REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 6 OF 2017

MWALIMU CHENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence at Mpeketoni

Criminal Case No. 228 of 2016 in the Judgment delivered

by Hon. J. W. Onchuru (PM) on 30th January 2017)

CORAM: Hon. Justice R. Nyakundi

Ms. Aoko Advocate for the appellant

Mr. Mwaniki for the State

JUDGMENT

Mwalimu Chengo, the appellant in this case was indicted, tried and convicted of the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act and sentenced to 15 years imprisonment.

Background of the appeal

It was alleged by the prosecution that on 26.8.2016 at 11.00 p.m. in Witu Division, Lamu West District, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **HKK** a minor aged 13 years. In support of the charge to discharge the burden of proof under Section 107, 108 and 109 of the Evidence Act the prosecution called six witnesses which evidence can be summarized as follows.

In the testimony by **(PW1), the victim** it all happened on 26.8.2016 when she found herself in church with the appellant and other siblings. In the course an offer was made by the appellant for them to go to the shop to buy some 'P.K' chewing gum. While on the way, the appellant initiated to her that they could instead go to **Baraka's** home to spend a night. It was at that time that the appellant had sexual intercourse with her and left the following day. Her parents became inquisitive as to where she spent the night and this caused her to disclose the location to be appellant's home.

According to **PW2 KK** on 26.8.2016 he had allowed PW1 and her siblings **PW3 Kazungu** to go for a church kesha. However, at the end of the kesha, others returned home at around 11.00 p.m. but **(PW1)** had followed the appellant to his home. Thereafter, when she appeared in the morning on interrogation it became apparent that she spent a night with the appellant. The decision was reached to have the incident made known to the police for them to investigate and charge the appellant.

From the evidence of **PW5 – PC Boniface Chumo** he investigated the case, issued the P3 form and recorded witness statements. Afterwards he recommended a charge of defilement be preferred against the appellant.

On the evidence by **Benson Mwarabe (PW6)** the clinical officer attached to Witu Health Centre, testified to the effect that he examined the victim (PW1) where he made the following findings: A broken hymen and on age assessment ascertained at 13 years old.

At the close of the prosecution case, the appellant put up a defence of alibi that he was involved in anyway in committing the defilement offence preferred by the prosecution.

The Learned trial Magistrate keeping view of the evidence from both sides, convicted the appellant and sentenced him to fifteen (15) years imprisonment.

Being dissatisfied with the decision of the trial court, the appellant appealed to this court on the following grounds:

> ***(1). That the Learned trial Magistrate erred in Law and fact in not considering that my rights under the children's act No. 8 of 2001 were violated as I was under age during the alleged offence.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by admitting the victims evidence with not considering that she acted as an adult hence Section 8(1) 8 (5) was applicable in this case.***
>
> ***(3). That the Learned trial Magistrate erred in Law and fact in not considering that I was not represented by a legal counsel throughout the trial hence prejudice to me the appellant.***
>
> ***(4). That the Learned trial Magistrate did not consider that medical-evidence adduced could not serve any purpose in this case hence unreliable.***
>
> ***(5). That the Learned trial Magistrate did not consider my defense and it was reliable.***

On appeal, the circumstances as to the substratum of the entire matter turned on one key issue; the age of the appellant. **Ms. Aoko** for the appellant submitted that the prosecution failed to appreciate and assess the age of the appellant who at the time happened to be a minor as well counsel added that she was able to access the appellant birth certificate admitted as an exhibit showing his date of birth to be on 18.8.2001. That therefore meant as at 16.8.2016 the appellant was certainly 15 ½ years old.

Mr. Karori counsel for the respondent conceded the appeal and submitted that with the evidence of the birth certificate both the appellant and the victim had no capacity to consent to any sexual or carnal knowledge.

Analysis and Determination

Guidance for sentencing children offenders is to be found in Section 190 of the Childrens Act which provides as follows:

> ***'(1). No child shall be ordered to imprisonment or to be placed in detention camp.***
>
> ***(2). No child shall be sentenced to death.***
>
> ***(3). No child under the age of ten years shall be ordered by children's court to be sent to a rehabilitation school."***

In determining what sentence to pass on a child offence who has been found to be in conflict with the Law, a court must take into account the provisions of Section 4 of the Act which also states:

> ***"In any matters of children all judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers confirmed by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child. In the face of the provisions while the seriousness of the offence will be starting point, the approach required of the childrens court should be individualistic and focused on the welfare and best interest of the child as opposed to the offence in question. The trial court is also called upon to take into consideration the effect the custodial sentence is likely to have on the child offender both positive and negative indicators."***

In the instant case, evidence shows that the appellant was mistakenly sentenced fifteen years (15) imprisonment for the offence he had no capacity to fathom its ramifications. When dealing with this appeal, the appellant had served approximately two (2) years prison custody.

In this connection I would refer to the decision in **Daniel Langat v State {2010} eKLR** where the court held:

> ***"Since the statutory scheme provides that, such a child cannot be sent to prison and since the Law further provides that such a child can only be sent to a borstal institute for no more than three years, the options are limited to trial courts, even where on analysis and evidence such a court might be persuaded that the almost – adult it is dealing with is a danger to society and has failed to acknowledge or came to terms with his or her errors."***

On this ground I agree with both counsels that the appeal be allowed.

I would also point out that at the time of the trial the appellant was unrepresented and being a lay minor, he was not equipped with capability to defend himself without legal representation. The constitution of the Republic in Article 50 (2) (H):

> ***"every accused person has a right to be assigned an advocate by the state at the state expense, if substantial injustice would otherwise result, and be informed of this right promptly."***

As a state party to the convention on the Rights of the child and the African charter and welfare of the child Kenya has the legal obligation to recognize and ensure actualization of certain minimum rights for children in conflict with the Law.

In cases of this nature where an appellant was investigated, indicted, and tried as a minor for the offence of defilement, he was entitled to legal representation at the state expense. See the principles in **David Njoroge Macharia v R {2011} eKLR,** the Court of Appeal observed interalia:

> ***"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 those involving complex issues of fact or Law, where the accued 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."***

The result as I consider this right, is the effect lack of legal counsel had on the pretrial and trial process of the appellant to mitigate both the substantive and procedural rules of a criminal proceedings. There is no doubt that assigning legal counsel by the trial court. In terms of Article 50 (2) (H) of the Constitution at state expense would have prevented the infringement of a right to a fair trial associated with the appellant trial. The appellant legal counsel could have brought out the issue of his age at the earliest opportunity in advising the court appropriately.

In the **U. N. Draft principles and Guidelines on Access to Legal Aid** in criminal justice systems adopted by the General Assembly of the United Nations in late 2012 observed that:

> ***"States should consider the provision of legal aid as their duty and responsibility so that end, they should consider, where appropriate, enacting specific legislative, legal and system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system."***

In compliance with the above on Assembly Resolution, parliament enacted the Legal Aid Act 2016 as an enabling statute to provide for the model and structure on Legal Aid services.

However, notwithstanding that in my view, in this case the Learned trial Magistrate erred in not properly considering whether to not the appellant would actually suffer substantial injustice in absence of legal counsel being appointed by the state and on state expense.

Similarly, Section 36 of the Legal Aid Act provides as follows:

> ***"A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is a citizen of Kenya, a child, a refugee under the Refugee Act No. 13 of 2006, a victim of human trafficking or an internally displaced person ……"***
>
> In **Advocates Sans Frontiers (on behalf of Bwampanye) v Burundi African Commission on Human Rights Comm. No. 213 of 99 {2000}** where it was observed that:
>
> ***"Legal assistant is a fundamental element of the right to a fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case."***

Based on these principles and in the context of the appellant's trial bridging procedural and substantive justice strictly connected with the serious charge required an integral component of legal representation pursuant to Article 50 (2) (H) of the constitution.

Despite a trial having been held under the provisions of Article 50 (1) of the Constitution, the right relating to legal representation was denied and a violation of that right occasioned prejudice and or failure of justice.

What emerges from this review, the appellant did not have a satisfactory trial. In my Judgment I allow the appeal, quash the appellant's conviction and set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT LAMU THIS 21ST DAY OF MARCH 2019

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwaniki for the state

2. Ms. Aoko for the appellant

3. The appellant