REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.272 OF 2015

D K L .....APPELLANT

VERSUS

REPUBLIC .....STATE

JUDGMENT

1. The Appellant in this case is DKL. He was convicted of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. It was alleged that on 11/07/2010 at [particulars withheld] Trading Centre in Bahati, he unlawfully and intentionally committed an act by inserting his male genital organ (penis) into the vagina of JWM, a child aged 4 years which caused penetration.

2. The Appellant pleaded not guilty and the case proceeded to a full hearing. The Learned Magistrate was persuaded that a case had been proved beyond reasonable doubt and proceeded to convict the Appellant. She also imposed the mandatory life imprisonment as provided in the statute.

3. The Appellant was aggrieved by the conviction and sentence and appealed to this Court.

4. At the initial hearing, it struck me that the Appellant was visibly youthful and I sought to know his age. He told me that he was 24 years old. This struck me since the Appellant was convicted in 2014 but was first arraigned in Court on 19/07/2010. If his allegations were true, then it would mean that he was only fifteen at the time of trial.

5. I ordered for a forensic age assessment from the Nakuru Provincial General Hospital. The report filed in Court on 05/07/2018, a Dr. Dennis Atao of Nakuru PGH Hospital stated that it is not possible to ascertain what the age of the Appellant was in 2010. All he could do was confirm that the Appellant was now above 18 years old.

6. At the next hearing date, fortunately, the relatives for the Appellant were able to produce the Appellant's original Child Health (Immunization) Card. A preliminary examination persuaded me that it was a genuine copy of the Card. Mr. Motende, State Counsel agreed. The Card shows that the Appellant was born on 03/08/1994. This means that the Appellant was fifteen years and eleven months at the time of the alleged offence. He was, clearly, a minor at the time.

7. It is not clear why the Learned Trial Magistrate did not notice that the Appellant was a minor. The Appellant says he informed the Court but it is not recorded anywhere. But there is a Court document that indicates the age of the Appellant. It is a Pre-Bail Report dated 06/10/2010. It establishes the age of the Appellant as 16 years and reports that he was then in Standard 7. It is unclear if the Learned Trial Magistrate noted the age of the Appellant in the Report. In any event, the case proceeded with the Appellant being remanded.

8. At some point in the record, it would appear that a Ms. Muturi appeared for the Appellant and urged the Court to have the case withdrawn under section 202 of the Criminal Procedure Code in view of the fact that the Appellant had been in custody for more than two and half years and yet he was a minor. That was on 12/03/2012. At the next hearing date on 05/04/2012, the Court released the Appellant on his own free bond. The case proceeded with the Appellant being out on bond since that time.

9. However, upon conviction, the Learned Trial Magistrate proceeded to sentence the Appellant as an adult. The sentencing took place on 05/11/2014. At the time, the Appellant was twenty years old. The delay in trial was due to the fact that for a long duration of time, the Complainant was unable to testify.

10. What should happen in such cases?

11. The penalties for child offenders are provided under section 191(1) of the Children Act, which provides as follows:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) by discharging the offender under section 35(1) of the Penal Code (Cap. 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);

(k) by making a community service order; or

(l) in any other lawful manner.

12. Several cases in our jurisprudence have grappled with these kinds of cases. The Court of Appeal in ***R v Dennis Kirui Cheruiyot [2014] eKLR*** dealt with a somewhat analogous case. In that case, the Appellant was aged 20 years at the time of sentencing but was 15 years old when the offence was committed. He was convicted of murder by the High Court. The Court sentenced him to life imprisonment. The Court of Appeal reduced the sentence to 10 years imprisonment after noting the dilemma a Court faces in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at the time of sentencing or at the time of an appeal.

13. In reaching its decision in the ***Dennis Kirui Cheruiyot Case (supra)***, the Court relied on ***JKK vs Republic (2013) eKLR*.** This is a decision of the Court of Appeal sitting in Nyeri. In that case, a minor charged with murder was convicted and sentenced to death. The Court of Appeal found that the Appellant was under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The Court of Appeal reduced the sentenced from the death penalty to a custodial sentence of 12 years. The Court reasoned as follows:

The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

14. In the ***Dennis Cheruiyot Case (Supra)***, the Court of Appeal expressed itself thus:

Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.

15. In both the ***Dennis Cheruiyot Case*** and the ***JKK Case***, the Court of Appeal latched on to the omnibus proviso in section 191(1)(l) of the Children's Act to fashion a sentence that it deemed appropriate for the context and circumstances of the case at hand.

16. I will do the same here.

17. I begin by noting that the Appellant has been in custody for a period of about six (6) years cumulatively (1 year and 8 months in remand and 4 years and 2 months since in prison). I requested for a Social Enquiry Report from the Department of Probation and Aftercare services. The Report is exceedingly positive. It says of his Prison rehabilitation:

> *Whilst in prison, [the Appellant] has attained grade 1, 2 and 3 in carpentry. He says he sees this as a good thing to come out of his incarceration. The Prison authorities cite him as a model inmate with no incidence to his name and he also has received spiritual nourishment and is an active member of the Pentecostal church as well as a choir member*.

18. The Report concludes that the Appellant tis a good candidate for Probation and highly recommends it. It points out that the family, which visits him often in Prison, is willing and able to support him as he re-adjusts to life outside prison.

19. In the specific circumstances of this case, I invoke section 191(1)(l) of the Children's Act to sentence the Appellant in a manner that I deem lawful given his status as a minor when the offence was committed. I sentence him to the time already served in addition to a probation sentence for a period of two years. I believe that this is sufficient and appropriate punishment for the Appellant given his age at the time the offence was committed.

20. Orders accordingly.

Dated and delivered at Nakuru this 24th day of January, 2019

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JOEL NGUGI

JUDGE