REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 152 OF 2018

ISAAC WANJALA WASABULO....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal against the conviction and sentence made on 29/11/2018 by Hon. D. Onyango (SPM) in Kimilili SOA No. 77 of 2016)

J U D G M E N T

1. Isaac Wanjala Masambulo (the appellant), then aged 21 years, was on 22/12/2016 arraigned before the Principal Magistrate's Court Kimilili with the offence of defilement Contrary to **section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of the offence were that, on 22/12/2015 at [Particulars withheld] Village Kamukuywa Location in Kimimili District within Bungoma County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of JK a child aged 15 years.

3. He also faced an alternative charge of committing an indecent Act with a child contrary to ***section 11 (9) of the Sexual Offences Act No. 3 of 2006*.** It was alleged that on the same date, time and place, the appellant unlawfully touched the vagina of JK a child aged 15 years.

4. The appellant denied the charge but after trial, he was found guilty was convicted of the main charge and sentenced to 15 years imprisonment.

5. Aggrieved by the said decision, the appellant preferred the present appeal raising the following grounds of appeal: -

> **a. That, the trial magistrate erred in failing to find that the appellant's right to legal representation at the state's expense as per Article 50 of the Constitution was violated.**
>
> **b. That the trial magistrate erred in law and fact when he failed to appreciate that the unique facts and circumstances of this case do not establish that the appellant possessed the requisite mens rea to carry out the offence.**
>
> **c. That the learned trial magistrate erred in fact by imposing a harsh and excessive sentence on the appellant which was not informed from the facts and circumstances unique to the case.**

6. The Respondent filed a notice to cross-appeal seeking the the enhancement of the sentence.

7. In his submissions, the appellant reiterated the need for him to have been accorded an advocate or informed of this right promptly. That the same resulted in substantial injustice. He cited the provisions of ***Article 50 of the Constitution, Section 43 of the Legal Aid Act No. 6 of 2016*** in support of that contention**.** He cited the case of **Karisa Chengo & 2 Others v R Cr. No.s 44, 45, and 76 of 2014** among other authorities.

8. The appellant also submitted on the facts and circumstances of the case. He highlighted that there was a span of one year from the time of the alleged offence to the time of his arrest. That the appellant was in secondary School at the time and though it was demonstrated that he was 21 years of age, his cognitive age was that of a minor. He cited the cases of **Michael Charo v. Republic [2016] eklr & Eliud Waweru Wambui versus Republic (2019) eklr** in support of his submissions.

9. On sentence, he pleaded with the Court to look at the conduct of the complainant. He opined that the sentence was excessive and cited the

cases of **Dennis Kabaara v. Republic [2019] eklr, Francis Muruatetu & Anor v. Republic Petition No. 15 of 2015, Eliud Wanjala vs Republic [2019] eklr** amongst others.

10. The Respondent submitted that the appellant was capable of cross-examining the witnesses hence substantial injustice was not occasioned. It relied on the cases of **Dominic Kimaru Tanui v. Republic and Daniel Njoroge Macharia v. Republic [2014] eklr**. That all the ingredients of the offence were proved. The respondent prayed that the sentence be enhanced to 20 years imprisonment.

11. The prosecution case was that on 22/12/2015, the complainant who had gone to visit her aunt, was lured by the appellant from that home at 9 pm. She accompanied the appellant to his house where they had sexual intercourse till morning. The next morning at 5 a.m., the appellant took her back home. Three days later, she started vomiting and on being taken to hospital in April 2016, she was found to be pregnant. She delivered a baby boy on 6/9/2016. Her father **WKO (Pw2)** reiterated the complainant's story of visiting her auntie and how she later on became pregnant and delivered a child.

12. Catherine Akiru (Pw3), a clinical officer at Kimilili Sub County Hospital testified that at the time she examined the complainant on 29/8/2016, the complainant was 32 weeks pregnant. She concluded that she had been defiled. That she did not understand why it took time to bring the complainant to hospital.

13. Pw4 Gladys Kamena was the investigation officer. She testified that the complainant reported the matter to their police station on 29/8/2016. She took out an Order of arrest and the appellant was thereafter arrested. She produced the Birth Certificate as **Pexh 1.**

14. In his defence, the appellant denied having defiled the complainant. That he was not informed of the birth of the child as is required by custom. Had he been informed, he would have taken part in the naming of the child. In cross-examination however, he admitted having sex with the complainant but denied paternity of the child. His mother, **Zikolo Kolea Wafula Wanyonyi (Dw2)** denied ever seeing the complainant in her home.

15. The first ground of appeal was whether substantial injustice was caused by the lack of legal representation being afforded the appellant. The same is anchored on Article 50 (2) of the Constitution.;

16. In **David Macharia Njoroge v Republic (2011) Eklr**, the Court of Appeal held: -

> **"We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."**

17. In **KARISA CHENGO & 2 OTHERS V R, CR Nos. 44, 45 & 76 OF 2014,** the court held that substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. That it is only then that the state obligation to provide legal representation would arise.

18. In the present case, the appellant had been charged with defilement and not murder or robbery with violence or treason, which carry death sentence. The record shows that the appellant not only understood the case facing him, but that he aptly cross-examined the prosecution witnesses. In his defence, he told the Court that he was aware of the charges levelled against him. In this regard, I see no prejudice that the appellant might have suffered as a result of failure to be informed of his right to representation or being afforded one.

19. The **second ground of appeal** related to the circumstances and facts of the case. The complainant produced her birth certificate and proved her age to be about 15 years. She stated that she had sexual intercourse with the appellant, the result of which was birth of a baby boy. The appellant admitted in cross-examination that he had sexual intercourse with the complainant but contested the delay of his arrest and paternity of the child.

20. The P3 form shows that as at the time the complainant was being examined on 31/8/2016, she was at the time 32 weeks pregnant. The view this Court takes is that the element of penetration and that the appellant was the perpetrator was proved.

21. The last ground of appeal relates to the sentence imposed and whether the same was harsh and excessive. In **Eliud Waweru Wambui v Republic (*supra*)** the Court of Appeal held: -

> **"We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in GILLICK vs. WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps ...**
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> **Where to draw the line for what is elsewhere referred to as statutory rape is a matter that calls for serious and open discussion. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See**

Archbold Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation……"

22. In **Dennis Kibaara v Republic [2019] Eklr,** the court held: -

"In the appeal, the Appellant is a young man aged 19 years. He certainly made a costly mistake by sleeping with an underage girl but given the circumstances he may have been mistaken about the age of the complainant but ended up committing an offence under Section 8 (3) notwithstanding the fact that the girl may have been a willing partner and I have found based on the evidence tendered that she was a willing partner. However, it must not be lost that defilement is one of the most heinous crimes against children and they must be protected. It is however not in dispute that sentences must be commensurate with the offence committed as per the cited sentence policy guidelines and each case must be determined on its own merit. Taking everything into consideration I am persuaded not to allow this appeal on conviction but on sentence, based on the unique circumstances in this case, I am convinced to allow the appeal on sentence. The sentence of 20 years imprisonment is hereby set aside and in its place I will substitute it with a sentence of 5 years imprisonment, from the date of sentence in the lower court."

23. The above cited authorities present considerable focus on the guidelines courts ought to take in a scenario familiar to the circumstances of this case. There is no doubt that the appellant engaged in sexual relations with the complainant. There is need to protect the society from crimes against children. His contention is that he was not involved in the naming of the child and that therefore the child was not his.

24. However, given the circumstances of this case and the age of the appellant, I find that the sentence imposed was excessive. I set aside the sentence of 15 years and substitute therefore with 5 years imprisonment from the date of the sentence by the lower court.

25. The appeal on conviction is dismissed but the same is allowed in respect of the sentence as foretasted.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE