REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.71 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. C.A. OTIENO – AG.PM delivered on 26th April, 2013 in Kikuyu PM. CR. Case No.699 of 2013)

J N N…………………………………………………………APPELLANT

VERSUS

REPUBLIC…………………………………………………….....RESPONDENT

JUDGMENT

The Appellant, J N N was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 25th July 2009 at ***[particulars withheld]*** Village, Kiambu County, the Appellant ***"intentionally and unlawfully defiled E W M, a girl under the age of 15 years"***. He was alternatively charged with the offence of **committing an indecent assault** on a female contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant indecently and unlawfully assaulted E W M, a girl under the age of 15 years by touching her private parts, namely vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged. He was sentenced to serve twenty (20) years imprisonment. He was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had not been accorded an opportunity to be legally represented during trial and thereby had his constitutional right to be accorded fair trial breached. He faulted the trial magistrate for failing to take into consideration material inconsistencies in the complainant's evidence as compared with that of PW4 and PW6 in regard to where the medical examination of the complainant took place. He was aggrieved by the failure of the trial court to take into consideration the fact that he was not medically examined to prove or disprove contention by the prosecution that he had infected the complainant with a sexually transmitted disease. He took issue with the fact that the trial magistrate had failed to take into consideration the evidence which did not support the thrust of the prosecution's case that he had sexual intercourse with the complainant. He was aggrieved that the trial magistrate had failed to take into consideration the fact that he had not admitted to having sexual intercourse with the complainant. He was aggrieved that the character of the complainant had not been taken into account when he was convicted. He was finally aggrieved that he had been sentenced to serve a harsh, punitive and excessive sentence. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard the rival submission made by the Appellant and by Ms. Aluda on behalf of the State. This appeal raises a disturbing issue where the law comes in conflict with what transpires in society. In the present appeal, it was the complainant, a girl then aged 15 years, who went to the house of the Appellant, a boy then aged 19 years. For the full import of what transpired at the material time, it is imperative that this court re-produces verbatim the testimony of the complainant:

"I am E W M. I am 15 years old. I live in [particulars withheld] with cucu E W. Last year I lived in [particulars withheld] with my mum – R W. I am a student – Thika, [particulars withheld] High School – form 2. 29th July 2009 I was at Jeralds place where he lives. He was my boyfriend. There he is. I had gone to stay with him at his place about a week earlier. He lived at [particulars withheld]. We lived together. He was working at Wangige he would leave in the morning and return in the evening. We lived as husband and wife. I had been away from home. We had a misunderstanding between (sic) with my mum because I had been chased away from school for sneaking out of school to go to the clubs in Thika and rave. We would take spirit – Napoleon. We smoked bhang, we were in a group of girls and we would go and rave and smoke Bhang. So when I chased away I went home and we disagreed with my mother and I ran away. I knew Jerald about 2 months earlier from when I ran away from school. We lived in the same plot. He knew I was a student. I had planned to quit school and get married to Jerald. He lived alone. That week is when we started having s**. My dad stays in Githunguri. I never told him. He didn't know I had been chased from school. I didn't tell him that I drink alcohol and smoke bhang. I don't think my mother knew about it. I cant remember the day that I went to start living with Jerald. We had sex on the second day. I was willing. It was my first encounter. It was protected sex. Jerald did all the cooking. We lived together for 7 days. Jerald never asked me to go back to my mothers house. In the plot everybody went to work. So I could get out of the house and go back unnoticed. We had agreed with Jerald that we live as husband and wife. He is 19 years old. He had finished school. I don't recall then date when I was arrested. It was about 7 – 8 p.m. We were sitted on the chair. We heard a knock. I was with Jerald. When he opened the door, Jerald saw 3 policemen and my mother and they went about the house and they arrested us. We were taken to Kingeero police post. We were locked up. I spent one night. My mother came the following day and I was released and taken to Nairobi Women's Hospital. I was taken tests and told that I had contracted hepatitis 'B'. We were given a report. Report – MFI.1. I wasn't taken to any other hospital. I only went to Nairobi Women's. I never went to any clinic at Kinoo. I see this document has my name but I wasn't taken to any other document P3 – MFI.2 the doctors at Nairobi Women's hospital confirmed that I was having sex with accused. Jerald knew I was to quit school. After the arrest we haven't communicated (sic)."

On strict legal evaluation of the evidence adduced by the complainant, the trial court cannot be faulted for reaching the finding that the prosecution had established to the required standard of proof beyond any reasonable doubt that indeed the Appellant had defiled the complainant. The three ingredients to establish the charge were present in the evidence adduced by the complainant: the identity of the perpetrator was not in doubt. The Appellant and the complainant were neighbours. They had related as lovers for two months prior to the fateful week. Penetration was established first by the testimony of the complainant and secondly by a medical report which was produced in evidence. The mother of the complainant, PW2 R W N produced a birth certificate which established that the complainant was born on 29th May 1994. The complainant was therefore 15 years old at the time of the incident. That would have been the end of the story. An open and shut case.

However, this was not the case. It was the complainant who took herself to the house of the Appellant to seek refuge. She had been chased away by her mother when she learnt that she had been expelled from school for sneaking out of the school without permission of the school authority. By her own admission, the complainant was a truant. She was not interested in schooling. She drank alcohol. She smoked bhang. She had decided that she was ready to get married. She had identified the Appellant as her husband. In fact, she testified that she went to live with the Appellant as his wife. There was no evidence which was adduced by the prosecution witnesses to point to the fact that it was the Appellant who encouraged the complainant to abandon school. The evidence adduced by the complainant and her mother clearly points to the fact that it was the complainant who voluntarily took herself to the house of the Appellant. She willingly had sexual intercourse with the Appellant.

This court acknowledges the fact that a girl child of below the age of 18 years lacks capacity to give consent for sexual intercourse. However, in the peculiar circumstances of this case, it was clear that the defence available to the Appellant under **Section 8(5)** of the **Sexual Offences Act** was not considered by the trial court. By her own admission, the complainant was no longer interested in schooling and desired to get married. She took herself to the house of the Appellant and started living there as the Appellant's wife. This is the other aspect of this case that is not as straight forward as the trial magistrate considered when she reached her verdict. In any criminal proceedings, what is intended to be punished is the intentional or negligent conduct of the accused. The prosecution must establish that the accused had requisite mental capacity to commit the offence. In the present appeal, no evidence was adduced by the prosecution to establish either the fact that the Appellant enticed or encouraged the complainant to abandon school and go and live with him. It was the complainant herself who became truant and was expelled from school. Matters were not helped by the fact that when she went home, her mother was not sympathetic. She chased her from home. That is when she decided to go and live with the Appellant. This is the disturbing aspect of this case. The Appellant was 19 years old at the time. The age difference between the Appellant and the complainant was 4 years. It was possible that the relationship between the Appellant and the complainant was akin to that of Romeo and Juliet: they were consumed with passionate love that they did not give a damn to what others thought of them, including the fact that the complainant was a teenage child.

Prior to reserving this case for judgment, this court directed the probation office to prepare a probation report. The mother of the complainant who testified as PW2 told the probation officer that she was shocked when the Appellant was sentenced to serve twenty (20) years in prison. Her expectation, when she made the report to the police, was that the Appellant would be sentenced to serve a light sentence. Since the Appellant's conviction and sentence, her conscience had gnawed her. She urged the court to forgive the Appellant. On her part, the complainant, now aged 21 years, (she is also married with one child) told the probation officer that she had willingly participated in the sexual intercourse with the Appellant. At the time, her relationship with her mother was not good. After the incident, she went and lived with her paternal grandmother. She was able to complete her secondary schooling. She expresses remorsefulness and forgiveness towards the Appellant. She has no ill feeling towards him. In his report, the probation officer had this to say:

"Our inquiry established, the current home environment is quite conducive for his resettlement and integration since his family and significant others are supportive of the same. The complainant and her family have also shown mercy towards this remorseful first offender who committed the offence in his youth. The two families live barely 200 metres from each other and we did not experience any animosity or hatred towards each other. In any case, it is the family member of the inmate who guided us to the house of the victim's parents and observed warm greetings between the parties. Taking into consideration the circumstances and the ages of the inmate and complainant, what comes out is that these two having been brought up by single parents, lacked parental guidance and education on how to relate emotionally. As our inquiry further established, the offender has greatly benefited from his custodial sentence and he is desirous to continue ministering the word of God to the public and also continue in his quest as a peer educator. He is oriented towards not re-offending and his father is ready and willing to assist him settle on his land in Maragwa and introduce him to farming. Your honour, the inmate will also benefit from intensive counseling and mentoring on how to engage in emotional relationships so that he may not re-offend again."

In the premises therefore, although the prosecution established its case to the required standard of proof, this court is of the opinion that this is not a case that should attract the punishment that was meted by the trial magistrate. Although the **Sexual Offences Act** provides for minimum sentences, this court is of the view that the peculiar situation that the Appellants finds himself in was not contemplated when the **Sexual Offences Act** was enacted. This calls for the amendment of the **Sexual Offences Act** to ameliorate the harshness of sentences in situations such as this one. Under **Article 159(2)(d)** & **(e)** of the **Constitution**, this court is required to administer justice without undue regard to procedural technicalities and with a view to promoting the purpose and principles of the **Constitution**. This court does not think that the peculiar circumstances of this case warrant the Appellant to serve a custodial sentence. The justice of this case demands that the Appellant's custodial sentence be relooked afresh by this court.

In the premises therefore, the appeal lodged by the Appellant against conviction is hereby dismissed. However, his appeal on sentence is hereby allowed. The custodial sentence of the Appellant is shall be substituted by a non-custodial sentence. The Appellant is sentenced to serve one (1) year probation. The sentence shall take effect from the date of this judgment. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2015

L. KIMARU

JUDGE