



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 145 OF 2019**

**BENSON LIRU KHAWATENGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence in Criminal Case***

***No. 1741 of 2016 at the Chief Magistrate's Court Bungoma by***

***Hon. G.P. Omondi – SRM on 3/9/2019)***

**JUDGMENT**

1. Benson Liru Khwatenge, the appellant, was charged and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. Particulars of the offence were that on the 30<sup>th</sup> July 2015, at [Particulars Withheld] Village in Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of **SBS** a child aged thirteen (13) years.
2. In the alternative, he faced a count of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act where he was alleged to have caused his penis to touch the vagina of the complainant on the material date.
3. Having pleaded not guilty to the charges he was subjected to full trial, and found guilty, convicted and sentenced to serve ten (10) years imprisonment for the offence of defilement.
4. Aggrieved, he filed a petition of appeal where he argued that; the sentence imposed was excessive; That he was a lay person and was not informed of the right to be represented by an advocate and he is remorseful therefore seeks leniency.
5. Briefly, facts of the case were that the victim was lured by the appellant to a house where she was molested. Evidence of penetration of her genitalia was proved by medical evidence. Upon examination by a Clinician, Elias Adoka, she had a freshly torn hymen with mild bleeding. With regard to her age, she was stated to have been born in 2002, which meant that at the time of the incident she was thirteen (13) years old.
6. The appeal was disposed through written submissions. It was urged by the appellant that he was a first offender, a youth whose life was in danger if the ten (10) years could not be reduced. That during the period that the appellant has been in custody he has changed having been trained as a carpenter and hence he is patriotic enough to serve the society.
7. In response, the Respondent argued that the right to be informed of legal representation is an irrebutable presumption. That at the date and time of plea taking, every person arraigned in court has the right to legal representation. And every person waiving the right is deemed to have acquiesced and taking upon himself to act in person, hence cannot later turn around and claim to have been denied the right under the doctrine of estoppel.
8. This being a first appellate court, it has a duty to re-consider analyze and assess afresh the evidence adduced before the lower court and come up with independent conclusions, bearing in mind that it neither saw nor heard witnesses. In **Kiilu vs. Republic (2005) KLR 174** the Court of Appeal stated thus;

***1. "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive***

*examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.*

*2. 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 findings and 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."*

9. In the case of **Thomas Alugha Ndegwa vs. Republic (2006) eKLR** the Court of Appeal addressed the issue of legal representation, and of importance was **Section 43(1)** of the Legal Aid Act and **Article 50 (2) (h)**. The court stated as follows:

*"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 a 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.*

*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."*

10. It is apparent that the court did not inform the appellant of the right to legal representation on the date the plea was taken. But, on the date scheduled for hearing three weeks later, the appellant had instructed counsel of his choice who represented him. What transpired thereafter is what cannot be discerned. But, the appellant herein defended himself properly, cross examined several witnesses having understood the charges that he faced, therefore he suffered no prejudice. Failure to seek legal aid, which is progressive cannot persuade this court to allow the appeal based on that ground.

11. In his submissions he concentrated on mitigation on sentence.

The question would therefore be whether the sentence imposed was harsh?

12. **Section 8(3)** of the Sexual Offences Act prescribes sentence for defilement of a girl between 12 and 15 years to be twenty (20) years imprisonment. In the case of **Ogola s/o Owour vs. Reginum (1945) EACA 270, 29** the Court of Appeal held that:

*"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."*

13. In the case of **Francis Karioko Muruatetu and Another Vs. Republic (2017) eKLR** the question of minimum mandatory sentence was considered and it was found to be unconstitutional. The Court of Appeal following the decision was of the view that the principle was applicable to the Sexual Offences. (See **Christopher Ochieng vs. Republic 2018) eKLR: Jared Koita Injiri Vs. Republic KSM (App. Criminal Application No. 93 of 2014)**).

14. However, following directions given in **Francis Karioko & Another Vs. Republic and 5 others (2021) eKLR**, it was clarified that the principle only applies to murder cases. This means that at the time of passing sentence the learned trial court exercised the discretion it had then, hence having not acted on wrong principles, this court will not, therefore, interfere with the sentence meted out.

15. The upshot of the above is that the appeal lacks merit. Accordingly, it is dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY,**

**THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Appellant

ODPP – Mr Ayekha

Court Assistant – Immaculate