REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 11 OF 2010

SAMSON WAFULA HIMBIRI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of 20 years imprisonment

in CR. CASE No. 2954 OF 2009 by Hon. E. MICHIEKA (RM)

at Mombasa Law Courts on 08/01/2010).

JUDGMENT

1. The Appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement of a girl contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the charge are that on diverse dates between the months of February 2009 and August 2009 in Bamburi, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of XXX a girl aged 13 years.

3. The Appellant is facing an alternative charge of INDECENT ASSAULT on a girl contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 in that on the same material particulars as in Count I (above), the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of XXX a girl aged 13 years.

4. The prosecution evidence in summary is that one day in February 2009, the complainant was sent to the shop to buy tomatoes at about 8 p.m when she met the Appellant riding on a bike. He stopped his bike and told the complainant that he loved her. Again in May 2009 she bumped into the Appellant at 7 p.m and he told her to go to his house.

She got on the bike and went to his house where the Appellant forcefully had sex with her. She stayed in his house up to 10 p.m when she walked back to her home.

Again on 28/08/2009, the complainant went to the Appellant's house. The complainant's father (PW2) reported the matter and the complainant was arrested and charged with the offence of defilement.

PW4, the Doctor who examined the complainant on 17/09/2009 confirmed that the complainant was penetrated.

5. The Appellant said in his defence that the complainant was his friend. He said his parents met the parents of the complainant but they could not agree. The complainant's parents wanted Kshs. 30,000/= which the Appellant and his parents could not raise. He said he was arrested on 07/09/2009 and taken to Bamburi police station and charged with defilement.

6. The Trial Court found the Appellant guilty as charged and convicted him and sentenced him to 20 years imprisonment.

The Appellant has appealed to this court against conviction and sentence on the following grounds which I reproduce verbatim:-

i. **That the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without considering that the evidence was unsafe for the AGE of the complainant being the material factor herein was not proved beyond any reasonable doubt.**

ii. **That the learned trial Magistrate erred in law and fact by arriving at his conclusion without seeing that the charge preferred against the Appellant by the prosecution was fatal and incurable defective for section 8 (1) of the sexual offences Act No. 3 of 2006 was not indicated in the charge sheet.**

iii. **That the learned trial Magistrate erred in law and fact by arriving at his conclusion without seeing that the prosecution did not prove its case beyond reasonable doubt hence section 109 of the evidence Act was violated.**

iv. **That the learned trial Magistrate erred in failing to consider the Appellant's reasonable defence statement.**

7. The Appellant filed written submissions in which he testified as follows:-

i. That the sentence of 20 years imprisonment was not done within the parameters of the law and that the charge the Appellant is facing is defective.

ii. That the age of the complainant was not proved. The Appellant relied on the case of HILLARY NYONGESA VR CRIMINAL APPEAL No. 123 OF 2009 where it was held that age is a critical aspect in sexual offences because the sentence is determined by the age of the victim.

iii. That the prosecution did not prove their case beyond reasonable doubt as required by the law.

8. The Respondent opposed the Appeal and submitted orally in court as follows:-

i. That the Respondent concedes that the age of the complainant was not proved.

ii. On the issue of defective charge, the Respondent submitted that the error was curable under section 382 of the C.P.C.

iii. The Respondent urged the court to invoke section 179 and convict the Appellant with the lesser charge of sexual assault which is cognate with the charge of defilement.

9. This is the first appellate Court and I have a duty to re-evaluate the evidence on record while bearing in mind that the trial court had the opportunity to see and hear the witnesses. In the case of ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***

ii. ***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.***

10. My findings are as follows:-

(i) The Respondent conceded that the age of the Complainant was not proved. However, I find that the Appellant penetrated the Complainant and Section 179 of the CPC is applicable. Sections 179 of the CPC provides as follows:-

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
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> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

(ii) The application of Section 179 was given by the Court of Appeal in the case of IRUNGU Vs REPUBLIC [2016] eKLR in which a charge of indecent assault was substituted with one of sexual assault and it was held as follows:-

> **"We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault. As this Court observed in *James Maina Njogu v. Republic, Cr App No. 38 of 2004 (Nyeri)* regarding section 179 of the Criminal procedure Code:**
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> ***"It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence."***
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> **In the same vein, we stated as follows in *Robert Mutungi Muumbi v. Republic, Cr App. No. 5 of 2013:***
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> ***"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."***

i. I find that the evidence on record discloses the offence of sexual assault, which is a cognate and minor offence of the offence of defilement with which the appellant was charged.

ii. I accordingly allow the appeal, quash the conviction for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and set aside the sentence of 20 years. In lieu thereof I substitute a conviction for the offence of sexual assault contrary to section 5 (1) of the Act and impose a sentence of 10 years imprisonment from the date

of sentence by the High Court. It is so ordered.

Dated and signed at MOMBASA this 16th day of November 2016 in the presence of the parties.

ASENATH ONGERI

JUDGE.