REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.16 OF 2015

BERNARD KIPRONO KOECH……..……..….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal from the decision and sentence by Hon. L. Kiniale SRM in Kericho S. O. No.42 of 2014)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 3rd day of June 2014 at [particulars withheld] in Kipkelion District within Kericho County, unlawfully and intentionally did an act which caused penetration of his penis into the vagina of C C, a girl aged 3 years. The accused faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of this count were that on the 3rd day of June 2014 at [particulars withheld] in Kipkelion District within Kericho County willfully and unlawfully indecently assaulted C C a girl aged 3 years by touching her private parts namely vagina.

2. He pleaded not guilty to the offence and after a full trial, he was convicted on the main count and sentenced to life imprisonment.

3. Dissatisfied with both conviction and sentence, he has appealed to this court on the basis of the grounds contained in his Further Amended Petition of Appeal filed by his Learned Counsel, Mr. Sang, dated 1st February 2017.

4. The grounds of appeal as set out in the said Further Amended Petition of Appeal are as follows:

> ***1. The Learned trial magistrate erred in law as she deliberately overlooked the fact that PW1 did not testify against the appellant or in any way create a nexus between him and the offence.***
>
> ***2. The trial Magistrate erred in law and in fact by not allowing the appellant to consult any advocate so as to make the right decision on the plea and also failed to inform the appellant of the said right promptly.***
>
> ***3. The plea that was taken by the appellant was not unequivocal.***
>
> ***4. The appellant was not informed of his right to legal representation to counsel (sic) at state expense even though there was a likelihood of substantial injustice.***

5. The appeal was prosecuted on his behalf by Mr. Sang, while Learned State Counsel, Mr. Mutai, represented the state.

6. In his submissions, Mr. Sang stated that the centerpiece of the appellant's case was the first ground of appeal in his Further Amended Petition of Appeal: that the investigating officer failed to implicate or in any way positively identify the accused person. His submissions were that she introduced an alien by the name Benson Rono as the accused person whereas the accused person's name is Benard Kiprono Koech. It was his submission that the magistrate overlooked the fact that the prosecution failed to discharge the burden of proof as required in law, and the appellant was subjected to a process that led to miscarriage of justice.

7. His second ground of appeal was that the appellant was not afforded the right to legal representation, nor was he prompted on the said right. He urged the court to allow the appeal and quash both the conviction and sentence.

8. Through Learned State Counsel, Mr. Mutai, the state opposed the appeal Mr. Mutai submitted, with respect to the first ground of appeal, that there was no doubt about the identity of the accused. The evidence of PW1 and PW2, who knew the appellant before the incident, mentioned him by name and identified him in court. Their evidence was not challenged in any way by the appellant. That when the appellant was given a chance to cross-examine PW1 after her testimony, he stated, as indicated at page 3 of the record, that he pleaded for forgiveness, and that he did not have a question for the witness. He also, according to Mr. Mutai, stated that he understood the proceedings.

9. Mr. Mutai further pointed out that after PW2 testified, the appellant indicated that he had no questions in cross-examination, then stated that he had *"asked for forgiveness from the parents of the minor"* and *"it is true I committed this offence."* He was cautioned by the court, and when he offered to plead guilty, the court did not accept the plea as being unequivocal. He then stated that he wished the case to proceed. The appellant did not have any questions in cross-examination for PW5.

10. The state further pointed out that in his defence, the appellant had stated that he had been framed and that he had a dispute with *"these people."* Mr. Mutai's submission was that there was no issue of mistaken identity that emerged from the proceedings, or that another person committed the offence other than the appellant. It was his submission therefore that the appellant's first ground failed.

11. With respect to the appellant's second ground, the response from the state is that the appellant had the opportunity to consult an advocate to represent him in the proceedings, and had this right even prior to the institution of the proceedings. Mr. Mutai's submission is that the issue of legal representation could only have arisen if the appellant had a right under the Constitution to be assigned an Advocate at State expense.

12. Further, in the state's view, the appellant did not satisfy the conditions laid down in the Constitution as well as case law to make him qualify for the right to legal representation. Mr. Mutai's submission was that, this was not a complex case where if he had not been accorded the right, substantial injustice would have resulted. There were no complex issues of law or fact and the sentence was not the death penalty. Counsel relied on the decision in **David Macharia Njoroge vs Republic Criminal Appeal No.497 of 2007 (Nyeri CA) [2011] eKLR** and **Meru Criminal Appeal No.101 of 2011 – George Gikundi Munyi vs R.** The state's submission was that the appellant was able and did ably defend himself. The state submitted that the appeal must therefore fail.

13. As the first appellate court, I am required to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing this, I must be conscious of the fact that I have not had the advantage, which the trial court had, of seeing and hearing the witnesses-see **Kiilu & Another vs R (2005) 1 KLR 174**.

14. I note that in the Further Amended Petition of Appeal on the basis of which Mr. Sang presented the appellant's case, there is no challenge of the conviction of the appellant on the basis of the evidence

presented before the trial court, or its analysis and conclusions thereon. However, and with an abundance of caution given that the appellant is facing a life sentence, I will start by setting out briefly the proceedings and evidence presented before the trial court.

15. At the commencement of the trial, the trial magistrate observed that the complainant is very shy and aged 3 years. She therefore allowed the complainant to testify through an intermediary, her mother, C L (C), in accordance with the provisions of section 31 of the Sexual Offences Act.

16. The testimony of the intermediary was that she was weeding the farm when she heard the child, C, crying. She called her but the child did not respond, so she went to look for her. She saw her coming from the accused's house. The child informed her that the accused had touched her. She checked her and found that she had been defiled. She had a lot of dirt on her private parts. She took her to the nearest dispensary and she was referred to Kericho District Hospital. The accused ran away.

17. After the testimony of Caren, the record indicates that following exchange took place:

> ***"Accused: I plead for forgiveness.***
>
> ***Court: It is time for cross-examination.***
>
> ***Accused: I do not have questions for this witness. I understand the proceedings."***

18. PW2 was C K L (C), the father of the child. His evidence was that he was called by his wife and informed that the accused had taken their child and did "bad manners" to her, that he had raped her. He narrated what his wife had told him, and confirmed that they had taken the child to the dispensary and later reported the matter at the police station. The accused, who had run away, was arrested the following day.

19. After the evidence of the second prosecution witness, the record indicates the following took place:

> ***"Cross-examined by Accused: I don't have any questions for this witness.***
>
> ***Court: Court warns the accused of the seriousness of the offence and he responds:***
>
> ***Accused: I plead for forgiveness. I understand what the witness has said. I don't have any questions."***

20. The court then indicated that there were no questions in cross examination from the accused, and the prosecutor then asked for an adjournment to call other witnesses. The accused objected, stating:

> ***"Accused- I object. I have asked for forgiveness from the parents of the minor. It is true I committed the offence."***

21. The court then directed that the plea be read afresh to the accused, and after it was read to him in Kipsigis, a language he understands, he responded: *"It is true"*. A plea of guilty was then entered, and after the court had recorded that the accused had been cautioned, again, the facts were read to him. The accused then stated *"The facts are true"*. However, after the court again cautioned him on the seriousness of the offence, he stated:

> ***" I wish to change my plea. Let the case proceed."***

22. PW3 was the clinical officer, Mitei Weldon, from Kipkelion Sub-district Hospital. He had examined the child on 4th June 2014. His findings were that she had bruising of the vaginal orifice (*labia minora)*, which was highly inflamed and swollen. The hymen was also torn. His conclusion was that the child had been defiled. In cross-examination by the accused, he stated that he confirmed defilement because the child's hymen was torn and she had injuries on the *labia minora*.

23. PW4, Thomas Kibet Kosgey, the assistant chief from Siret sub-location, arrested the accused. He had received a call from a neighbouring Assistant Chief that someone had defiled a child and run away to his location. He found members of the public interrogating the accused and he arrested him. He confirmed in cross-examination by the accused that he had been asked to arrest him on suspicion of having committed an offence.

24. The final prosecution witness was the investigating officer, No. 89596 PC Faussy Kanyoro from Kipkelion Police Station. She was the duty officer when the report of the child's defilement was made. The accused was brought in by an Assistant Chief called Thomas (PW4). She charged the accused with the offence. The accused had no questions in cross-examination for this witness. She referred to the person arrested and brought to the station as *"Benson Rono"*.

25. At the close of the prosecution case, the court found that the appellant had a case to answer and placed him on his defence. The appellant elected to give an unsworn statement, and stated that he would call 3 witnesses. He stated that he had been framed by the villagers; that there was a time he had a dispute with *"those people"*. He then stated that he would not call other witnesses.

26. In the judgment dated 21st April 2015, the trial court set out the evidence presented before it, both by the accused and the defence, and the issues that arose for determination, viz: whether the complainant is a child below 18 years; whether there had been penetration; whether the accused is the one who defiled the complainant; and whether the evidence on record is sufficient to sustain a conviction.

27. After analyzing the evidence on record, the trial court found in the affirmative in respect of all the issues. There was documentary evidence with respect to the age of the child; the medical evidence established that the child had been defiled; the identity of the accused was not in doubt as he was a neighbor and the mother of the child saw the child coming from his house and the child informed her mother that it was the accused who had touched her. She therefore proceeded to find the accused guilty as charged and to convict him on the main count of defilement.

28. As I observed elsewhere in this judgment, the grounds of appeal presented by learned counsel for the appellant, Mr. Sang, as well as his submissions at the hearing, do not in any way challenge the findings of the trial court, except in one instance. They are focused primarily on the right of the accused to legal representation.

29. The first ground charges the trial magistrate of having deliberately overlooked the fact that PW5, PC Kanyori, did not testify against the appellant or in any way create a nexus between him and the offence. Mr. Sang submitted that the investigating officer failed to implicate or in any way positively identify the accused person. His submissions were that she introduced an alien by the name Benson Rono, while the appellant's name is Bernard Kiprono Koech.

30. It is true that the record of the court indicates that the witness referred to one *"Benson Rono"* whom Mr. Sang referred to as an *"alien"* that was introduced at the trial. However, it is clear from the proceedings that there was no doubt, even in the mind of the appellant, that he was the one being referred to. As noted earlier, at the end of the testimony of P. C. Kanyoro, PW5, he did not have any questions in cross-examination, nor did he challenge in any way the reference to him by another name. Further, throughout the proceedings, there was no doubt about who had allegedly committed the offence. After the testimony of C and C, the parents of the child, he basically admitted the offence, and only changed his mind and reverted to a plea of not guilty after he was warned by the court of the seriousness of the offence that he was facing. I therefore find no merit in this ground.

31. In the second ground of appeal, the appellant faults the trial magistrate for not allowing him to consult any advocate so as to make the right decision on the plea and also failed to inform the appellant of the said right promptly.

32. It is correct that an accused person has a right, under Article 50(2) (g), ***"to choose, and be represented by, an advocate, and to be informed of this right promptly."*** In the present case, the

appellant complains that he was not *"allowed"* to consult an advocate. However, a perusal of the record does not show a person who wished to seek legal advice, but was denied the opportunity to do so by the trial court. Rather, it demonstrates a person who was supremely confident and clear about the charges facing him, one who was even eager to admit the offence, and did so on at least two occasions, only retracting his admission after he was warned by the court of the seriousness of the offence facing him. In the circumstances, I find no basis for impugning the decision of the trial court on this ground.

33. The third ground of appeal is that the plea taken by the appellant was not unequivocal. As observed earlier in this judgment, the appellant initially pleaded not guilty, then later in the proceedings changed his plea to guilty, and then soon thereafter changed his plea again to not guilty. I believe therefore that the issue of whether or not the plea was unequivocal does not apply in the present case. The accused was not convicted on his plea of guilty. He was convicted after a full trial. In **Adan vs Republic 1973 EA 445**, the Court of appeal set out the steps to be taken in recording a plea as follow:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."***

34. Had the trial court convicted the accused on his plea of guilty following his admission after the testimony of C, PW2, then perhaps the issue of an unequivocal plea could have arisen. Since the court, properly so, emphasized the seriousness of the offence and allowed the appellant to change his plea, I see no basis for the appellant's third ground of appeal, and it must also fail.

35. The fourth ground is that the appellant was not informed of his right to legal representation at state expense even though there was a likelihood of substantial injustice. It is correct indeed that an accused person is entitled, under Article 50(2) (h), ***"to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."***

36. The Constitution has not defined the phrase *"substantial injustice"*. However, in the case of **David Macharia Njoroge vs Republic [2011] EKLR** the Court of Appeal stated as follows with respect to the provision of legal representation at state expense:

> ***"State funded legal representation is a right in certain instances.*** *Article 50 (1)* ***provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the Constitution. However, provisions of international conventions that Kenya is signatory to are applicable by virtue of*** *Article 2 (6)****. Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.***
>
> ***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."***

37. In **Karisa Chengo & 2 Others vs Republic CR AP NOs. 44, 45 & 76 of 2014**, the Court of Appeal sitting in Malindi stated:

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the*** *David Njoroge Macharia case (supra)* ***seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result, and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, 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 only then would the state obligation to provide legal representation arise."***

38. In the present case, I am mindful of two considerations. First, as observed by the Court in the **Karisa Chengo** case, it is not in all circumstances that an accused person is entitled to legal representation. An accused person facing a capital offence is entitled to legal representation if he cannot afford such representation due to financial constraints.

39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the **Legal Aid Act No. 6 of 2016** for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

> ***43. (1) A court before which an unrepresented accused person is presented shall —***
>
> ***(a) promptly inform the accused of his or her right to legal representation;***
>
> ***(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and***
>
> ***(c) inform the Service to provide legal aid to the accused person.***

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the **Karisa Chengo** case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose.

41. In the circumstances, I find no merit in the present appeal, and it is hereby dismissed.

Dated, Delivered and Signed at Kericho this 29th day of March 2017.

MUMBI NGUGI

JUDGE