IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 176 OF 2010

BETWEEN

J A O .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 15th June, 2005

in

H.C.CR.A. NO. 282 OF 2003)
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JUDGMENT OF THE COURT

This is the second and final appeal by ***J A O*** (*"the appellant"*) who was convicted by Makadara Resident Magistrate (Mrs. Nyakundi) on 18th March, 2003, for the offence of incest by male contrary to ***section 166 (1)*** of the Penal Code. Upon his conviction, the case was referred to the Principal Magistrate in the same court, Mrs. Juma, who sentenced him to life imprisonment. His appeal to the superior court (Ochieng, J) against both conviction and sentence was dismissed on 15th June, 2005, hence the appeal now before us which may only lie on matters of law (***section 361***, Criminal Procedure Code).

The allegation that was found by the two courts below to have been proved beyond reasonable doubt, through 8 prosecution witnesses, was that between the 24th April, 2001 and 13th May, 2001, at M Village in Nairobi, being a male person, the appellant had carnal knowledge of ***W A*** a female person who was to his knowledge his daughter.

The concurrent findings of fact made by the two courts were that W A (W) was aged seven years at the time. Her mother and the appellant had disagreed and gone separate ways and W, together with two other siblings, went to live with their grandmother in Kisumu, Nyanza. The appellant, who was a shoemaker, lived alone in M Valley, in Nairobi. At some point the grandmother died and the appellant brought W to Nairobi in April, 2001. The appellant's neighbor in M was ***R A*** (PW2) also known as *"Mama L"*. She came to know W on 24th April, 2001 as W used to play with her own children. On 7th May, 2001, Mama L found W in her house looking unwell and reluctant to go back to her father's house. She wanted to ascertain the reason for this and she found W was having diarrhoea, was urinating without control and

had lost appetite. She asked W to lead her to their house which she did and to her horror, Mama L found the house was an untidy one room with no bed, stove, sufurias or cups etc. The appellant was nowhere near. She returned to her house with W. The following day 8th May, 2001 Mama L contacted a social worker at St. Theresa's Church, ***Lucy Wairumi Kithiru*** (PW3), who organized for W's treatment at St. Theresa's Dispensary. Another visit was made to the appellant's home, which was found to be in a sorry state with only an empty sack in the corner used by both to sleep on. The appellant was also interviewed by Lucy and he lied that his wife was dead and he was forced to take W in after the death of her grandmother who was taking care of her. Lucy contacted other social workers at St Theresa's, (PW4) and (PW6), and they agreed to admit W into their *"Rescue Dada"* programme in the institution.

A nurse at the institution confirmed that W had been sexually abused in addition to the other ailments she had and she was transferred to Gertrude's Children's Hospital on 13th May, 2001 where she was admitted and treated for one month**. *Dr. Joseph Kariuki Mbuthia*** (PW8) who attended to her found she was malnourished, had pneumonia, tonsillitis, infected ear, typhoid, was anaemic due to lack of proper nutrition; unable to walk and was going on long and short calls on herself which was abnormal. He also suspected W, who was fearful of male presence, was suffering from depression and so, he invited a female psychiatrist Dr. Jane Kangethe to talk to her. That is when W disclosed that the appellant used to lock her up in the house every day and would come in the evening drunk. He would also hold a knife at her and defile and sodomise her. A gynecologist, ***Dr. Jean Kagia*** examined the child in theatre and confirmed the hymen was injured and the bladder was infected. Defilement was confirmed and appropriate treatment given up to 4th June, 2001 when W was discharged. The matter was reported to the police for investigations and the Police Surgeon, ***Dr. Zephania Kamau*** (PW7) examined W on 30th September, 2002 and confirmed the earlier findings. He formed the opinion that the loss of hymen, urine incontinence and bladder infection were the result of cross infection from another person.

The appellant was not arrested until 24th October, 2001 as he was not readily traceable. ***Sgt. Meshack Maeri*** (PW5) in the company of other officers from Pangani Police Station traced him to Kariokor Market where he was arrested, and later interrogated, charged with, and tried for the offence of incest after consent to prosecute was obtained from the Attorney General.

The evidence of W in connection with the offence is best reproduced verbatim:

"*I was staying upcountry before I came to M, i.e Kisumu. I was staying with my father. My father brought me to Nairobi. We were living together at M at the house of my father. There was no one else staying in the house with us. Mama L came to pick me up after I told her that I was sick.*

While staying with my father, there is something that he did to me. He used to sleep on top of me. He slept on top of me twice. I felt a lot of pain and cried. He told me to keep quiet. I screamed. He then let go of me. I continued staying in the house. I did not go anywhere."

She had earlier confided the same information during counseling sessions to ***Ann Wanjiku Kihagi*** (PW4), thus:

"The father used to go to work for casual labour and come home in the evening while drunk and he could make her lie down, open her legs and then proceed to defile her."

That evidence was wholly believed by the two courts below as it found corroboration in medical evidence.

The appellant in his defence confirmed that he was W's father but denied that he was living with W when she fell sick. He asserted that W was living with Mama L. He also denied that he had defiled his daughter as alleged but his defence was rejected by the two courts below.

Before us, the appellant still challenged the findings of fact that W was defiled and that she was defiled while she was living with him. As stated earlier, however, this second appeal ought to be on matters of

law as the Court will be slow to interfere with concurrent findings of fact unless they were based on no evidence at all or on a perverted appreciation of the facts. In our own assessment, the findings of fact challenged by the appellant were made on sound evidence and we find no merit in the appellant's complaints in that respect.

The appellant nevertheless raised one issue of law which was conceded by learned Senior State Counsel Ms. Nyamosi as it was apparent on the face of the record. The issue is that the trial court did not take a plea in the case before commencing the trial. It is apparent on the record that the appellant was taken before the Chief Magistrate Makadara on 29th October, 2001 when the charge and particulars thereof were put to him but he was not required to plead because there was no consent from the Attorney General to prosecute. It took another 11 months of mentions before it was confirmed on 9th September 2002 that the consent had been issued. A date was fixed for trial which commenced on 2nd October, 2002 without the plea being taken. The response by Ms. Nyamosi to this anomaly was that it did not invalidate the charge or the trial as the appellant fully participated in cross-examining all the witnesses and testified in his defence. There was therefore no prejudice and the irregularity was curable under ***section 382*** of the Criminal Procedure Code (CPC).

We have considered the issue and we agree with Ms. Nyamosi that the irregularity was curable under ***section 382*** of the CPC. The requirement under ***section 207*** of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered. By a later amendment in 2008, the plea would also determine whether the accused was guilty but subject to a plea agreement. In this case, the Chief Magistrate explained the charge and particulars thereof to the appellant in a language fully understood by him. The only reason why the plea was not taken was because of the legal requirement for consent of the Attorney General. As correctly observed by Ms. Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the appellant was given full opportunity to cross-examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the appellant was ready to plead guilty nor was any complaint raised at all. We think in all the circumstances therefore that there was no failure of justice occasioned by the irregularity belatedly complained of and we find it was curable under ***section 382*** of the CPC. That ground of appeal fails.

The only other issue of law arising in the matter was raised by the court itself and relates to the legality of the sentence which this Court under ***section 361 (1) (b)*** CPC has the jurisdiction to consider. As stated earlier, the trial was conducted by a Resident Magistrate. That may well have been an error on the part of the Chief Magistrate who allocated the hearing because ordinarily an offence under **section 166 (1)** of the Penal Code ought to be tried before a "*subordinate court of the first class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate*" as provided under ***section 5 (2)*** of the CPC and the fifth column of the First Schedule to the Code. By definition, a "*magistrate's court of first class*" means "*a Resident Magistrate's Court which is duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate*." It shall have such jurisdiction and powers in proceedings of a criminal nature as are for the time being conferred on it by the Criminal Procedure Code or any other written law. – See ***sections 2, 3*** and ***4*** of the Magistrate's Courts Act, Cap 10.

By dint of ***section 7 (1)*** as read with ***section 7 (2),*** of the CPC a Resident Magistrate can only pass sentences of imprisonment not exceeding seven years and fines not exceeding Shs.20,000/=. The Resident Magistrate who tried the case here was alive to this provision of the law but was perturbed that she could not impose the sentence provided for offences under ***section 166 (1)*** of the Penal Code, which is life imprisonment. For that reason, she made an order transferring the case to the Principal Magistrate for sentencing. With respect, there was no power under the Code for the trial magistrate to adopt that course of action. The power donated under the CPC to commit a case to a higher court for sentence is in ***section 221*** which provides in relevant part as follows: -

(2) Where a person who is not less than eighteen years of age is convicted by a subordinate court of

the first class of an offence which is punishable by either that court or the High Court, and the court convicting him, after obtaining information as to his character and antecedents, is of the opinion that they are such that greater punishment should be inflicted than it has power to inflict, the court may, instead of dealing with him itself, commit him in custody to the High Court for sentence.

(3) Where the offender is committed under subsection (1) of subsection (2) for sentence, the court to which he is committed shall inquire into the circumstance of the case, and may deal with the offender in any manner in which he could be dealt with if he had been convicted by that court; and, if that court passes a sentence which the court convicting him had not the power to pass, the offender may appeal against the sentence to the High Court (if sentenced by a subordinate court of the first class) or to the Court of Appeal (if sentenced by the High Court), but otherwise he shall have the same right of appeal in all respects as if he had been sentenced by the court which convicted him."

So that, even if there was power to transfer the case for sentencing purposes, only the High Court would have jurisdiction to receive and enquire into the circumstances of the case before meting out the appropriate sentence. The case was therefore referred to the Principal Magistrate without jurisdiction and the superior court ought to have rectified that error of law, but did not.

The sentence provided for under ***section 166 (1)*** is not a minimum sentence. Under section ***26(2)*** of the Penal Code: -

"(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."

The option available to the trial magistrate was to consider the appropriate sentence within the limits of its jurisdiction under ***section 7*** CPC, depending on the antecedents of the appellant here and the circumstances surrounding the offence. The antecedents of the appellant do not appear to have been fully explored but he was treated as a first offender, was remorseful and had two other children. The superior court was on the view that there were aggravating circumstances in the offence considering that the victim was a child of seven years, was subjected to neglect and emotional abuse and had to receive extended medical attention. Before us, the appellant stated that he was aged 80 years but provided no proof of that age. In all the circumstances we think this was a case deserving of the most severe punishment to serve as a deterrent to other marauding sexual pests who threaten the girl child. The saving grace for the appellant is the law which we have a duty to apply.

In the result we set aside the sentence of life imprisonment imposed on the appellant and substitute therefor the maximum sentence of seven years which the trial court had the jurisdiction to impose. The sentence shall take effect from the date of conviction by the trial magistrate. The appeal against conviction is dismissed.

Orders accordingly.

Dated and delivered at NAIROBI this 1st day of JULY, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI
.....

JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR