



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL APPEAL NO. 7 OF 2019**

(Being an appeal from Original Conviction and Sentence in Criminal Case S. O. No. 37 of 2018 of the CM's Court Naivasha delivered on 14<sup>th</sup> February, 2019)

**PETER KINYUA MWENJE.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with defilement of a girl, RWM, aged ten (10) years contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that 15<sup>th</sup> and 22<sup>nd</sup> May, 2018 at [particulars withheld] Village, Kongoni, he unlawfully and intentionally caused his penis to penetrate the vagina of RWM. He also faced on alternative charge of performing an indecent act with a child on the same dates contrary to **Section 2** of the **Sexual Offences Act**.

2. After hearing five prosecution witnesses and the Appellants unsworn statement, the trial court convicted the Appellant of defilement, and sentenced him to life imprisonment. Dissatisfied, the Appellant has filed this appeal.

3. The grounds of appeal are:

1. That, the learned trial magistrate erred in law and facts by failing to find that the rights and fundamental freedoms of appellant were violated by the failure of the prosecution to disclose to him all material documentary evidence in their possession that they wished to rely on to prosecute him.

2. That, the trial magistrate erred in law and facts by failing to appreciate that the provisions of Section 211 of the Criminal Procedure Code were not adhered to.

3. That, the learned trial magistrate erred in law and facts by sentencing the appellant to the mandatory sentence despite relevant law provisions to the contrary.

4. The DPP opposes the appeal. Both parties filed written submissions detailing their opposing portions.

5. This court's duty as to re-evaluate the evidence and come to its own conclusion without disregarding the conclusions of the trial court. **Okeno v Rep (1972) EA 32**.

**Failure to disclose Material to Accused and Violation of right**

6. The Appellant asserts that the prosecution marshalled five (5) prosecution witnesses. However, he was not provided with witness statements and other documentary evidence to defend himself. He cites a violation of **Article 50 (2) (c) (j)** of the **Constitution**. The provision granted him the right to be informed in advance of the prosecution's evidence, and to have access to that evidence; and to have adequate time to prepare his defence. He supports his argument by reference to the proceedings which he says show that he was not availed the witness statements.

7. The prosecution confirmed the right to fair trial to include the right to be afforded and have access to evidence, facilities and time to prepare his defence. They contend, however, that the Appellant faced no prejudice in this case; that the trial magistrate inquired if the Appellant was ready to proceed and replied in the affirmative.

8. Both parties cited the case of **Thomas Patrick Gilbert Cholmondeley v Rep. [2008] eKLR** where it was held:

**“We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under ..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, copies of documentary exhibits....”**

9. The proceedings show that the hearing started on 23<sup>rd</sup> July 2018. On that date, the Accused said: *“I am ready”*. PW1, the complainant then underwent a voir dire examination and testified. The accused said he had no questions for cross-examination. PW2 testified the same day too and was cross examined by the accused. On 8<sup>th</sup> January, 2019 Appellant said he was ready when PW3 was available to testify. Accused said he had no questions; sincerely for PW4. Accused said he had no questions. On 24<sup>th</sup> January 2019 Accused said he was ready for PW5. After PW5 testified the accused said he had no questions.

10. I am alert to the fact that fair trial rights under **Article 50 (2) (j)** of the **Constitution** to be informed in advance of the evidence, the prosecution intends to rely on and to have access to it, are fundamental rights in the bill of rights. I am also alert to the fact that under **Article 25 (e)** of the **Constitution** such a right cannot be limited.

11. The courts have dealt with this issue fairly substantially. In **MEM v Republic [2018] eKLR** Ngugi J stated:

**“[21] In this case, the Appellant says on appeal the witness statements were never supplied to him. However he does not allege that he asked for them and that the court failed to give them. Indeed his argument is that the court record does not reflect that he was given witness statement. This argument verges on the technical: that failure of the court to record that an accused person has been given witness statements is per se proof of violation of his constitutional right to fair trial. I do not think our decisional law has enunciated such rigid and formalistic rule.**

**[22] Instead, on case law provides a more functional approach. While it is a salutary practice for a Trial Court to record to indicate that it has given orders for an accused person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal.”**

12. Similarly, in **Simon Ndichu Kahoro v Republic Nrb Criminal Appeal No. 69 of 2015 [2015] eKLR**, the Court of Appeal, dealt with the question whether failure to give the accused statement was fatal. There, the trial court had ordered that they be furnished but they were not.

**“We should not be understood to be setting up a general principle or precedent that every every breach of Article 50 of the Constitution, 2010, should automatically result in acquittal of an accused person. Each case must be considered in light of its own special circumstances or consequences of breach of fair rights to trial depend on all the surrounding circumstances of a case.”**

13. Given that in this present the accused was consistently engaged, stated that he was ready for trial and freely conducted or declined to cross-examine, I do not think that any violation of his right to fair trial was occasioned. No prejudice was suffered. The Appellant’s argument here is built on a mere technicality of the failure of the court to record that he was provided witness statements. That failure was not in this case fatal, and this ground fails.

#### **Whether the Prosecution proved its case beyond reasonable doubt taking account of the defence evidence**

14. The Appellant’s submission is that the trial magistrate appears to have accepted the prosecution’s case, then placed the onus of disproving it on the defence.

15. The DPP argues that the only evidence challenged was that of PW2; that penetration was proved through the medical evidence; that the age of the complainant was proved by a birth certificate; and that the evidence of the minor was sufficient to prove the offence.

16. PW1, the complainant, gave unsworn evidence. She was a class 3 pupil at the material time. She said she was washing dishes at home. Only she and her younger sister were in the same house. At about 11.00am the accused, who she knew knocked at the gate and she opened for him. As she went on with the dishes, he caught her and laid her on a seat. He removed her skirt and panty. He opened the zip of his shorts and lay on her and put his “thing for susu” into her “thing for susu”. She felt pain. He covered her mouth, and when he finished he went away. She saw blood on Kinyua’s thing and also on her panty.

17. When her parents came home at about 3.00pm she told them. Her father telephoned the accused who came. Her father tied the accused and took him to the police station. The following morning she was taken to hospital.

18. Given the chance to cross-examine, the State accused stated:

**“No, I have no questions.”**

19. The complainant’s father PW4 confirmed that the complainant told him. What had happened; that he called the accused, who is a neighbour, tied him and took him to the police station.

20. PW3 the Clerical Officer at Naivasha District Hospital testified. She examined the complainant. She found the child had an inflamed

labia, broken hymen, with mild bleeding from the vaginal orifice, and a foul smell from the vagina. She produced a P3 form and Post Rape Case form containing details of the examination.

21. The accused asked by the court to cross-examine stated:

“I do not have a question.”

22. Ultimately, the evidence of defilement was undisputed. The birth certificate produced by the investigating officer proved the complainant’s age to be ten (10) years.

23. The fact that the complainant’s evidence was not corroborated by an eyewitness is immaterial. Under **Section 124** of the **Evidence Act**, the evidence of a child of tender years no longer need, corroboration if the court is satisfied that the victim is truthful. In **Fappyton Mutuku Ngui v Republic [2014] eKLR** the Court of Appeal held:

“.....it is now settled that the courts shall no longer be humstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it satisfied that the child is truthful.”

24. The trial court found the evidence of the child “*well articulated, constituent and was supplied by medical evidence*”, and was unchallenged. Accused’s defence was found to be quite plainly, a simple and mere denial.

25. I found that there is no basis to impugn the trial court’s finding. This ground of appeal fails.

### **Mandatory Minimum Sentence**

26. The Appellant argued that the trial court meted a mandatory minimum sentence of imprisonment for life under **Section 8 (2)** of the **Sexual Offence Act**. He states that such sentences are now constitutional because they do not give the court discretion to issue a sentence that would be more appropriate to the circumstances. He cited a number of authorities including the famous case of **Francis Karioko Muruatetu & Another v R [2017] eKLR**.

27. The DPP argued that the trial magistrate used his discretion to mete sentence after noting the mitigation, and that there was no bar to the sentence provided by **Section 8 (2)** of the **Sexual Offences Act**.

28. The proceedings show that the Appellant was given an opportunity to give mitigation; that the prosecutor equally indicated that the accused had no previous record of conviction, and was treated as a first offender. Giving his sentence the trial magistrate stated that:

“**The offence for which the accused been convicted is not only extremely grave, but also attracts a mandatory penalty as provided by statute at Section 8 (2) of the Sexual Offences Act.**

29. The jurisprudence now in place pursuant to Muruatetu and other authorities by the Court of Appeal applying the principles under Muruatetu. In **Dismus Wafula Kilwake v Republic [2018] eKLR** the Court of Appeal, extending the reasoning in Muruatetu held:

**[W]e 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.**

30. Applying the principles in the **Dismus Kilwake** case, I think the trial court failed to exercise its discretion when rendering sentence. The Learned Magistrate appeared to feel constrained by the penalty provided under **Section 8 (2) of the Sexual Offences Act**. Although he noted the mitigation, he did not incorporate his appreciation of it in exercising his discretion to give an appropriate sentence. He should have done so guided by the **Judiciary Sentencing Guidelines** and of course, **the statute**.

31. Sentencing constitutes a hearing at which parties provide material that is assessed, and from which the output is a sentence based on that material. This is the import of **Section 329** of the **Criminal Procedure Code** which provides:

“**The court may, before passing sentence receive such evidence as it thinks fits in order to inform itself as to the appropriate sentence to be passed.**”

32. That section rhymes with the requirements in the **Muruatetu** and **Dismus Kilwake** cases in respect of mandatory sentences, particularly where sentences of death or life imprisonment are involved. I do not see any demonstrated in the judgment that the trial magistrate exercised his discretion in meting sentence. He should have.

### **Disposition**

33. In light of all the foregoing, the conviction of the Appellant is affirmed and the appeal dismissed in that respect.

34. (a) As for the sentence, the file is remitted back to the trial court forthwith for purposes of properly considering the mitigation of the Appellant and to exercise his discretion in meting an appropriate sentence.

(b) The file shall be placed before the trial court within fourteen (14) days from the date hereof through the orders herein for the purpose of re-sentencing hearing.

**Administrative directions**

35. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

36. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

37. Orders accordingly.

**Dated and Delivered in Nairobi by teleconference this 22<sup>nd</sup> Day of October 2020**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Peter Kinyua Mwenje - Appellant in Naivasha Maximum Prison

3. Court Clerk - Quinter Ogutu