REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 165 OF 2016

REPUBLIC …….……..... APPLICANT

VERSUS

WILLIAM SAID MAGHANGA….……RESPONDENT

RULING

INTRODUCTION

1. The Respondent had been charged with the offence of defilement contrary to the provisions of Section 8(1) as read with Section 8(2) and 8(5) (sic) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on 8th June 2016 at [particulars withheld] Village at Maktau Location within Taita Taveta County, he intentionally and unlawfully caused his penis to penetrate the anus of D K (hereinafter referred to as "PW 2"), aged eleven (11) years at the material time.

2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act. The particulars of this charge were that on the aforesaid date, time and place, he intentionally and unlawfully touched PW 2's buttocks with his penis.

3. The Learned Trial Magistrate Hon N.N. Njagi, Senior Principal Magistrate, convicted the Respondent for the offence of defilement and sentenced him to serve ten (10) years imprisonment. He made no findings on the alternative charge.

4. By a letter dated 29th November 2016 filed on the same date, the State moved the court for a revision of the sentence that was meted upon the Respondent on 25th November 2016 by the Trial Magistrate, Hon N. N. Njage in **Cr Case No 289 of 2016 Republic vs William Saidi Maghanga**at Wundanyi Law Courts as it contended that the least sentence the said Learned Trial Magistrate would have meted upon the Respondent herein was imprisonment for life.

LEGAL ANALYSIS

5. The State submitted that once the trial court convicted the Respondent of the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act, the trial court ought to have sentenced him in accordance to the same Section 8 (2) which provides as follows;

> **"A person who commits an offence of defilement with a child aged elevenyears or less shall upon conviction be sentenced to imprisonment for life."**

6. It pointed out that during trial, the complainant's birth certificate was produced and it confirmed that

the complainant was born on 9th September 2005. The offence committed by the Respondent occurred on the night of 7th and 8th June 2016. It submitted that complainant was aged ten (10) years and (9) months at the material time and hence PW 2's age was sufficiently proven to have fallen within the age bracket as prescribed under Section 8(2) of the Sexual Offences Act. In this regard, it relied on the case **Kaingu Elias Kasomo vs Republic Criminal Appeal No 504 of 2010**(case not attached) where the Court of Appeal in Malindi held as follows:-

> **"Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim…A birth certificate is an official document which provides credible and conclusive proof of the complainant's age."**

7. It submitted that the wording in Section 8 (2) of the Sexual Offences Act was couched in mandatory terms and made use of the word **"SHALL"**and consequently the Learned Trial Magistrate did not have a right to exercise his discretion to sentence the Respondent to a lesser sentence than what had been provided for under Section 8(2) of the Sexual Offences Act.

8. To buttress its argument, it referred this court to the case of **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR** where the Court of appeal held as follows;

> **"A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms using the word "shall". It is not for the judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so."**

9. It also pointed out that this court has supervisory powers over all subordinate courts and tribunals and can call for proceedings to review as provided for in Article 165 (6) and (7) of the Constitution of Kenya, 2010 which provides as follows:

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.**
>
> **(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

10. This jurisdiction is further conferred by dint of Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) which empowers the High Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

11. It thus urged this court to review the sentence of ten (10) years that had been imposed upon the Respondent as the same was illegal and instead sentence the Respondent to life imprisonment which was the proper sentence provided under the law.

12. Through his counsel, the Respondent argued that the State ought to have appealed against the sentence and that having failed to do so, it was estopped from making an application for revision. He added that in any event, it did not indicate what should be revised in its application for Revision and therefore urged this court to dismiss the application herein.

13. He relied on the provisions of Section 364(5) of the Criminal Procedure Code which provides as follows:-

> **"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."**

14. He placed reliance on the case of **Felix Muoki Muteti vs Republic [2016] eKLR** where in dismissing an application for Revision, Nyamweya J held as follows:-

> **"With respect to the present application, I note that the Applicant is not disputing the correctness, legality or propriety of sentence meted on him by the subordinate Court, but is asking for a reduction of the sentence. Section 362 of the Criminal Procedure Code is therefore inapplicable to the instant application. In addition, the power of revision by this Court is curtailed under Section 364(5) of the Criminal Procedure Code, when or if no appeal has been brought against a finding, sentence or order."**

15. As was rightly argued by the State herein, high court should review sentences, orders, findings or proceedings that are improper or illegal. Again as was rightly pointed out by the Respondent, a party cannot seek a revision of an order, sentence or finding where he or she could have appealed against such order, sentence or finding.

16. This court's understanding of this provision was that a person who failed to appeal against an order, finding or sentence could not seek to reverse such order, finding or sentence by way of revision. A revision is therefore only limited to cases where there has been an illegality and impropriety. It does not mean that if a party did not appeal against an order, finding or sentence he cannot apply for a revision. Rather, the application for revision must be limited to examining records of a subordinate court to satisfy itself of the correctness, legality and propriety of an order, finding or sentence as envisaged in Section 362 of the Criminal Procedure Code.

17. A perusal of the court proceedings showed that the Learned Trial Magistrate convicted the Respondent for the offence of defilement of PW 2 who was aged eleven (11) years old. It is therefore correct as the State submitted that a person who was convicted of defiling a child of eleven (11) years shall be sentenced to imprisonment for life.

18. Even so, in determining whether or not the sentence the Learned Trial Magistrate imposed upon the Respondent was correct, legal and proper, this court went a step further to analyse the evidence that was adduced in the Trial Court to establish whether or not the Prosecution had proved its case against the Respondent herein, beyond reasonable doubt, justifying the sentence.

19. In the case of **Charles Gitau vs Republic [2008] eKLR,** Ojwang J (as he then was) referred to the case of **R. v. Ajit Singh s/o Vir Singh [1957] E.A. 822.** He stated and observed as follows:-

> **""In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):**
>
> **"We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect…merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu** (sic)**even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.""**

20. What this court understood to have been the purport of the said holding was that a court could act *suo moto* and exercise powers conferred on it by Section 361 and 361(3) of the Criminal Procedure Code to disturb a finding, sentence or order where the issue had been presented as a revision instead of an appeal especially where an applicant was a layman as was contemplated in the case of **Republic vs Ajit Singh s/o Vir Singh**(Supra). Indeed, the Respondent herein had represented himself during the trial. His counsel only took over the matter herein at the appellate stage on a *pro bono* basis.

21. According to PW 1, the Respondent had asked PW 2's father to allow PW 2 to go to his home and give him company. He would go to the Respondent's house twice in a week. The first day, the Respondent did nothing to him. However, on the second night, the Respondent inserted his penis into PW 2's anus.

22. He went home the following day and informed his mother of what the Respondent had done to him where after he was taken to Mlegwa Dispensary and thereafter to Mwatate Dispensary. During the Cross-examination, it appeared that the Respondent was known to PW 2. His mother, C K (hereinafter referred to as "PW 3") was the one who took him to hospital. She confirmed having seen injuries in PW 2's anus and stated that he had not taken a bath or gone for a long call.

23. G P M (hereinafter referred to as "PW 4") confirmed that he spoke to PW 2 who indicated that he was sodomised by the Respondent. Devota Ochieng, the Clinical Officer of Mwatate Sub-County Hospital (hereinafter referred to "PW 1") testified that PW 2 was examined on 8th June 2016 at 5.30 pm, the incident having occurred on the night of 7th and 8th June 2016. He noted that PW 2's anus had superficial bruises at the anal region and the trouser he was wearing was stained with feaces.

24. PW 1 stated that he was looking for deposit for sperms but did not conclusively say that he found any. However, a perusal of the P3 Form that he filled showed that PW 2's head, neck, upper and lower limbs and genitalia were essentially normal. There were superficial bruises with no bleeding or discharges. No 91461 PC Clement Kiaraho (hereinafter referred to as "PW 5") reiterated the evidence of the Prosecution witnesses. The Respondent opted to be silent and for the Prosecution to prove its case.

25. The court took cognisance of the provisions of Section 124 of the Evidence Act that stipulate as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **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 to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

26. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

27. The Learned Trial Magistrate believed PW 2's version because the medical report by PW 1 confirmed that PW 2 had superficial bruises. However, PW 1 did not establish that the said bruises were as a result of the Respondent having penetrated PW 2 the night of 7th and 8th June 2016. Indeed, there was no indication of the approximate age of injuries and no evidence of penetrative injury to the anus.

28. In the mind of this court, the Prosecution did not adduce any evidence before the Trial Court to prove that it was indeed the Respondent who caused PW 2's superficial injuries on his anus. It will be

appreciated that PW 3 had contended that PW 2 had not gone for a long call. PW 1 noted that the trousers PW 2 was wearing were stained with feaces. The Prosecution would have gone a step further to rule out that the failure of PW 2 to have gone for a long call did not cause the superficial bruises. Notably, the Respondent opted to remain silent during his defence and leave the Prosecution to prove its case.

29. Going further, it was not clear under what circumstances PW 2 used to go to the Respondent's house to give him company as was contended by PW 3. It was the feeling of this court that certain information had been withheld by PW 2 and PW 3 as to what really PW 2 had gone to do at the Respondent's house. The fact that there were no evidence of penetration which is an ingredient to prove the case of defilement as was held in the case of **Kaingu Elias Kasomo vs Republic**(Supra),this court was hesitant to find and hold that the provisions of Section 124 of the Evidence Act were applicable herein as the Prosecution had proved its case to the required standard, which was, proof beyond reasonable doubt.

30. Assuming that this court would have found that the Prosecution had proved its case, it would have agreed entirely with the State that the sentence the Learned Trial Magistrate imposed upon the Respondent was not correct, legal or proper. Appreciably, according to the Certificate of Birth, PW 2 was aged about eleven (11) years and three (3) months at the material time. Upon conviction, the only sentence that could have been meted upon him was imprisonment for life as that was the mandatory sentence.

31. Accordingly, having perused the application for Revision by the State, its Written Submissions and those of the Respondent, this court came to the conclusion that in the absence of cogent and consistent evidence, doubt was raised in its mindsufficient to have found and held that the Prosecution had proved is case beyond reasonable doubt. It could not therefore revise the sentence that was meted upon the Respondent upwards as the State had urged it to do.

DISPOSITION

32. In the circumstances foregoing, this court found the Applicant's application for Revision dated and filed on 29th November 2016 was not merited and the same is hereby dismissed.

33. For the foregoing reasons, in view of the fact that the evidence that was adduced before the Trial Court created doubt in mind of this court, that benefit of doubt leads it to quashthe conviction and set aside sentence that was meted upon the Respondent by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Respondent be set free forthwith unless held or detained for any other lawful reason.

34. It is so ordered.

DATED and DELIVERED at VOI this 30th day of November 2017

J. KAMAU

JUDGE

In the presence of:-

Aywa h/b for Miss Munyari-for Applicant

Miss Anyumba-for Respondent

Susan Sarikoki- Court Clerk