REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 36 OF 2019

HMM alias J.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate

Hon. Kelly E. delivered on 2nd of April in NAKURU CM Criminal Case No. 200 of 2017

Republic v HMM alias J.)

JUDGMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8 (1) as read together with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence as per the charge sheet were that on diverse dates between 2nd September 2017 and 4th of September 2017 at [particulars withheld] Village, in Njoro Sub County within Nakuru County unlawfully and intentionally committed an act by inserting your male genital organ namely penis into the genital organ anus of **ENM**, a boy aged 8 years old which caused penetration.

2. In the alternative, the appellant was charged with the offence of **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that, on diverse dates between 2nd September 2017 and 4th of September 2017 at [particulars withheld] village, Njoro in Njoro Sub County within Nakuru County unlawfully and intentionally indecently assaulted **ENM** a boy aged 8 years old by touching his private parts namely Anus.

3. The appellant denied both the min and alternative charge. The case proceeded for hearing with prosecution calling 4 witnesses and appellant in his defence gave unsworn statement. The Appellant being dissatisfied with the conviction and sentence and have appealed to this court on the following grounds: -

> *i. THAT, the learned trial magistrate erred in points of Law and fact when he violated my rights and fundamental freedom in the Bill of rights contrary to the provisions of Articles 19(3)(9)20(1) (2) (3),25 ©.27 (1)(2),28,29,48,49 ,50(1) and 50 (2) of the new constitution of Kenya 2010 thus rendering to the very serious miscarriage of justice.*
>
> *ii. THAT the honorable learned trial Magistrate erred in points of law and fact by sentencing me to serve life imprisonment, yet failure to consider that the same was contrary to the clear provisions of the law under Article 53(1) (f) (i) and (ii) As read with Article 53(2) of the new constitution of Kenya 2010 thus rendering to the prejudice of justice.*
>
> *iii. THAT, honorable learned trial Magistrate gravely faulted in points of law and fact by failing to accord me with right to legal representation at the state expense, despite the fact that he knew very well that ''substantial injustice'' would otherwise result. And by failing to inform me of this right promptly as provided by the law under the article 50 (2) (h) of the new constitution of Kenya 2010 as read with legal Aid act No 6 of 2016 thus rendering to the serious miscarriage of justice.*

SUBMISSIONS BY THE APPELLANT

4. The appellant submitted that he was a child aged 16 years old at the time of arrest and approximately a child of 17 years old at the material date of sentence; that the honorable learned trial magistrate grossly erred in points of law and fact by failing to sentence him as a minor at the material date of the judgment.

5. That the honorable learned trial magistrate grossly faulted in the matters of law and fact in failing to accord me with a fundamental right to a fair trial, yet failure to observe; that his fundamental right also to be sentenced as a child or as a minor was violated and infringed contrary to the clear provisions of **Section 8 (7) of the Sexual Offences Act No.3 of 2006** as read with **Sections 5 and 6 of the Burstable Institutions Act Cap 92 Laws of Kenya,** together with the provisions of **Section 191 of the Children Act No** 8 of 2001. Thus, also rendering to the serious miscarriage of justice.

6. That he was sentenced to serve undefined of undetermined sentence i.e. life imprisonment, yet failure to consider that to sentence a person under the age of 18 years old to what may potentially constitute life imprisonment infringes on the rights of such person not to be subjected to cruel, inhuman or degrading treatment or punishment. Hence rendering a prejudice.

7. That, honorable learned trial Magistrate erred in the points of law and fact by violating my rights guaranteed under the provisions of **Article 37 (a) (b) and (c) of the convention of the rights of the child ;Article 2 (b) of the African Charter on the rights and welfare of the child**; together with the provisions of **paragraph 1 of the United Nations rules for the protection of the juvenile's.** And hence deprived my liberty and that any punishment that cannot be determined from the outset in respect of a suspected person or a prisoner under the age of 18years old is cruel, inhuman and degrading hence unconstitutional. Thus, rendering to the prejudice of justice.

8. That, pursuant to the respective judgment by the Supreme Court of the Republic of Kenya in the case law of **Republic Vs Karia Chengo and two others (2017) eKLR,** the right to legal representation at state expense under **Article 50(2) (h) of the constitution** is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

9. That, pursuant also to the recent and the celebrated decision by the Supreme Court of the Republic of Kenya in the case law emphasized of **Francis Karioko Muruatetu and Another Vs REPUBLIC (2017) eKLR**, the scope of ''accused to justice '' is enshrined in **Article 48 of the new constitution** is very wide. And the Courts are enjoined to administer justice in accordance with the principles laid down under **Article 159 of the new constitution of Kenya 2010**. Hence with regards to "Access to justice and fair hearing'' the state through Courts ensures that all persons are able to ventilate their disputes. And that access to justice includes the right to a fair trial. But if a fair trial is unfair one cannot be said to have accessed justice.

10. The appellant submitted that the complainant knew him because he was selling milk. The complainant's parent did not come to Court to testify and nobody from where he lived came to testify that the appellant lived with the complainant. He urged the Court to set aside the judgment and set him at liberty.

RESPONDENT'S SUBMISSIONS

11. The state opposed the appeal on both conviction and sentence. The state counsel submitted orally. In respect to age the state counsel submitted that the complainant stated he was 9 years old and a birth certificate was produced as exhibit 7 by PW4 who was the investigating officer to confirm her age.

12. On penetration she submitted that PW2 said he was repeatedly defiled by the appellant for 4 nights at his home. The doctor noted lacerations on the anal opening. They recovered the minor's underwear which was stained with blood and marked as exhibit 6.

ANALYSIS AND DETERMINATION

13. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; 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 v. Sunday Post, [1958] EA 424.)"**

14. In view of the above I have perused the trial court record and consider the following as issues for determination: -

> **i. Whether the prosecution proved the ingredients of the offence of defilement beyond reasonable doubt.**
>
> **ii. Whether the appellant was accorded fair trial.**
>
> **iii. Whether the sentence imposed was legal.**

(i) Whether the prosecution proved the ingredients of the offence of defilement beyond reasonable doubt

15. In a case of defilement three ingredients namely age, penetration and identification of the assailant have to be proved. In respect to age the complainant's birth certificate was produced as exhibit 7 which shows the complainant was born on 23rd April 2009. There is therefore no doubt that there was sufficient prove that the complainant was 8years and about 5 months at the time of the defilement.

16. On identification of the perpetrator**,** the complainant knew the appellant prior to the incident as he used to hawk or sell milk a fact that the

appellant confirmed in his oral submissions. The complainant lived in the appellant's house for 3 days and they used to go and graze cows together during the day. On the 3rd day the complainant's parents spotted the complainant and the appellant heading to the shop and they called the appellant. The trial court stated: -

> *"I find no doubt that the complainant was defiled by the accused person who was positively identified and that the complainant is a child of tender age. The accused person in my considerable view came across the complainant that evening, the latter being a child he already knew and who considering his age and familiarity with the accused, had no reason to decline the accused's request for help in transporting the charcoal…"*

17. Evidence adduced clearly show the appellant was known to the complainant and he stayed in complainant's house for 3 days; there was no doubt on identification of the appellant by the complainant.

18. **In respect to penetration, Section 2 of the sexual Offences Act** defines penetration to mean "partial or complete insertion of the genital organs of a person into the genital organs of another person." According to the interpretation of **Section 2** the slightest and brief arousal penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or serine of the male organ for the act of penetration to be said to be complete.

19. The complainant testified on that fateful day he was grazing his father's goat and because one his father's goat had been hit by that of his friend he decided to go away from home and stay with his uncle. On the way that is how he met the appellant who requested him to assist him carry some charcoal and he would pay him Kshs.50. He accompanied him to his house. The appellant put sexual videos for him to watch. Later in the night he inserted his penis inside his anus and covered his mouth and due to the pain, the complainant experienced he bit the appellant's hand. He repeated the act until morning for 3 days and told the complainant that it was not a bad thing.

20. PW3 who examined the complainant stated that he noted bruises on the anus. It was the doctor's finding after anal examination that there was obvious laceration on the anal orifice. From the medical records there was no proof of penetration or defilement/sodomy. The trial court depended on the testimony of PW1 that he was sodomized by the appellant for 3 days in his house and that of PW3.

21. When dealing with sexual offences involving persons under the age of maturity the Court is entitled to apply **Section 124 of the Evidence Act** in the absence of corroboration, which provides as follows:

> **"provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons be reached in the proceedings the court is satisfied that the alleged victim is telling the truth."**

22. Appellant argued that the complainant's parents were not called to testify; he however failed to demonstrate that there was crucial evidence which they need to adduce; appellant was given an opportunity to cross examine him. PW2 testified as the guardian of the complainant who lived with him in the absence of his parents who worked in Saudi Arabia and only came to help look for their son when they heard he had disappeared from the grandfather's homestead.

23. In his unsworn defence the appellant stated PW2 had framed him for the offence for spoiling his motorcycle. The trial Court stated: -

> **"…***the later defence of the accused person that PW2 took his money and phone because he had damaged PW2's motorcycle was notably not brought up at any point during the prosecution's case and neither was any evidence, whether in terms of a report made to the police or other authority, or in any other term, the accused having been assaulted by PW2 or anyone, tendered before the court. He was advised to report any complaints he had to the police station but he never reported to the court, any decline by the prison officers to take him to the police station to make a report nor of any state officer's refusal to register his complaint. No witness was cross-examined on the said evidence and it's hence only an afterthought***."**

24. It is my view the prosecution proved their case beyond any reasonable doubt and the appellant defence did not water it down as held by the trial magistrate.

(ii) Whether the appellant was accorded fair trial

25. The appellant appeals that his constitution right to a fair trial provided for under **Article 50 of the Constitution** were not observed in that the appellant was denied a chance to recall PW1 despite his request, was also not accorded a juvenile trial as he was a minor and was not provided with legal representation at the state's expense.

26. The appellant argued that he was denied a chance to further cross examine the complainant upon making the said request in Court. Record does not show that at any point recall PW1 for further cross examination. He indicated to the Court he wanted the case to start *de novo* after PW1 and PW2 had testified on the issue that he had not been provided with the witness statements. The Court overruled his application because it noted before the trial began on 5th March, 2018, he had confirmed to the Court he had received the statements and he was ready to conduct the hearing and did not give any special reason or circumstance he wanted the case to start a fresh.

27. On argument that he was a minor at the time of the offence and that be the case then the trial court ought to have sentenced the appellant in accordance with **Section 8 (7) of the Sexual Offences Act** which invoke the **Boarstal Institutions Act and the Children's Act** (Section 19 thereof).

28. Trial court record shows that the appellant was arrested on 9th September, 2017 and arraigned in Court on 11th September, 2017. From

the prebail report dated 19th April, 2018 indicated that the appellant was 24 years of age having been born in 1994. If the appellant's age was not properly captured the court would not have made observations to that effect or the appellant would have also raised the issue. This doesn't appear on the record and in my view for the appellant to bring it up at appeal stage is an afterthought. I see no merit in this ground of appeal.

29. On legal representation it is not absolute and there are instances where the same can be limited. This was succinctly dealt with in this case of **S V Halgryn 2002, (2) SACR 211 (SCA) Paragraph 11, Herms JA** stated that: -

> **"Although the right to choose a legal representative is fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations**."

30. It therefore appears from the above provisions of law that legal representation at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. It is therefore incumbent upon the accused person to prove that unless he or she is assigned an advocate by the state, substantial injustice would occur.

31. The Court of Appeal in the case of **Macharia v R.** after reviewing the past and current law stated that as follows: -

> **"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...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."**

32. From the record, the trial was conducted in a language clearly understood by the appellant and as a result he was able to cross examine the witnesses. The appellant clearly understood the trial process and the language used, was able to cross examine the witnesses; record does not also indicate that he was a minor at the time of the offence; he did not therefore suffer any prejudice or injustice in the trial.

(iii) <u>Whether the sentence was harsh and excessive in the circumstances.</u>

33. From the record, the appellant faced a charge of **defilement contrary to section 8(1) of the Act**. The victim of the defilement was found to be aged 9 years old. The appropriate sentence on conviction is provided in **Section 8(2) of the Act** to be mandatory **life imprisonment**. The learned trial Magistrate therefore considered and paid due regard to the minimum legislated sentence for the offence of defilement.

34. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70.** It is well set out 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."**

35. Life imprisonment is the minimum and not the maximum sentence meted out by **Section 8(2) of the Sexual Offences Act**; the trial magistrate-imposed minimum set out in the law. However, the Supreme Court in the case of **Muruatetu** declared mandatory nature of sentences unconstitutional as it takes away the discretion of the judicial officer. It ties the hand of the judicial officer from imposing sentences as per circumstances of the case and considering the mitigating factors raised by the accused, it renders mitigating factors superfluous.

36. There is no doubt that the innocent child herein was traumatized and the experience may leave him with permanent psychological effects. There is no doubt that the intention of parliament in imposing minimum sentences in sexual offences was intended to deal with societal problem of sex predators. However, the intended goal should be balanced with the rights of the accused persons as enshrined in the constitution of Kenya 2010.

37. In view of the above I have taken into consideration the circumstances of this case; I have also taken note of the fact that the child herein was 8 years old at the time of defilement, considered the appellant's mitigating factors and find it appropriate to reduce the appellants sentence from life imprisonment to 20 years' imprisonment.

38. **<u>FINAL ORDERS</u>**

1. Appeal on conviction is hereby dismissed

2. Sentence reduced to 20 years' imprisonment.

Judgment dated, signed and delivered via zoom at Nakuru This 30th day of September, 2020

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person