IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 25 OF 2011

BETWEEN

J O A.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu,(Ali- Aroni, J) dated 3rd January, 2011

in

HCCRA NO. 111 OF 2008)

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JUDGEMENT OF THE COURT

This is a second appeal. By dint of Section 361(1) (a) of the Criminal Procedure Code we are mandated to deal only with issues of law but not matters of fact which the two courts have made findings upon unless is be shown that there has been a misdirection on the treatment of facts or the findings of fact are not based on evidence. This statement of the law has been made, stated and restated in the many decisions that have come fourth from this court such as **Thiongo v Republic [2004] lEA 333** and **Aggrey Ochieng Aguch & Anor v Republic (Kisumu) Criminal Appeal No. 367 of 2008 (ur).**

The charge facing the appellant, **J O A**, before the Chief Magistrate, Kisumu, was that of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006. It was alleged that on 18th October, 2007 at [particulars withhed] in Kisumu the appellant caused penetration with his sexual organ to a child "MAA" then aged 10 years. It was alleged, in the alternative, that on the said day at the said place the appellant committed an indecent act with the said child by touching the childs' private parts.

A trial was conducted before the learned Principal Magistrate (Mrs. A. G. Onginjo) who in a judgement delivered on 4th August 2008 convicted the appellant on the main count and sentenced him to serve twenty years imprisonment.

These findings did not find favour with the appellant who preferred an appeal being Kisumu High Court Criminal Appeal No. 111 of 2008 where the appellant complained that his constitutional rights had been violated because he was kept in police custody beyond twenty four hours; that the prosecution had not proved its case to the required standard; that the arresting officers not only stole money from the appellant but also subjected him to threats and intimidation; that the trial magistrate erred by shifting the evidential burden of proof and that the defence was ignored. Ali- Aroni, J, who heard the appeal did not find any merit in it and accordingly dismissed it and while doing so, in exercise of powers stated to be donated by Section 153 of the Criminal Procedure Code (the provision is Section 354 of the said code) enhanced the sentence from the said twenty (20) years imprisonment imposed by the trial court to a life term.

That is the background to this appeal which is premised on a home-grown Memorandum of Appeal where seven (7) grounds of appeal are set out. For brevity these grounds are to the effect that the learned Judge erred in relying on insufficient evidence; that the appellant should have been subjected to a DNA test; that the learned Judge erred in not noticing that the charge sheet was defective; that important witnesses were not called and that the evidence of identification was not sufficient. The appellant also presented written submissions where the said grounds of appeal are expounded and it is prayed that the appeal be allowed.

When the appeal came up for hearing before us the appellant who conducted his appeal in person adopted and relied on the said grounds of appeal and written submissions.

Mr. Abele, the learned Assistant Director of Public Prosecutions, in opposing the appeal on conviction submitted that the complaint on absence of DNA test was misplaced because there was no legal requirement for it as what was to be proved in a defilement charge was penetration. On the allegation that certain witnesses were not called, learned counsel submitted that it was the prosecutions' prerogative to decide which witnesses to call in proof of their case which, according to him, had been done and the charge proved to the required standard. Mr. Abele did not however support the enhanced sentence because the learned Judge did not warn the appellant before enhancing sentence, thus leading to a prejudice against the appellant. Counsel therefore urged us to interfere with this aspect of the High Court judgement.

What are the issues of law raised in this appeal that call for our consideration?

The appellant has raised grounds relating to sufficiency of evidence and further that the charge sheet was defective.

The appellant was charged on a defilement charge and an alternative charge of indecent assault. The appellant submitted that on the evidence, he should have been charged with incest considering his relationship with the complainant. That complaint has no basis in law. The prosecution was entitled to choose the charge to prefer against the appellant as long as such charge was supported by the evidence presented before the court.

On sufficiency or otherwise of evidence **"MAA"** (hereinafter "the complainant")

who underwent voire dire examination and was found to be intelligent but did not understand the meaning of taking an oath testified that she was eleven years old and knew the appellant who she called **"uncle"**. This **"uncle"** lived with her mother, her father having died, in a relationship commonly called **"widow inheritance".**

On the night of 18th October, 2007 the complainant was asleep in a bedroom with her younger sibling when the appellant knocked at the door. The complainant refused to open the door but the appellant pushed it open, entered the room, removed a lamp that was in the room, came back and lay on the complainant. This led to the complainant screaming but this was stopped by the appellant who covered her mouth and...

> **"…did bad things to me. He removed my underpant and he also removed his shirt and**

remained with T-Shirt. He put his penis into my vagina. He remained with short trouser. When I told him I would report to my fathers' brother he left and ran away..."

The complainant informed her mother (PW2), her cousin and uncles of what had happened which led to arrest of the appellant by **PW5 P. C. F K**. One of the uncles (PW3) gave evidence that upon hearing the complainant crying on the fateful night he came out of his house and witnessed the appellant fleeing from the scene.

Perez Auma Wawire (PW4), a Clinical Officer at Kisumu District Hospital received and examined the complainant on 24th October, 2007. The complainant, who appeared to be ten years old, had been treated some five days earlier at the same hospital. The witness saw bruises on the labia and a broken hymen and there was a whitish discharge and this led to the conclusion that the complainant had been defiled.

This is the case that the prosecution presented which led to a finding by the trial court that there was a case to answer. Called to answer the appellant, who identified PW2 as a woman he cohabited with, stated that the cohabitation had been interrupted by PW2's engagement in a business of selling bhang supplied by her brothers. He did not approve of this and she threatened to teach him a lesson. He was arrested on 19th October, 2007 through instigation of PW2 and her brothers and the charges preferred were fabricated as a result of the said threat by PW2.

After identifying the matters that called for her determination the learned trial magistrate stated in the course of her findings in the judgement:

"Accused had inherited complainant's mother and therefore had free access to her house and PW1 knew him well as a father and could not have made such claims against a man who had relationship with the mother and who was held in positions of the father. If PW2 had sworn to fix accused for reasons which he alleged then the clinical officer's findings on medical examination could not have revealed that PW1 was defiled. In the circumstances I do find that it has been proved. Complainant was defiled and that it is accused who defiled her…"

The learned Judge on the first appeal reviewed and re-evaluated the evidence and reached similar findings as the learned trial magistrate. Both courts found the evidence to be water-tight and consistent thus displacing the appellants defence.

We have ourselves perused the record and examined the treatment of evidence by the trial court and re-evaluation by the first appellate court and we have no doubt that both courts reached solid findings based on the evidence and there is no basis at all for the complaint by the appellant in that regard. In the event there is no merit at all to the appeal on conviction and the same is accordingly dismissed.

On the issue of sentence the appellant urged us to interfere with the way the High Court had dealt with that aspect of the matter where the sentence of twenty years imprisonment imposed by the trial court was enhanced by the High Court to a sentence of life imprisonment.

The learned Assistant Director of Public Prosecutions agreed and similarly thought that we should interfere.

The issue of the age of a complainant in a sexual offence is an important one because the age of the complainant determines the sentence to be imposed by a trial court to an accused person convicted of such an offence under the Sexual Offences Act.

That issue therefore is an issue of law and we are entitled to examine it and make a determination based on the way it was treated by the courts below.

The complainant testified that she was eleven years old. Her mother, PW2, did not testify on the age of the complainant at all. The medical officer (PW4) who examined the complainant and completed P3 Form estimated the age of the complainant as ten years and gave that age in testimony before the court.

The trial magistrate in the Judgement observed that the minimum sentence for defilement of a child aged ten years or below was twenty years imprisonment and proceeded to award that sentence.

The learned Judge on first appeal pronounced herself thus in the judgement on that issue after considering the material placed before her as she proceeded to pronounce a term of life imprisonment:

> **"The law that is applicable gives only one sentence for the offence committed by the appellant. That of a life sentence. The court therefore agrees with the prosecution that the sentence meted by the trial court was unlawful. Under Section 153 of the Criminal Procedure Code this court enhances the sentence to that of life imprisonment."**

There had been no cross - appeal by the Republic.

This court differently constituted in **Josea Kibet Koech v Republic [2009] e KLR** while dealing with an appeal where sentence was enhanced by the High Court on first appeal observed that because the State did not give any notice of enhancement of sentence to the appellant such enhancement was without jurisdiction.

In **JJW v Republic [2013] e KLR** this court was dealing with an appeal where the appellant had been sentenced to seven years imprisonment but that sentence was enhanced to ten years imprisonment without any notice to the appellant and without a cross appeal by the State. We observed in that appeal that:

> **" It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."**

In the judgement appealed from there was no cross - appeal by the State. All the State Counsel stated to the learned judge in submissions was that:

> **"...Child was fourteen years. Appellant aught (sic) to have been imprisoned for life as this is the only sentence provided under Section 8 (2) .."**

There was no warning of any nature that was given to the appellant who was unrepresented before the Judge. The learned judge accepted the State Counsels' submission and enhanced sentence as already stated. In the event the sentence was enhanced without affording the appellant an opportunity of persuading the court against such a proposal. If the appellant had been warned it is possible that he could very well have abandoned the whole enterprise that made his situation more precarious where a jail term became a life sentence. It was important for the learned Judge to give the appellant that warning without which she proceeded without jurisdiction. The Assistant Director of Public Prosecution was right to concede this point as the enhanced sentence was clearly unlawful.

As already observed the age of the complainant was not properly ascertained. She herself stated that she was eleven years old. But the medical officer thought that she was ten years old. The State Counsel at the High Court in asking for enhanced sentence gave the complainants age as fourteen years. In a situation as prevailed in the case where there was no agreement or certainty on the age of the complainant and

because of the importance of age of a complainant in offences of a sexual nature the appellant was entitled to the benefit of doubt to be exercised in his favour, in this case the age of the complainant could have been ten years or eleven years or even twelve years.

In the premises we are of the opinion that the determination of the relevant age bracket should have been favourable to the appellant. The prosecution had the onus to clear doubts regarding the age of the complainant failure of which the benefit would go to the appellant. We do so in this case. It follows, upon such finding, that the sentence imposed upon the appellant by the High Court Judge had questionable legality and thus entitles this Court to interfere. The punishment for defiling a child aged between twelve and fifteen years is a minimum of twenty years imprisonment (Section 8 (3) of the Sexual Offences Act). We think that is the lawful sentence which ought to have been imposed and which indeed the learned Principal Magistrate imposed upon the appellant.

We accordingly dismiss the appeal on conviction for the reasons stated in this judgement. We allow the appeal on sentence to the extent that the enhanced sentence of life imprisonment is set aside and in its place we restore the original sentence awarded by the trial court of twenty (20) years imprisonment from the date that sentence was awarded.

Dated and Delivered at Kisumu this 4th day of July, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR