REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 108 OF 2019

PHILEMON KIBOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**An appeal from conviction and sentence by H.M. Nyaberi (SPM)**

in ITEN SPMCRC No. 23 of 2018)

JUDGMENT

1. PHILEMON KIBOR (the appellant) was convicted on a charge of defilement contrary to section 8(1), as read with section 8 (2) of the Sexual Offences Act No 3 of 2006, and sentenced to serve life imprisonment. The particulars of the charge were that on 23rd May 2018 in ELGEYO-MARAKWET county he unlawfully and intentionally committed an act which caused penetration with his genital organs namely penis into the genital organ namely vagina of MT* (name withheld), a girl aged 9 years.

3. MT* told the trial court that on the material date at about 11.00pm, she was in deep sleep, when she suddenly experienced pain in her vagina. She woke up and found a man on top of her. The man who spoke in low tones, told her to keep quiet as he was her grandfather. She realized that she was naked, so she screamed loudly, and her sister ST who was sleeping in the same room but on a separate bed woke up, and flashed a torch, beaming it on the man whom they recognised as **KIPKONGOR.**

3. Their father who had heard their screams rushed to their aid, asking them to open the door, and in the process, the appellant slipped away. MT saw blood flowing from her vagina, and the mattress also had blood.

4. PW2 (RTM), a resident of **KAPYEGO** was asleep in the main house with his youngest child named **C,** while his daughters slept in the kitchen, when he heard the children screaming out the name **PHILEMON.** He rushed to the kitchen and found the children traumatised and crying. He noticed that his daughter MT was naked and crying-she said the appellant had defiled her. The same was repeated by another daughter named ST.

5. PW1 took all the children to sleep with him in the main house. The next day at about 7.00am, PW1 together with a village elder and a police reserve apprehended the appellant. They took the appellant alongside MT to KAPYEGO AP camp, and the minor was taken to hospital. PC GLADWELL KERUBO (PW4) confirmed receiving the report alongside the appellant and the victim. PW1 gave her his daughter's health card which showed the minor was born on 6/6/2007 – meaning she was 9 years old at the time of the incident.

6. DR WILFRED KIMOSOP (PW5) who examined the minor noted lacerations in the labia majora and minora, and the hymen was torn, and there was evidence of forceful penetration. He filled the P3 form which was produced as Exhibit 1.

7. In his unsworn defence the appellant said he had visited the minor's parent 0n 21/5/2018 to demand a debt which they owed him of Kshs 12,000 plus 2 sheep, but he did not find him. They met at a busaa den on 23/5/2017, and he reminded PW1 of the debt, saying he would distrain one of his cows to recover the debt. The next thing he knew was him being escorted to the police station in the company of a police reserve and PW1.

8. In his judgment, the trial magistrate pointed out that the clinic health card confirmed that the minor was 9 years old at the time of the offence. The appellant was not a stranger to the family as he had visited their home in the past to eat supper, and he lived not too far from them-just 100 metres from the home of the complainant's parents. PW2 and PW3 knew him very well as he was a shepherd to one Chembos. Further, PW3 beamed the torch at him, and immediately recognised him and shouted out his name.

9. The appellant's defence was considered, and dismissed on grounds that he had never raised the issue of a debt when cross examining PW1The trial magistrate observed the demeanour of PW2, her consistence and straightforward nature, and found that she had told the truth in court

The trial court also noted that the medical evidence confirmed that the minor had been defiled.

10. Being dissatisfied with the outcome, the appellant filed this appeal on grounds that:

a. The charge sheet was fatally defective

b. The age of the minor was not properly depicted

c. The victim's evidence and the medical evidence was inconsistent and uncorroborated

d. Some of the witnesses mentioned were not called.

11. The appeal was canvassed through written submissions, but the appellant also made oral additions, where he argued that although the charge sheet gave the minor's age as 9 years, when she testified in court, she gave her age as 12 years, and the evidence was that she was 11 years. He maintained that the incident stemmed from a debt owed to him by the minor's father.

12. The appellant also complained that his right to a fair trial was violated, as he was not accorded legal representation. That in any event some witnesses who were mentioned such as the Kenya Police Reserve was not called as a witness.

In opposing the appeal, Miss Okok submitted that the ingredients of the offence were met, as the evidence of the complainant coupled with the medical findings confirmed penetration. That the minor's evidence regarding the appellant's presence in the room was corroborated by the evidence of her sister PW2 who flashed the torch and saw the appellant on top of her sister.

13. Miss Okok acknowledged that the complainant's age based on the information in the clinic health card was 11 years as the incident took place on 23/05/2018, but the charge sheet gave her age as 9 years., but this was not fatal, as the victim still fell within the age bracket contemplated under section 8(2) of the Sexual Offences Act.

14. That identification was by recognition, as the appellant was someone well known to them, and they had interacted with him on several occasions, including having supper at their home. That he was properly identified by both PW1 and PW2 when the latter beamed her torch at him, and saw him on top of her sister.

It was further submitted that the defence was duly considered and properly rejected as it was a mere denial.

15. As regards the right to legal representation, Miss Okok pointed out that this right is not absolute, and there was nothing to suggest that the appellant suffered prejudice, as he was able to cross-examine the witnesses.

Miss Okok also pointed out that the police reserve alluded to only helped in apprehending the appellant, and the failure to call him as a witness was not fatal, since in any case, there is no legal provision as to the number of witnesses prosecution ought to call to prove its case. She described the evidence tendered by prosecution witnesses as credible and consistent, and urged this court to uphold the conviction.

16. On sentence, while acknowledging that the appellant was sentenced to life imprisonment, and that the emerging jurisprudence regarding the unconstitutionality of mandatory sentences as propounded by the Supreme Court in the case of FRANCIS KARIOKO MURUATETU & ANOR V REPUBLIC, Miss Okok nonetheless urges this court not to interfere with the same, taking into account the circumstances of the offence and the age of the victim.

17. I have duly considered the arguments presented and make the following findings:

a. Age: It is true that the heath card shows the minor was just a month shy of turning 11 years at the time of the incident, having been born on 6th June 2007 and the incident occurred on 23/5/2018. However, this discrepancy in age was not fatal as section 8 (2) of the Sexual Offences Act provides:

> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The minor indeed fell within the age bracket under that provision and the defect was not fatal.

b. Identification: The appellant was not a stranger to the two girls, indeed they knew him well, and had interacted with him, a fact confirmed by the appellant's own defence when he alluded to having gone to their home on a different occasion, and there could have been no case of mistaken identity as this was identification by recognition

c. Corroboration: PW2's evidence as regards the incident including the appellant's presence, conduct, and he state was corroborated by PW1, PW2, and confirmed by the medical findings, so that there was even no need to invoke the proviso to section 124 of the Evidence Act. Indeed, the witnesses were consistent and unshaken even under cross-examination

d. Legal representation: I recognise the provisions of **Article 50 (2) of the Constitution of Kenya (2010)** which states:

> **Every accused person has the right to a fair trial, which includes the right- (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 the State's expense, if substantial injustice will otherwise result**

e. The question that arises is whether the appellant is complaining that he was not informed of his right to legal representation, or is he complaining that the State ought to have provided him with legal aid? What is the effect of derogation of that right? This was examined in a very detailed judgment by the Supreme Court of Kenya in the case of **Charles Maina Gitonga v Republic [2018] eKLR that:**

9] WE now opine as follows:

> **(a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in Criminal Appeal No.78 of 2014 and the matter properly addressed by that Court within its jurisdiction, and;**
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> **(b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the Repealed Constitution and that under Section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;**
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> **(c) The application does not satisfy any principle prior or subsequent to the decision by this Court in Petition No. 7 of 2018 Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others where the Court stated recently regarding the principles for allowing additional evidence;**
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> **"…we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows;**
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> **a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;**
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> **b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;**
>
> **c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**
>
> **d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;**
>
> **e. the evidence must be credible in the sense that it is capable of belief;**
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> **f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;**
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> **g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;**
>
> **h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;**
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> **i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filing gaps in evidence. The Court must find the further evidence needful;**
>
> **j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;**
>
> **k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."**

(d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted through the Legal Aid Act, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged

violation of Article 50(2)(g) & (h) of the Constitution of Kenya

18. I share the above approach. Consequently, I hold and find that the right to legal representation is not absolute and the appellant did not suffer any prejudice.

Sentence: I take into consideration the nature of the offence, and the age of the victim.

I also take judicial notice that sexual offences have become rampant and indeed a deterrent sentence is appropriate. However, I acknowledge the emerging jurisprudence that even for life imprisonment, there ought to be a determinate period. I therefore set aside the life imprisonment and substitute it with a sentence of 25 years to take effect from the date of conviction. It is only this aspect of the appeal which succeeds.

DELIVERED AND DATED THIS 18TH DAY OF MARCH 2021 AT ELDORET

H. A. OMONDI

JUDGE