IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 23 OF 2015

BETWEEN

S J.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya

at Mombasa (Muya, J.) dated 29th October, 2014

in

H.C.CR. A. NO. 185 OF 2011)

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JUDGMENT OF THE COURT

The appellant and the complainant in the Criminal Case that is the subject of this appeal are biological brother and sister. On 27th March, 2011, the appellant, his younger brother **GJ (PW3),** and the complainant, aged 9 years old were at home alone. At around 5.00 p.m. the appellant chased away **PW3** and was left with the complainant in the house. He immediately seized the complainant, tossed her into their parent's matrimonial bed and sexually assaulted her both in the anus as well as in the vagina. Before embarking on the despicable act, it is alleged that the appellant applied some jelly to the genital organs of the complainant. Thereafter, the appellant walked away and when PW3 came back the complainant immediately told him what had transpired.

When their mother, **EW (PW2)** came back from running her errands at about 6.00 p.m. both complainant and PW3 narrated to her what the appellant had done to the complainant. PW2 waited until the following day when she reported the incident to Gitobo Police Patrol Base and the appellant was arrested and escorted to Taveta Police Station.

Corporal Lucy Gichohi (PW5) of Taveta Police Station was detailed to investigate the case. As part of the investigations she arranged for the complainant to be examined at Taveta District Hospital for purposes of filling the P3 Form. A clinical officer by the name, **Samora Kilengi (PW4)** examined the complainant on 28th March, 2011. His examination revealed that the *"labia majora"* was normal, though

the *"labia minora"* was swollen, emythermatous and that the hymen was broken. The anus too showed evidence of forceful penetration. In his opinion, the complainant had been sexually assaulted.

The appellant was subsequently arraigned before the Senior Resident Magistrate's Court at Taveta on one count of incest contrary to **Section 20(1)** of the Sexual Offences Act with particulars being that the appellant on 27th March, 2011 at about 5.00 p.m. in Taita Taveta County intentionally inserted his penis in the anus and vagina of the complainant who to his knowledge was his sister. The appellant similarly faced an alternative count of sexual exploitation contrary to **Section 20** of the Childrens Act. For purposes of this appeal nothing much however turns on this alternative count.

The appellant denied the offences and was soon thereafter put on trial. Defending himself, the appellant in unsworn statement of defence claimed that he never, defiled the complainant on the alleged date or on any other date and that all that had been said regarding the alleged incident were a pack of lies.

At the conclusion of the trial, the appellant was convicted on the main count in a judgment delivered on 17th July, 2011 and was thereafter sentenced to 20 years imprisonment. His appeal against conviction and sentence was dismissed by the High Court (**Muya, J.**) sitting at Mombasa in a judgment delivered on 29th October, 2014. The appellant was dissatisfied with the judgment and has filed this second appeal premised on grounds of appeal dated 26th September, 2016.

In summary the grounds of appeal are that: the ages of the complainant as well as the appellant were not proved, the sentence imposed was contrary to **Section 34(1)** of the Sexual Offences Act; the prosecution case was not proved as required; and failure by both courts to take into account the appellant's defence. Expounding the above grounds, the appellant in his written submissions contended that the charge sheet was defective as it was at variance with the information in the P3 Form as well as the evidence led. That in every case the burden of proof rests upon the prosecution. In the circumstances of this case, this burden was not discharged according to the appellant, and instead the trial court endeavoured to make the case for the prosecution. In the premises, the appellant maintains that the offence alleged against him was not proved beyond reasonable doubt, that the trial court based its sentence on his alleged previous sexual encounters with the complainant which was contrary to the provisions of **Section 34(1)** of the Sexual Offences Act and finally that the defence advanced by the appellant though unsworn, was not given due consideration by two courts below.

Opposing the appeal, **Mr. Eugene Wangila**, learned Prosecution Counsel, submitted that the ages of both the complainant and appellant were proved, that in any event in determining whether or not the offence was committed, the appellant's age was, irrelevant. Counsel further submitted that the appellant was not convicted or sentenced as a result of his past sexual antecedents with the complainant. Therefore **Section 34(1)** of the Sexual Offences Act was not violated. It was further submitted that contrary to the appellant's assertion that the prosecution did not prove its case, there was evidence of the appellant's penetration of the complainant beyond reasonable doubt, which received corroboration by medical evidence. Finally, counsel submitted that the appellant was given a chance to defend himself and his unsworn statements of defence merely served to confirm the prosecution case.

We have considered the submissions by the appellant and the State, the grounds and record of appeal. This being a second appeal, its determination must turn on only points of law. As was stated in **Karingo v. Republic [1982] KLR 214**, a second appellate court will not as a general rule interfere with the concurrent findings of fact of the courts below unless they are shown not to have been based on evidence. In **David Njoroge Macharia v Republic [2011] eKLR** it was stated by this Court that under **Section 361** of the Criminal Procedure Code

> " …. **Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence; or the courts below are shown demonstrably to have acted on wrong principle in making the findings …."**

The points of law that are readily discernible in this appeal are fourfold namely, the age of the appellant

and complainant, application of **Section 34(1)** of the Sexual Offences Act, whether the prosecution proved its case against the appellant beyond reasonable doubt and the alleged rejection of the appellant's defence.

Before we embark on the consideration of the issues of law aforesaid, we must first revisit the sentence imposed on the appellant by the trial court and confirmed by the 1st appellate court. The appellant was convicted and sentenced to 20 years imprisonment. Under **Section 20(1)** of the Sexual Offences Act upon which the appellant was charged and convicted, the punishment that should have been meted out was imprisonment for not less than ten years. However, there is a *proviso* and it is to the effect that if it is alleged in the information or charge sheet and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

In this case, the charge sheet specifically stated that the complainant was aged 9 years old which fact was proved by evidence. Accordingly, the trial court ought to have sentenced the appellant upon conviction, to life imprisonment, as opposed to 20 years imprisonment that was meted out. We drew the attention of the appellant to this illegal sentence and the possibility that should we find no merit at all in this appeal and we dismiss it, we will be minded to correct the sentence and impose the correct one, which is life imprisonment. The appellant having carefully pondered over the purport of the warning nonetheless elected to prosecute the appeal.

With regard to the age of the appellant we would readily agree with the submissions of the state that the age of the appellant in an offence of this nature is immaterial. The section under which the appellant was charged only talks of the age of the victim and not the perpetrator. The section deals with incest by male persons and makes no reference at all to the age of the male perpetrator. Accordingly, it was not necessary for the prosecution to adduce evidence as to the age of the appellant. With regard to the age of the complainant, the complainant herself testified to that effect both under *voire dire* examination as well as in her evidence in chief. In fact the appellant did not at all cross-examine her on this aspect. The appellant is a brother to the complainant and had he suspected that the complainant was lying about her age, nothing would have been easier than putting it to her in cross-examination. Similarly both

PW4 and **PW5** testified as to the age of the complainant. They were all emphatic that the complainant was aged 9 years at the time that the offence was committed. We are accordingly satisfied that the complainant's age was proved beyond any reasonable doubt. Further and as already stated the appellant is the elder brother of the complainant. At the time of the commission of the offence, the appellant put his age at 18 years. The *proviso* to **Section 20(1)** of the Sexual Offences Act only makes reference to a victim under the age of 18 years. Accordingly, whichever way one looks at the circumstances, the complainant was under the age of 18 years if the age of her elder brother the appellant, is anything to go by.

The ground of appeal that the trial court and the first appellate court erred in convicting and sentencing the appellant to twenty years imprisonment in reliance on evidence of the alleged previous sexual history of the appellant contrary to **Section 34(1)** of the Sexual Offences Act is bereft of merit. The section deals with circumstances under which evidence of previous sexual experience or conduct of an accused may be led. In other words, the section deals with the evidence of character and previous sexual exploits of the accused. For such evidence to be adduced an application has to be made by any party to the proceedings. No such request or application was made by any party to the proceedings in this case, nor was such evidence ever led by the prosecution. Secondly, the mere fact that PW1 and PW2 fleetingly referred to the fact that this was not an isolated incident does not by itself violate the provisions of the aforesaid section. That information was not elicited from a direct question. It was merely a by the way or as an afterthought. Lastly, in imposing the sentence, the trial court did not at all revert to the fact of the appellant having previously defiled the complainant.

Regarding whether or not the prosecution proved its case against the appellant beyond reasonable doubt, we have on record concurrent findings of the two courts below that indeed the appellant committed the heinous act. We are beholden to those findings unless the findings are not based on evidence or taken as a whole the findings are demonstrated to have been founded on wrong principle as already said elsewhere

in this judgment. We discern no such misgivings in the circumstances of this case. There was simply overwhelming evidence of the complainant, her brother, mother and the clinical officer, which connected the appellant to the offence.

Both courts below carefully considered the appellant's defence and found it wanting. They were of the view that since the appellant was a brother to the complainant and that all the witnesses who testified with the exception of the investigating and clinical officer were members of the same family, they could not see any justification or reason for them to gang up and falsely accuse the appellant. Nor did the appellant say in his defence why his mother and young siblings would want him out of their way.

The upshot of the foregoing is that the appeal has no merit and it is accordingly disallowed. However since the sentence imposed was illegal as demonstrated elsewhere in this judgment, the sentence of 20 years imposed is hereby set aside. *In lieu* thereof the appellant shall be imprisoned for life. It is so ordered.

Dated and delivered at Mombasa this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR