IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2016

BETWEEN

ERICK IDDI SHATALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Kakamega (R. Sitati, J), dated 14th October, 2015

in

HCCRA No. 22 of 2014)

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JUDGMENT OF THE COURT

The appellant was charged with defilement of a girl contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**. The particulars of the offence are that on diverse dates between 20th May 2012 and 22nd May 2012 in Kakamega District within the former Western Province, he unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of L.V, a girl aged 14 years.

In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**.

The appellant denied the charges leading to a trial in which the prosecution called 8 witnesses in support of its case. The magistrate (C. Kendagor, Ag. SPM) heard the testimonies, the star witness being the complainant who testified that indeed the appellant picked her up from a shopping centre where she had been sent by her mother, took her to his friend's house and defiled her. The trial magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to 20 years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court and judgment was delivered by Sitati, J on 14th October 2015 dismissing the appeal in its entirety. The learned judge upheld the sentence meted on the appellant by the trial court.

Still aggrieved, preferred the instant appeal based on 5 grounds, which we summarize as, that the judge erred in law and fact by;

a) Disregarding the appellant's defence and merely dismissing it without due consideration.

b) Failing to appreciate that the complainant had given her consent to the appellant.

c) Passing harsh and excessive sentence against the appellant.

During the hearing of the appeal, learned Counsel **Mr. Muchere** held brief for **Ms. Imbaye** who is on record for the appellant while the respondent was represented by **S. Thuo**, the learned Prosecution Counsel.

It was submitted on behalf of the appellant that his right to a fair trial as enshrined in **Article 50** of the **Constitution** was violated. Counsel contended that the appellant had a right to legal representation due to the complexity of the the case and the fact that he was 16 years old at the time the trial took place. The magistrate's court ought to have protected this right and appointed Counsel for the appellant. Further, upon conviction, the trial court should have applied the **Borstal Institutions Act** and the **Children's Act**. As a result of such errors, the trial ought to be declared a nullity.

It was further argued that the conduct of the complainant suggested that she was of age and or had deceived the appellant to believe that she was able to give consent. Counsel relied on the case of **R V HOWARD [1965] 3ALL ER 684**. Even if she was not of age, the appellant was also a minor at the time the crime was committed and hence the appellant and the complainant defiled each other. She further relied on this Court's holding in **ELIUD WAWERU WAMBUI V REPUBLIC [2019] eKLR**.

On the issue of the sentence, Counsel contended that the same was too harsh and excessive considering the circumstances of the case which are clear that the complainant willingly had sex with the appellant. The Court was urged to allow the appeal, quash the conviction and set aside the sentence.

In opposition, the prosecuting counsel relied on **MOSES GITONGA KIMANI V R**, **Meru Criminal Appeal No. 69 of 2013**, in which this Court held that the law on the provision of legal representation by the State, which was to be passed by Parliament, was progressive therefore cannot be applied retrogressively. Since the same is yet to be passed, the trial court cannot be said to have breached that which does not exist.

Learned Counsel maintained that the prosecution had proved its case beyond a reasonable doubt having established, the age of the complainant, penetration and the identity of the perpetrator. He defended the sentence meted out on the appellant as appropriate since **section 8 (3)** of the **Sexual Offences Act** provided for a sentence of not less than 20 years. The Court was urged to dismiss the appeal as it had no merit.

As this is a second appeal, the Court restricts itself to consideration of questions of law only by dint of **Section 361(a)** of the **Criminal Procedure Code**. As was held **DAVID NJOROGE MACHARIA V REPUBLIC [2011] eKLR**;

> ***"That being so only matters of law fall for consideration–see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v. R [1984] KLR 611."***

The matters of law left for this Court to consider are whether the complaint had capacity to give consent, whether the appellant was entitled to legal representation at State expense during the trial and whether the sentence meted out was too harsh.

The age of a complainant is a critical component in defilement matters as it enables the court to determine whether the charges preferred are appropriate and also to determine the apposite sentence to mete on the accused if he/she is found guilty of the offence. The complainant herein was born on 5th December 1997 as per the birth certificate on record. The offence according to the charge sheet and as established by the two courts below was committed between 20th and 22nd May 2012. Meaning at the time the complainant was defiled she was around 14 years and 5 months. Counsel for the appellant argued that by the conduct of the complainant, she had willingly given her consent to engage in sexual activities with the appellant. From the record, the relevant testimony of the complainant was as follows;

> **"Erick is the one who had a motorcycle….I knew him as my friend….He called for short cake money. It was kshs 100/= He gave it to me….He took me to a house in Handiti. It was Geoffrey's house. I remained there. I slept there. He refused to stop at the shops. I did not shout or scream. I slept with Erick in one bed. We had sex. It was three times in the night…..Erick left in the morning…..I did not leave the house the whole day……He took me to Handiti to a video show….Shollyne told me to accept him as a friend to just get money from him."**

The full testimony of the complainant was to the effect that she had sex with the appellant on the first night. However, she stayed on for a second night when the appellant came back while drunk and told her he was going back to his house to sleep with his wife. She spent a second night at the appellant's friend's house. On the third day, the appellant came and took her to a video show then took her to another friend's house where she was finally found by her father and the police later in the evening.

PW7, Police Constable Lilian Achieng testified that the complainant told her that the appellant was her boyfriend. The question is whether the complainant had capacity to consent or whether her behaviour can be construed as consent.

Section 42 of the **Sexual Offences Act** defines consent as when a person agrees by choice, and has the freedom and capacity to make that choice. Therefore, we must satisfy ourselves as to whether the complainant at the age of 14 years 5 months had capacity to consent. Counsel relied on the finding in **R V HOWARD [1965] 3ALL ER 684** and **ELIUD WAWERU WAMBUI V REPUBLIC [2019] eKLR** to assert the position that the complainant had capacity to give consent through her conduct. However, the same are distinguishable as the circumstances in both cases involved complainants who were above the age of 16 and the courts held that at that age, an individual has attained the age of discretion. This is not what we stated in **ELIUD WAWERU WAMBUI V REPUBLIC [2019] eKLR** to affirm this position;

> ***"We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in***

***GILLICK vs. WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY* [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps."**

Counsel thus relied on case law that dealt with individuals older than the 14 years 5 months attained by the complainant at the time. It is clear to us that a child below the age of 16 years does not have the capacity to consent and is incapable of effective discretion when it comes to the decision to engage in sexual activities. Her conduct, be wild as it may can only be interpreted as childish foolishness and the same cannot amount to consent, as was held correctly by the learned judge. In **CHARLES KAHIRO NG'ANG'A V REPUBLIC [2009] eKLR** a case where the complainant, who was below the age of 16 years, engaged in a sexual relationship with an accused until she got pregnant and still refused to reveal the identity of the accused until she was pressured by her mother and brother, this Court rejected the notion that her conduct amounted to consent as follows;

"That could not be a valid answer to a charge of defilement because the complainant, being under the age of sixteen years, could not legally consent to such an act."

In the case before us, the appellant lured the complainant with a promise that he would make her his wife. He induced her allegedly consensual behaviour with lies and deceit. Even where the complainant was capable of giving legal consent, and she was not, the same was not willingly given. It is enough for us to reiterate that a girl of 14 years is incapable of giving consent. We follow the holding of this Court in **EZEKIEL ORAMAT SONKOY V REPUBLIC [2013] eKLR**

"The appellant himself testified to living as husband and wife with PW1 for 2 months in Eldoret because he intended to marry the appellant after carrying out formalities. The appellant and PW1 engaged in s in Eldoret and Kilgoris. The appellant knew that PW1 was 14 years old. There cannot be any substance to the appellant's complaint on this aspect of the matter at all."***

On the second issue, Counsel for the appellant contended that evidence on record shows that the appellant was 16 years of age during the trial and was therefore entitled to be accorded legal representation and to be sentenced under the provisions of the **Borstal Institutions Act** and the **Children Act**.

The said evidence was a lab report, a handwritten note really, that indicated the age of the appellant as 16 years contained at page 47 of the record of appeal. It was produced by PW8, the senior clinical officer. However, we take the information with a pinch of salt as the same was not indicated as being a conclusion pursuant to a proper age assessment and did not even purport to be an age-assessment report. Also, the medical report, which was filled by the same officer, does not indicate the age of the appellant. The witness did not testify on the issue of the appellant's age. Nor did the appellant himself ever raise it with the prosecution witnesses or even in his defence.

We cannot fault the trial magistrate for not looking into the issue since there was nothing apparent before the court to indicate that he was a minor. From the record, the appellant was a *boda boda* operator who had a wife, a place to live and had enough money to engage in drunkenness and pick up young girls at shopping centres. These uncontested facts go against the notion that he was an underage boy. The matter was also never raised during the trial and under the circumstances we do not think that the magistrate had a reason to doubt or make any orders for the ascertainment of the appellant's age. We note that the issue has been raised for the first time at the hearing of a second appeal leading us to conclude that the same is an afterthought by the appellant's Counsel. We shall therefore not belabour the issue.

Lastly, Counsel for the appellant contended that the sentence meted out on the appellant was harsh and excessive under the circumstances. The trial magistrate sentenced the appellant under the provisions of **Section 8 (3)** of the **Sexual Offences Act** which provides for a minimum sentence of 20 years imprisonment. The trial magistrate was therefore within the law in imposing the said minimum sentence. Equally, the learned judge who affirmed and upheld the sentence was bound by the law as at the time of the delivery of the judgment. The Supreme Court decision of **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC & ANOTHER [2017] eKLR** had not been delivered and therefore she did not have the lee way to reduce the sentence, had she thought fit. The aforementioned **Francis Muruatetu** case held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. This Court has reduced sentences in various matters on that account including **JARED KOITA INJIRI V REPUBLIC [2019] eKLR**, **ALEX KIPCHIRCHIR KIPTOO V REPUBLIC [2018] eKLR,** and **ABDALLA SWALLEH AWATH V REPUBLIC [2018] eKLR**.

Having considered the circumstances surrounding this case and including that the appellant was a first offender, the complainant's own conduct and the appellant's youthfulness, we think there is substance in the complaint that the 20 year sentence meted on him was harsh and excessive and it should interfered with.

For the reasons we have set out herein we dismiss the appeal against conviction. We allow it on sentence, to the extent that we set aside the 20 year sentence meted out by the trial court and upheld by the High court and substitute it with a 10 year sentence to run from 19th December 2013 when the trial court passed the initial sentence.

This judgment is delivered under **Rule 32(2)** of the **Court of Appeal Rules**, our learned brother Odek JA having died before signing it.

Dated and delivered at Kisumu this 3rd day of April, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL