trial court.

29. What this court took judicial notice of was the Appellant's age. He had submitted that he was aged

seventy (78) years and that he was unlikely to complete his sentence as he had few years to live. This court had occasion to observe his physical appearance when he appeared in this court for the hearing of the appeal herein and there was no doubt in the mind of this court that he was a very senior citizen.

30. Although the Appellant herein was sentenced before the Sentencing Policy Guidelines were published, this court deemed it prudent to consider the same as the sentence that was meted by the Learned Trial Magistrate was not a fixed custodial sentence. It only contained a minimum sentence suggesting that a court can exercise its discretion on the extent of the penalty to be given.

31. Notably, in Paragraph 23.9 of the said Sentencing Policy Guidelines, it is stated that the starting point for a court when sentencing a person who has been convicted of an offence would be to look at the custodial sentence set out in the statute. The court then ought to consider fifty (50%) per cent of the maximum sentence of that offence. The aggravating and mitigating factors on either scale of fifty (50%) per cent would then assist the court in determining the number of years of a sentence it would impose on such a convicted person.

32. It was evident from the Appellant's submissions that he was not remorseful of the offence he was said to have convicted of. Save for the fact that he admitted to the offence when facts were read to him a second time, this court was not completely certain whether he really understood what he had been charged with as he had purported to give an explanation which was very different from the facts that were read to him. He only admitted to the Charge once the facts were read to him a second time.

33. Before he was sentenced, in his mitigation, the Appellant stated that he could not stay with such a child who had put him in trouble. His Grounds of Appeal were clear that he had poked holes in the Prosecution's case. This fortified this court's apprehension that he may have admitted to the charge due to lack of adequate knowledge of what was facing him.

34. It was therefore the opinion of this court that it may have been prudent for the Trial Court to have entered a plea of not guilty when the Appellant advanced an explanation when the facts of the Charge were the first time and directed that the case proceed to trial. This way, the Appellant would have had his case heard on merit as he has continuously denied any wrong doing and/or maintained his innocence whenever he has appeared before this court.

35. Nothing stops this court from ordering a Re-Trial as the process for the plea caused it some uneasiness. However, as the Appellant was sentenced on 17th June 2009 and has since served seven (7) years in prison, it would be prejudicial to start this case afresh due to the passage of time.

36. The above notwithstanding, the court was of the opinion that as it was uncertain as to whether the Appellant pleaded to the Charge herein due to lack of understanding of the court process as a result of his advanced age or if he actually understood the charges that had been preferred to him and admitted his guilt, it would be in the interests of justice to strike a balance herein. As its hands were not tied to one (1) mandatory sentence, it found and held that the minimum sentence of ten (10) years would be a good balance.

**DISPOSITION**

37. As the Appellant had not advanced any sufficient reason to persuade this court to interfere with the Trial Court's decision on his conviction, it hereby declines to quash his conviction as the same was lawful and fitting and instead affirms the same.

38. However, for the foregoing reasons, this court hereby sets aside the sentence of twenty (20) years that had been imposed on the Appellant and instead substitutes it with a minimum of ten (10) years imprisonment as provided for under Section 11 (1) of the Sexual Offences Act, the same is to run from the date he was imprisoned.

39. The upshot of this court's judgment, therefore, is that the Appellant's Appeal lodged herein was

allowed only as relates to the extent of the sentence only. If there is any remission to be granted to the Appellant, then the Prison authorities who are experts in that area ought to calculate the same.

40. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this **9th** day of **May** 2016

**J. KAMAU**

**JUDGE**

In the presence of:-

Joseph Kuligha- Appellant

Miss Anyumba- for State

Simon Tsehlo– Court Clerk