REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 88 OF 2019

SAMUEL NJOROGE MWAURA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence at the Chief Magistrate's Court at Thika dated 26th September, 2019)

JUDGMENT

1. ***SAMUEL MWAURA NJOROGE,*** (the appellant) was charged before the Thika Chief Magistrate's Court with the offences of Sexual assault contrary to **section 5(1) (a) (i) (2)** of the **Sexual Offences Act No. 3 of 2007 (2006),** (sic) on the main count, and on the alternative count he was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006.**

2. After trial the appellant was acquitted on the main count under the provisions of **section 215** of the **Criminal Procedure Code** (CPC) on the ground that the main count was defective. He was however convicted on the alternative count of committing an indecent act with a child. He was sentenced on that conviction, to 12 years imprisonment.

3. The appellant has filed this appeal against his conviction and sentence.

4. The Court of Appeal set out the duties of the first appellate court in the case ***OKENO V. REPUBLIC [1972] EA 32*** as follows:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA VS. REPUBLIC (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (SHANTILAL M. RUWALA VS. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS VS. SUNDAY POST [1958] E.A 424."***

5. Although the appellant filed seven ground of appeal he abandoned some of those grounds as he submitted, in writing, in support of his appeal.

6. In the first instance the appellant submitted that the trial court erred in convicting him over and offence "which he never understood and was never afforded the basic right to have legal representation." Appellant submitted that his constitutional right enshrined in **Article 50(2)** of the Constitution was breached by the trial court in failing to avail him legal representation.

7. Appellant cited the Court of Appeal decision ***THOMAS ALUGHA NDEGWA V. RPUBLIC (2016) eKLR.*** In that case the appellant, before the Court of Appeal applied to be provided with legal aid to enable him get legal representation before that court. The Court of Appeal referred to two Constitutional provisions, that is, Article 48 and 50.

8. Article 48 provides:-

> ***"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."***

9. *Article 50(2)(h) provides:-*

> ***"Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.***

10. The Court of Appeal reasoning of the application for legal aid in the case of ***THOMAS ALUGHA NDEGWA VS. REPUBLIC*** (supra) is captured as follows:-

> ***"20. In Kenya,*** *Section 43(1)* ***of the*** *Legal Aid Act* ***sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.***
>
> ***21. In the instant application, it is clear the framework for full implementation of*** *Article 50 (h)* ***is now in place as required by the Constitution.*** *Section 40 of the Act* ***requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to*** *Section 41* ***of the*** *Legal Aid Act* ***is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate****."*

11. Section 43 of the Legal Aid Act lays the duty, on the trial court, before which an unrepresented accused is presented to do as follows:-

> *"(a) Promptly inform the accused of his or her right to legal representation;*
>
> *(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and*
>
> *(c) Inform the service to provide legal aid to the accused person."*

12. The word "service" in paragraph (c) above is defined in the Legal Aid act as: -

> ***"means the National Legal Aid Service established under Section 5."***

13. The appellant was arraigned before the trial court on 7th December, 2015. He pleaded not guilty to both the main and the alternative count. The trial commenced on 21st march, 2016 when the minor SW testified. The appellant though unrepresented cross-examined SW. The cross-examination of the minor SW was on very pointed questions. Those question covered SW's evidence in chief. The appellant even asked SW whether her mother had influenced her on how to testify.

14. The trial was taken over by another magistrate and on that trial magistrate requesting the appellant to elect how to proceed he responded:-

> ***"I want my case to proceed de novo".***

15. SW was recalled and again the appellant cross-examined SW. SW's mother also testified and the appellant also cross-examined her. Similarly, the investigating officer on giving her testimony and submitting the medical reports on SW, she too was cross-examined by the appellant. On the whole, the appellant asked pertinent and intelligent questions in cross-examination.

16. Although the appellant faulted the trial court for not providing him with legal representation it needs to be noted that **Section 43(14)** sets out the criteria for providing legal aid to an accused person. That Section provide how a court should determine whether substantial injustice would be impacted as referred in Section 43 by considering:-

> *(a) The severity of the charge and sentence;*
>
> *(b) The complexity of the case; and*
>
> *(c) The capacity of the accused to defend themselves.*

17. Do the offences the appellant faced before the trial court meet the above criteria? In my view the answer is in the negative. The charges the appellant faced were not complex and the sentence provided under the Sexual Offences Act Section 11(1) is not severe. Additional as demonstrated above, the appellant showed he had capacity to defend himself.

18. The appellant's reliance on the case of THOMAS ALUGHA does not assist him at all. It is distinguishable. This is because in that case, THOMAS ALUGHA the appellant before the Court of Appeal had gone through a trial before the Magistrate's court, and on being convicted

appealed before the High Court. In both those two courts, he was not legally represented. The Court of Appeal did not make adverse finding to the fact that he was not legally represented in those courts. The Court of Appeal also noted that the "service" has discretion to grant legal aid. It follows that the fact the appellant was unrepresented during trial is not evident that his Constitutional right was breached. It is also important to note what **Section 43(6)** of the Legal Aid Act provide. It states:-

> ***"Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person."***

19. The above sub-section of Section 43 fully answers the appellant's submission. The fact he was not legally represented was not a bar to his case proceeding. Further, the appellant in alleging miscarriage of justice in not being legally represented bore the onus to prove such miscarriage of justice, which he did not.

20. The appellant erred to submit that the trial court convicted him on unequivocal plea. He erred because his conviction was after trial. The appellant pleaded not guilty.

21. The appellant submitted that he was not supplied with prosecution's witness statement and charge sheet.

22. This complaint was raised for the first time at the hearing of this appeal. There is no evidence that during trial, the appellant complained of lack of those documents. I am however more inclined to find on a balance of probability that the appellant had been served with prosecution's bundle. This is because when he testified in his unsworn defence he said:-

> ***"I had been given two different copies of P3 forms. They contain different findings."***

23. It hardly seems possible that the prosecution could have supplied the appellant with only the P3 forms and not the rest of the prosecution's bundle. The fact, I believe, is that the appellant had the prosecution's bundle and hence why he made reference to the P3 Form. That submission, therefore, is rejected.

24. It is important to do as I am expected to do, to submit "to a fresh and exhaustive examination" of the trial court's evidence: see ***OKENO VS. REPUBLIC*** (supra).

25. SW was a 4½ year old girl, when the offence was perpetrated against her. She knew the appellant very well because the appellant lived close to her parent's house. The appellant lived in the house SW referred to as Wambui's house. Wambui was SW's friend. Further, SW's mother also stated that the appellant was sometimes given the responsibility of taking SW and other neighbour's children to school. SW was very clear in her identification of the appellant. She referred to him as Njoroge. SW described in evidence what the appellant did to her when she said:-

> ***"He** (the appellant) **sucked my vagina. He then placed me on a chair. He touched here."***

26. The court noted that SW showed where the appellant touched by touching her vagina.

27. SW told her mother what the appellant had done. This is what her mother said in evidence:-

> ***"On 7/10/15 my child SW was being prepared to go to school at about 7.30 am. SW then told me that her private parts were paining…***
>
> ***She told me that Mwaura wa Njoroge sucked her vagina."***

28. The mother took SW to the family doctor at Galaxy Medical Care and the doctor at that facility, by a report, produced at the trial stated that the gynaecologist found the external genitalia of SW was intact but her hymen was torn showing that there was penetration.

29. The medical report was produced at the trial by the investigating officer because the doctor who examined SW and made the reports was not available to testify.

30. The appellant gave an unsworn testimony in his defence. He denied having sexually assaulted SW. He stated that on 10th September 2017 he was in Naivasha for two months. It was while he was there that his father called him and told him the police at Makongeni police station "tried to arbitrate." The appellant ended his testimony by saying he was innocent.

31. The appellant called one witness. This witness' evidence was entirely discredited in cross-examination. He was unable to confirm what date he was in the company of the appellant, even though he had testified in chief that he was in his company when the offence occurred. This witness' testimony also contradicted the appellant because the witness said he lived with the appellant when the offence occurred yet the appellant testified that during the period the offence occurred, he was in Naivasha.

32. Having examined the evidence adduced at the trial, my finding is that the trial court's conclusion was correct, that is that the case against the appellant had been proved beyond reasonable doubt, that he had committed an indecent act against a child. Indecent act is defined under the Sexual Offences Act as:-

"indecent act" means an unlawful intentional act which causes-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or display of any pornographic material to any person against his or her will."

33. SW testified that the appellant orally touched her vagina. That offence therefore was proved.

34. On sentence, **Section 11** of the **Sexual Offences Act** states that on conviction for the offence of indecent act with a child the sentence is not less than a term of ten years. In the case of ***FRANCIS OWINO OTIENO VS. REPUBLIC (2020) eKLR*** the court considered the Court of Appeal decision on the minimum sentence under the Sexual Offences Act and stated:-

"22. The reasoning in the above Francis Muruatetu case has been extended to mandatory minimum sentences imposed under the Sexual Offences Act and by extension, to all other statutes prescribing minimum sentences by the Court of appeal in DISMAS WAFULA KILWAKE V R [2018] eKLR, and in JARED KOITA INJIRI V REPUBLIC [2019] eKLR where the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:-

"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

35. The appellant did not provide any mitigation which can assist the court consider his sentence. I will however interfere with the trial court's sentence in view of the sentiments of the Court of Appeal above and because it seems the trial court bore in mind the minimum sentence set out in the Sexual Offences Act, in sentencing the appellant.

36. Accordingly, I will set aside he trial court's sentence and substitute the appellant's sentence with imprisonment for 6 years.

DISPOSITION

37. In the end the judgment of the court is as follows:-

(a) The appeal against conviction is dismissed.

(b) The appeal against the sentence succeeds to the extent that the trial court's sentence of 12 years is hereby set aside. The appellant is hereby sentenced to serve imprisonment for six (6) years and that sentence will be calculated as from 26th September, 2019.

Orders accordingly.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A: Kevin

Appellant ……..present

Appellant: …….. Mr. Knyanjui H/B for Mr. Oyatsi

Respondent: ……..…… Mr. Kasyoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE