REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRA NO. E 043 OF 2021

WILLINGTON ADONGO KAFUNJA.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Willington Adongo Kafunja, the appellant, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act by Principal Magistrate's Court Migori on 30/7/2021.

The particulars of the charge were that on 25/12/2020, in Suna East Sub-County of Migori County, intentionally and unlawfully caused his penis to penetrate into the vagina of EA a child aged 14 years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offence Act, in that he intentionally touched the female genital organs of EA, a child.

Upon conviction, the appellant was sentenced to serve 20 years imprisonment. No finding was made on the alternative charge.

The appellant is aggrieved by both the conviction and sentence and hence preferred this appeal through the firm of Abisai Advocate, dated 11/8/2021 and filed in court on 12/8/2021. The appellant cited 12 grounds of appeal. Miss Okota appeared for the appellant and also filed written submissions. In the submissions, counsel concentrated on one ground, that the court failed to comply with Article 50 (2) (g) of the Constitution in that the court failed to inform the appellant of his Constitutional right to counsel. The other grounds can be summarized as follows; that the court failed to take into account the complaints conduct before and after the alleged offence; that the court did not consider the evidence in light of section 8 (5) of the Sexual Offence Act; that the court failed to consider the appellant's defence; that the offence of defilement was not proved to the required standard and that the sentence was harsh and excessive. Counsel urged that the conviction and sentence be set aside and the appellant be set at liberty or in the alternative the court do order and retrial.

Miss Okota relied on the decision by **Mrima J in FOO =vs= Republic (2020) eKLR** where the judge referred to M.M.T alias **Aunty =vs=Republic. Migori CRA 44/2019** where the court held that the right under Article 50 (2) (g) cannot be limited in any way by dint of Article 25 of the Constitution and that failure to comply with the said Article renders the trial a nullity. Counsel also referred to several other decisions that the court considered.

The prosecution counsel **Mr. Kimanthi,** opposed the appeal to the extent that the evidence tendered by the seven prosecution witnesses established beyond reasonable doubt that the offence of defilement was committed; that the appellant never raised a defence under section 8 (5) of the Sexual Offence Act as he denied anything to do with the complainant.

As for the sentence, counsel urged that the appellant was given the minimum sentence under Section 8(3) of the sexual offence Act. Counsel however agreed with Ms. Okota's submission that the trial court did not comply with Article 50 (2) (g) of the Constitution which was a gross violation of the appellant's rights. He urged the court to order a retrial.

At the trial, the prosecution called a total of seven (7) witnesses. PW1 a minor aged about 15 years, recalled that on 25/12/2018 about 6:00 pm, she used her mother's mobile to call the appellant and she proceeded to his home. She said that she was the appellants lover; that she spent the night in his house where they had sex, that he used his genital organ. The next day the appellant went to the market center and came back to inform her that her parents were looking for her and had gone to report at the police station, she left and went to her grandmother's home from where she called the mother. Later she was picked up by police, taken to Rabour police station and then to

hospital for examination. Later she heard that the appellant had been arrested.

PW2 R AO and PW3 KOO parents of the complainant revealed how the complainant went missing on 25th evening and they mounted a search for her . PW2 had noted that the complaint had used her phone to call a number she did not know. The appellant was traced to the said number as a result of which he was arrested; that the complainant confirmed she had spent the night at the appellants home and they caused the appellant to be arrested.

PW4 PC Aaron Otieno Okello arrested the appellant after the complainant's parents suspected him for having been with the complainant.

PW5 PC Immaculate Achieng of Migori police station recalled 26/12/2029 when she saw a report of a defilement case, interrogated PW1, recorded her statement, issued her with a P3 form and charged the appellant.

PW7 Moses Ginono a Clinical officer at Migori County Referral Hospital examined the complaint on 26/12/2019 and found that both her labia had bruises and the hymen was missing.

When called upon to defend himself, the appellant denied having had the girl at his house or at all and denied knowing why he was arrested.

This being a first appeal, this court has the duty to exhaustively re-examine all the evidence that was tendered in the trial court, analyse it and arrive at its own findings but bearing in mind that it neither saw nor heard any of the witnesses testify. I am guided by the decision of **Kiilu =vs= Republic (2005) eKLR.**

I have considered all the evidence on record. To prove an offence of defilement, the prosecution has to prove beyond any reasonable doubt that there was penetration; The age of the victim and the identity of the perpetrator.

Age:

In this case, the complainant's age is not in doubt. She produced the birth certificate which indicates that she was born on 18/1/2004. As of 25/12/2019, she was already 15 years old. She was therefore a minor.

Whether there was penetration;

Penetration is defined under Section 2 of the Sexual Offence Act as "**the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

PW1, who was then already 15 years vividly narrated how both her and the appellant undressed and had sex, that the appellant used his genital organ. A;though PW1 did not fully disclose what the perpetrator did with genital organ, I find that the fact of penetration was corroborated by the testimony of PW7 who examined PW1 on the following day, on 26/12/2019 and found PW1 to have bruises to both labia and hymen missing.

I agree that the trial court correctly found that there was penetration.

Proof of identity of the perpetrator:

PW1 told the court that the appellant was her lover and had given her his number which she used to call him on PW2's cell phone. It is that phone call that led to his arrest and Pw1 confirmed that she had slept at his house. I have considered the appellants defence and found it to be a mere denial. There is no reason why PW1 or any other witness would have framed him.

The trial court believed PW1 to be truthful and her testimony was not challenged in anyway. I am satisfied that the prosecution proved that the appellant was the culprit. The prosecution therefore proved beyond doubt that the offence of defilement was committed.

One of the appellants ground of appeal is that the court failed to consider the appellant's defence under Section 8 (5) of the sexual offence act. Section 8 (5) provided as follows;-

> ***8(5) It is defence to a charge under this section if-***
>
> ***a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offences; and***
>
> ***b) the accused reasonably believed that the child was over the age of eighteen years .***

The appellant never raised this defence before the trial court for the trial court's consideration. He generally denied having been involved with the complaint and so the defence under section 8 (5) Sexual offence Act could not have arisen. He cannot raise it on appeal.

The main ground of appeal is that the court failed to comply with Article 50 (2) (g) and (h) of the Constitution.

The said Article provides as follows :-

> **(g) to choose and be represented by an advocate, and to be informed of this right promptly;**
>
> **(h) to have an advocate assigned to the accused person by the State and at State expenses, if substantial injustice would otherwise result, and to be informed of this right promptly;**

I have perused the proceedings and I find that the court that took plea never informed the appellant of his right to representation or counsel.

Upto the time the court started taking the evidence of witnesses, on 26/2/2020, there is no evidence on record that the court had informed the appellant of his right to counsel. I do agree with Miss Okota's submissions that the right under Article 50 (2) (g) can not be limited by dint of Article 25 of the Constitution.

It is mandatory and the court has to inform the accused of that right so that an accused can decide whether or not to get the services of the counsel if affordable or seek the service of the Legal Aid committee to allocate his counsel, if he is not able to defend himself. J Mrima in the decision of M.M.T. alias Aunty =vs= Migori CRA 44/2019 stated as follows ;-

> **The right under *Article 50(2)(g) of the Constitution must be distinguished from the right under Article* 50(2)(h) of the Constitution given that in many instances the rights under *Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article* 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under *Article* 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under *Article* 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. *Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.***

In **Joseph Kiane Philip =vs= Republic (2019) e KLR** , J. Nyakundi stated as follows of the same Article.

> **…it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced**
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> **14. That being the record the question which now begs an answer is what entails the right as provided in *Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate.* Since the Constitution does not define the word 'choose' I will make reference to the Tenth Edition of the Black's Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word 'choose or choice' but refers one to 'Freedom of Choice' (See page 294 thereof). At page 779 the Dictionary defines 'freedom' as follows: -**
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> **i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.**

The said right is supposed to be explained to an accused person at the earliest opportunity, which should be at the first appearance in court or before plea or soon thereafter.

In this case, the court grossly violated the appellants right to fair hearing and that rendered the trial and a nullity. It follows therefore that the conviction must be quashed and sentence set a side.

Should the court order a retrial? The decision of **Ahmed Sumar =vs= Republic (1964) EALR 483** settled the principles upon which a court can order a retrial when it said ;-

> ***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."***

In this case. I find that the potentially admissible evidence on record is likely to result in a conviction. Further, the appellant has not served a substantial part of his sentence. He was sentenced on 30/7/2021 and so far has only served 7 months.

The appellant was charged with a very serious offence where the victim was a minor and it carries a severe sentence and it is only proper

that the perpetrator, if found guilty, faces the force of law. For the above reasons, I find that the appellant will not suffer any prejudice if a retrial is ordered. I hereby order that there be a retrial. The appellant be released to police custody at Migori Police Station and be presented before Chief Magistrate's Court at Migori for fresh plea and trial. The trial be conducted by any other magistrate other than Hon. Areri. The case be heard on priority basis. Mention before Chief Magistrate Court Migori on **28th February, 2022.**

Dated, Signed and Delivered at Migori this 24th day of February, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Kimathi for the Respondent.

Mr. Singei for appellant

Appellant present.

Nyauke Court Assistant