IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 55 OF 2011

LOLDEPE LENANGERI .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court at Nakuru (Emukule, J.)

dated 25th November, 2010

in

H.C.CR A. No. 197 of 2010)

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JUDGMENT OF THE COURT

1. The appellant faced two counts under the ***Sexual Offences Act***. Count I was defilement. Particulars of the charge was that on the 27th May, 2009, at about 5.00 pm in Samburu Central District within Rift Valley Province the appellant did cause his penis to penetrate the vagina of NL a child aged 11 months in violation of ***Section 3 (1)*** as read with ***Section 3 (2)*** of the ***Sexual Offences Act No. 3 of 2006***. Count II of the charge was the offence of Indecent Assault contrary to ***Section 11 (1)*** of the S***exual Offences Act No. 3 of 2006***.
2. The particulars of the charge in Count II was to the effect that on the same 27th May, 2009, at about 5.00 pm, the appellant did intentionally and unlawfully cause his right hand forefinger to come into contact with the vagina of NL a child aged 11 months contrary to ***Section 11 (1)*** of the ***Sexual Offences Act No. 3 of 2006.***
3. The appellant appeared before the trial Magistrate on 4th June, 2009, whereupon he denied Count I. He pleaded guilty to Count II and the particulars as read to him. The trial Magistrate recorded as follows: Accused is convicted in his own plea of guilty. The appellant was sentenced to serve a period of 25 years in jail with hard labour. He filed a first appeal to the High Court against conviction and sentence.
4. The High Court ***(Emukule J.)*** upon hearing the appeal enhanced the sentence from 25 years to life imprisonment. The judge expressed himself as follows:

> ***"The punishment for the offence of defilement of a child aged eleven years or less upon conviction is life imprisonment. The appellant was sentenced to twenty-five years. That***

was an illegal sentence. It is set aside and in lieu thereof, the appellant is sentenced to life imprisonment to commence from the date of his sentence by the lower court. Save as aforesaid, the appeal is herein dismissed".

5. Aggrieved by the dismissal of his appeal by the High Court, the appellant lodged this second appeal. The main ground of appeal is that he pleaded not guilty to the charge of defilement and the learned judge erred when he enhanced the sentence from 25 years to life imprisonment without administering the normal caution. That the learned Judge erred in law when he failed to find that the appellant did not understand the meaning of appeal and no efforts were made to make him understand the same.
6. At the hearing of this appeal, the appellant appeared in person and the proceedings were conducted in Samburu language with the aid of an interpreter. Learned counsel J. K. Chirchir, Senior Principal Prosecution Counsel appeared for the State.
7. The appellant reiterated his grounds of appeal and urged this Court to reduce the sentence as he did not plead guilty to the charge of defilement. He submitted that he pleaded guilty to the charge of indecent assault and the High Court Judge erred in enhancing the sentence from 25 years to life imprisonment. He urged this Court to take into account his mitigation and lessen the sentence as he is a first offender.
8. Senior Principal Prosecution Counsel supported the appeal. He submitted that the appellant pleaded guilty to Count II on indecent assault. That the appellant was never tried and convicted of Count I on defilement and there is no finding that he was guilty of defilement. It was submitted that the trial Magistrate ought to have tried the appellant for Count I and since this did not happen, there has never been conviction of the appellant for defilement as in Count I. The State submitted that the Judge erred in law in enhancing the sentence on the erroneous assumption that the appellant had been found guilty of Count I. The State in supporting the appeal urged this Court to set aside the orders enhancing the sentence meted to the appellant .
9. We have examined the record of appeal and the judgment of the High Court and the grounds of appeal. This is a second appeal which must be confined to points of law. (See ***Kavingo – v – R, (1982) KLR 214,*** **and** ***Chemagong vs. Republic, (1984) KLR 213***).
10. There are two issues for consideration in this appeal. The first is whether the Honourable Judge erred in enhancing the sentence meted upon the appellant and the second is the merits of the second appeal by the appellant against conviction and sentence.
11. The record of proceedings before the trial Magistrate is clear that the appellant pleaded guilty to Count II on indecent assault. There was no conviction on the charge of defilement as particularized in Count I. We concur with the State that the learned Judge erred in law in enhancing the sentence meted to the appellant from 25 years to a term of life imprisonment. The reason given by the learned Judge in enhancing the sentence is that the appellant had been convicted of defilement; this was a misreading of the proceedings before the trial court.
12. The other ground for consideration in this appeal is whether the 25 years meted on the appellant by the trial court was harsh and excessive. In ***Macharia-vs- Republic, (2003) 2 EA 559***, this Court expressed itself as follows:-

> ***"The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1964 in the case of Ogola s/o Owour-vs- Republic (1954) EACA 270 wherein the predecessor of this Court stated:-***
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> ***"The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James -vs- Republic (1950) 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this we should also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case. See R-vs- Shershawsky (1912) CCA 28 TLR 263"***

13. ***Section 11 (1)*** of the ***Sexual Offences Act*** provides:

"Any person who commits an indecent act with child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

We are of the considered view that a term of 25 years is excessive as it is more than double the prescribed minimum. We hereby reduce the sentence meted on the appellant to a term of fifteen (15) years imprisonment.

14. The upshot is that we find that this appeal has merit. We hereby set aside the judgment of the High Court dated 25th November, 2010, and set aside the enhanced sentence of life imprisonment. We hereby confirm conviction for the charge of indecent assault as entered by the trial court and set aside the sentence of term imprisonment for 25 years and substitute in its place a sentence for a term of fifteen (15) years to run from 4th June, 2009, being the date of conviction and sentence by the trial court.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR