IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL NO. 47 OF 2016

BETWEEN

F S B ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma,

(F. N. Muchemi, J.) delivered on 21st October, 2010

in HCCRA NO. 15 OF 2009)

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CORRIGENDA

[1] Paragraph [19] of the Judgment delivered on 12th July, 2018 refers to the sentence of 20 years.

[2] The correct position is that the appellant was on 5th February, 2009, sentenced to 15 years imprisonment by the Resident Magistrate, Sirisia. On appeal to the High Court in Bungoma Criminal Appeal No. 15 of 2009, the sentence of 15 years imprisonment was enhanced to life imprisonment on 21st October, 2010. Thus, the reference to a sentence of 20 years imprisonment in paragraph 19 aforesaid is a clerical error.

Accordingly, paragraph 19 aforesaid is corrected under **Rule 35(1)** of the Court of Appeal Rules to read **"the sentence of life imprisonment"** instead of *"the sentence of 20 years"*.

Dated and delivered at Kisumu this 19th day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF THE COURT

[1] The appellant, F S B was tried and convicted by the Resident magistrate's Court at Sirisia with the offence of defilement of a child contrary to section 8(1) & (2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 12th January, 2007 in Mount Elgon District, he committed an act which caused penetration with **"NW"** (name withheld), a child aged 6 years.

[2] During the trial the minor's mother (E), the minor's father, PC Ochieng an officer attached to Chesikaki Police Station, and Vincent Oduor, medical officer attached to Chwele District Hospital, all testified for the prosecution and the appellant gave unsworn evidence. In his judgment, the trial magistrate rejected the appellant's defence having found that there was sufficient evidence including medical evidence that confirmed that the minor was defiled; that the minor identified the appellant as the person who defiled her; and that the complainant was truthful in her evidence. The trial magistrate found the appellant guilty,of the offence, convicted him and sentenced him to serve 15 years imprisonment.

[3] In his first appeal to the High Court, the appellant challenged the judgment of the trial court contending that the charge sheet was defective; and that the evidence was contradictory and not sufficient to sustain a conviction. In regard to the sentence, the appellant complained that the trial magistrate failed to take his mitigation into account; and that the sentence imposed was harsh and beyond the jurisdiction of the trial magistrate.

[4] In her judgment the learned judge of the first appellate court found that the charge sheet was not defective; that the appellant was arraigned in court two days after his arrest; and that although the OB numbers relating to his arrest were contradictory the same was a minor error that could be cured under section 382 of the Criminal Procedure Code.

[5] In regard to the commission of the offence, the learned judge found that there was ample evidence that the minor complainant was defiled; and that the minor gave a graphic account of how the appellant had raped her and sexually assaulted her. The learned judge noted that the trial court believed the evidence of the minor complainant and rejected the defence of the appellant. The learned judge found that the appellant committed the offence when he was around seventeen years old and that his trial was conducted when he was mainly eighteen years.

[6] As regards the age of the minor complainant, the learned judge was satisfied with the evidence of the doctor that she was six years old. The learned judge therefore concluded that the appellant was rightly convicted as the particulars of the offence were proved. As regards the sentence, the learned judge found that the sentence imposed was not in accordance with **section 8(2)** of the **Sexual Offences Act** that provides imprisonment for life where the victim of the offence is eleven years or less. She therefore set aside the sentence of 15 years imprisonment and substituted it with a life imprisonment.

[7] This being a second appeal, our jurisdiction is in accordance with section 361(1) of the Criminal Procedure Code limited to considering the appeal on matters of law only. As was stated in, **Mohammed Famau Bakari vs Republic**, Criminal Appeal No. 64 of 2014, on a second appeal, the Court will give deference to the concurrent findings of the two lower courts unless the findings are not based on evidence, or on a consideration of the evidence or no court considering the facts could have reasonably arrived at the same finding. In addition, under section 379(1)(b) of the Criminal Procedure Code, an appeal against sentence only becomes a matter of law if the sentence is one fixed by law.

[8] In this case, the appellant filed a memorandum of appeal on 4th April, 2013 and on 14th February, 2018 he added additional or supplementary grounds. In summary the grounds of appeal raised issues the following matters of law that merit consideration by this Court; the age of the minor complainant; the identification of the appellant as the perpetrator of the offence; proof of the offence to the required standard; admission of the evidence of the minor complainant; violation of the appellant's rights; and dismissal of the alibi defence without cogent reasons.

[9] In support of his appeal, the appellant filed written submissions. We summarize his arguments into three main limbs. First, that although the age of the minor complainant was stated in the charge sheet as six years, this was not established such as to bring section 8(2) of the Sexual Offences Act into play. Secondly, that the trial court failed to take note that the appellant was a minor and did not therefore apply the provisions of the Children's Act and finally that during the trial, the rules of natural justice and the appellant's constitutional rights were violated.

[10] In regard to the identification, the appellant pointed out that according to the police, the minor reported having been defiled by unknown persons; that the minor complainant did not name or identify the appellant until five days after the alleged incident; and that the evidence of identification was not voluntarily obtained from the minor. The appellant urged that the medical evidence adduced was not reliable as it contained information which was insignificant to the allegation of defilement; that there was no scientific or forensic evidence to link the appellant with the offence; that the minor's clothing that she was allegedly wearing at the time of the commission of the offence, were neither

produced nor subjected to forensic examination; and that the opinion of the medical officer who testified could not be relied on as he did not establish that he was an expert skilled in his profession.

[11] Mr. Mulati, Senior Public Prosecuting Counsel, who appeared for the State conceded that the record of appeal indicated that the appellant had just turned eighteen at the time of the trial and that although an assessment was done and his age established as nineteen years, the assessment was done two years after the offence was committed. Counsel therefore, conceded that the appellant ought to have been sentenced in accordance with section 191 of the Children's Act. He therefore urged the Court to invoke Rule 31 of the Court of Appeal Rules and vary the sentence that was imposed on the appellant.

[12] On the conviction of the appellant, Mr. Mulati argued that there was direct evidence adduced which proved that the appellant committed the offence. The evidence included the minor complainant's testimony and the doctor's evidence. With regard to age, Mr. Mulati pointed out that the minor's father testified that she was six years old and that this was confirmed in the P3 form. The Court was therefore urged to dismiss the appeal on conviction.

[13] We have carefully considered this appeal taking into account our obligation as a second appellate court. The first issue of law that we wish to deal with is the age of the complainant. In this regard we refer to **Stephen Nguli Mulili V Republic [2014] eKLR,** where this Court stated as follows:

> ***"Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."***

[14] In **Evans Wamalwa Simiyu eKLR 2016** this Court referred to the above quotation and explained as follows:

> ***"[16] Thus in relation to the appellant's case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act."***

[15] A child is defined in the Constitution and the Children's Act as a person under the age of 18 years. In this case, the fact that the complainant was a child was apparent, hence her being subjected to a *voire dire* examination by the trial magistrate who ruled that though she could not understand the meaning of an oath she was intelligent enough to understand the importance of speaking the truth. Although the complainant stated that she did not know her age her father testified that she was 6 years. In addition, the medical officer who examined the complainant and filled the P3 form gave her estimated age as 6 years. There was therefore sufficient evidence upon which it was established that the complainant was a child and that she was six years as alleged in the charge sheet. The ground of appeal relating to the complainant's age therefore has no substance.

[16] In regard to the appellant's age, the evidence on record indicates that at the time the offence was allegedly committed he was a primary school student. As conceded by Mr Mulati, a medical examination that was subsequently done revealed his age as 19 years, this examination was done two years after the commission of the offence; therefore it is evident that the appellant was under the age of 18 years when he allegedly committed the offence. The appellant ought to have had the benefit of section 191 of the Children's Act, under which he could not be sentenced to a term of imprisonment. To this extent the sentence imposed was illegal.

[17] In regard to the appellant's conviction, both the trial court and the first appellate court found the evidence of the appellant credible and believed that she spoke the truth such that her evidence could under section 124 of the Evidence Act, be acted on without corroboration. In addition, both courts found the evidence of the minor complainant consistent with the evidence of the child's mother who noticed that her underpants were bloodstained and that she was bleeding from her vagina, and the evidence of the Doctor who confirmed that the minor was actually defiled and her hymen broken. On our part we have no reason to fault these concurrent findings.

[18] It is true that the minor complainant did not immediately identify the appellant as her assailant. It is not clear whether the minor knew the appellant by name, but she did physically identify the appellant to her mother when she next saw him, and this is what led to the appellant's arrest. In light of the minor complainant's clear evidence, the defence of the appellant, which was a bare denial, was rightly rejected. We find that the charge against the appellant was proved to the required standard and that his conviction was safe. We therefore dismiss the appeal against conviction.

[19] Having found that the sentence imposed upon the appellant was contrary to the law, we allow the appeal against sentence, and set aside the sentence of 20 years. The appellant having already served 11 years out of the unlawful sentence, we substitute the sentence with an order that the appellant shall be unconditionally discharged under section 191 of the Children's Act. The appellant shall therefore be forthwith set free unless otherwise lawfully held.

Those shall be the orders of the Court.

Dated and delivered at Eldoret this 12th day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR