



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 177 OF 2019

TK.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from conviction and sentence by C.R.T.Ateya (SRM) in Iten PMCRC No 7 of 2018)

JUDGMENT

1. **TK (the appellant)** was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No 3 of 2006, The particulars were that on 24th day of February 2018 at around 7.40pm, at [particulars withheld] village, in KOIBARAK location, he committed an act which caused penetration with his genital organ, namely penis, into the genital organ, namely vagina, of **VJK***, a girl aged 8 years.

2. He faced an alternative charge of indecent act with a child contrary to **Section 11 (1) of the Sexual offences Act**, that on the same date, time and place, he committed an indecent act with **VJK**, a girl aged 8 years, by unlawfully touching her private parts, namely vagina with his penis. He denied both charges, and after a trial in which 5 witnesses testified in support of the prosecution, and the appellant was the only defence witness, he was convicted on the main charge and sentenced to life imprisonment.

3. **VJK** told the trial court that on the night of 24/02/2018, she was at home with her sister **C** while their mother had gone to buy milk, and their father was not at home. They had already had supper, and gone to bed, and **C** was already asleep, when the appellant arrived and removed his trousers, “**took his thing and did tabia mbaya. I felt pain in my part I use to urinate. The thing he inserted into me, he uses to urinate.**”

The appellant then left, and when her mother returned, PW1 disclosed to her what had happened. On cross examination, PW1 confirmed that she knew the appellant by name and as a neighbour.

4. **JJK* (PW3)**, the minor’s mother told the trial court that the child was born on 14/06/2008 although the clinic card indicated the year of birth as 3/6/2009. It was her evidence that on the date in question at 7.30pm, she left her children (the complainant and her three-year-old sibling) in the house, while she rushed to **KAPTABUK** to get milk. She returned home after 30 minutes, and found the children already asleep, so she ate he supper and sleep. As is her usual habit at midnight she woke up to check on the children, and realized that **VJK** was not wearing her trousers, and upon inspecting, she noticed that her vagina was open, and it had fluids. She woke the child up, who she narrated to her how **T** had come to the home, taken her out and defiled her by putting his organ in her organ. She took the child to **KAPSOWAR** hospital the next day.

She described the appellant as her cousin, by virtue of his being a son to her aunt, and that the on the date in question, he had been within the vicinity, and that according to what the child told the mother, that was not the first time that the appellant was defiling her.

5. A report to police, and **P.C SULEIAN MENGICH** confirmed that after receipt of the report, he arrested the appellant, and had him charged. **DR WILFRED KIMOSOP** who examined the minor noted that she could not walk properly due to pain, and her labia majora was freshly bruised, the labia minora had lacerations, and the hymen was freshly torn. There were multiple red blood cells, numerous pus cells, and urinalysis found heavy presence of pus cells, and there was evidence of forceful penetration.

6. In his unsworn defence the appellant described his activities of 24/0/2018, saying that on the material date he went to work and returned home at around 7pm, he had a shower, ate then went to sleep. The next day he went to church, then on 26th February 2017 he was arrested.

7. The trial magistrate in her judgment found that the evidence established that the victim was aged 8 years, and was able to identify the

appellant as he was someone well known to her. That the opportunity for identification was favourable as the child's mother informed the court that when she left to go to the shops, there was electricity light inside the house. Further that the evidence presented proved the element of penetration.

The appellant's defence was considered, and rejected as not being plausible because the victim had identified him

The appellant challenged the findings on grounds that:

- a. his rights to a fair trial were violated as he was not accorded legal representation**
- b. the evidence did not prove the charge and was fraught with contradictions**
- c. His defence was not considered**

8. In arguing the appeal, Mr V. Mutai on behalf of the appellant submits that the trial court did not inform the appellant of his right to legal representation as provided under **Article 50 (2) of the Constitution of Kenya, as well as Section 43 (1) of the Legal Aid Act**, yet protecting one's life, especially in a situation where he was facing a life sentence was critical.

9. It is counsel's contention that the appellant ought to have been assigned an advocate by the State, or be informed of such right, and in the absence of these, then it resulted in substantial injustice.

He points out that under **Section 43 of the Legal Aid Act** the trial court is required to take into consideration whether substantial injustice will be occasioned, by looking at;

- i. Severity of the sentence**
- ii. Severity of the case**
- iii. Capacity of the accused person to defend himself/herself**

10. The respondent represented by Miss Okok, opposed the appeal and filed written submissions which are duly considered:

A) VIOLATION OF THE APPELLANT'S RIGHT TO A FAIR TRIAL

11. Mr Mutai on behalf of the appellant argues that the evidence before the trial court suggested that the appellant was under 18 years of age, because, whereas the charge sheet indicates that he was 19 years as at the date of committing the offence in the year 2017, the pre-sentence report prepared in the year 2019 gave his age as 19 years at the time of sentence - his age could not have remained constant and the trial court ought to have made inquiries regarding his age. It is submitted that the appellant was treated as an adult throughout the trial, yet he was a minor and ought to have been accorded legal representation.

The appellant's counsel also points out that the appellant faced a life sentence, and his education qualification was such that he could not have the capacity to counter the evidence presented.

In opposing this limb of the appeal, Miss Okok on behalf of the DPP argues that whereas the right to legal representation is provided under the Constitution right it is not absolute. It is argued that during the hearing, the appellant did not request to be given time to source for an advocate nor did he request for a pro bono advocate and the court decline to offer such assistance.

It is submitted that in the instant case, the appellant was not prejudiced due to lack of legal representation as he fully participated in the trial, understood the charges facing him and was able to extensively cross-examine the prosecution witnesses.

That he was also able to offer a proper defence, and this court should make a finding that this ground of appeal cannot be sustained.

The appellant alleges that his right to a fair trial was violated as he was not informed of his right to legal representation. His counsel has alluded to his level of academic exposure as being an inhibiting factor in challenging the evidence presented by the prosecution and presenting a good defence. It brings to mind the observation made in the English case of **Pett vs. Greyhound Racing Association (1968) 2 All ER 545** where Lord Denning rendered himself in the following terms:

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

Does the record suggest an accused who was so petrified and tongue tied as not to even know what to ask? Does it instead demonstrate an individual who may have proceeded to present a sermonette?

Article 50(2) (g) (h) of the Constitution of Kenya, 2010 provides as follows:

(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(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;

I echo the words of Mrima (J) in **FOO v Republic [2020] eKLR** that:

the right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.

It then is apparent that there is a need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution. Such duty is placed on the trial court by section 43(1)(a) of **The Legal Aid Act No. 6 of 2016** that:

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;

In the case of **FOO (supra)** Mrima J examines the two schools of thought as regards failure to meet these constitutional requirements thus:

... the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?

“There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned”.

Caught in between these two schools, I find refuge in the case of **Charles Maina Gitonga v Republic [2018] eKLR** where the Supreme Court of Kenya in considering the issue on the right to legal representation stated thus:

a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in Criminal Appeal No.78 of 2014 and the matter properly addressed by that Court within its jurisdiction, and;

(b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the Repealed Constitution and that under Section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;

(f) More fundamentally, the issue of legal representation or lack thereof is a matter of record and no evidence beyond the trial and appellate Courts' record is required to submit on it as a matter of law which is what this Court is seized of.

The ultimate test is whether lack of such information and legal representation resulted to the appellant suffering substantial injustice during his trial and I find that no such prejudice has been demonstrated. Indeed, the appellant comprehended the nature of the charge, and the questions and answers elicited thereto demonstrate a mind that was fully aware of the allegations against him and the import of each witness' evidence. This is fortified by his own defence which attempted to raise the defence of an alibi

B) PROOF OF DEFILEMENT

12. The appellant's counsel argues that the evidence presented at the trial was entirely circumstantial in nature, and was at best unreliable, contradictory and weak thus failing to irresistibly point to the guilt of the appellant. That PW5 whose evidence was said to corroborate that of the minor, was an unreliable witness, whose evidence was concocted, because on one hand he stated that the minor's clothes were clean, yet in the P3 form, he recorded that the clothes were blood stained. That whereas the witness claimed "the minor was taken to hospital immediately, the other prosecution witnesses said a report was made after two days. It is on account of this, that the appellant's counsel submits that the contradictions were material and ought to have been resolved in favour of the appellant. Would such contradiction affect the key ingredients of the charge

The key ingredients in the offence of defilement are:

a) Penetration

b) Age of minor

c) Identity of the accused

Penetration

13. Miss Okok points out that the evidence of the minor clearly stated that on the material night, the appellant defiled her, an act that she referred to as "*tabia mbaya*". She described how the appellant removed her under-pant and removed his clothes, and "*...put the thing he uses to urinate*" and inserted into the part she uses to urinate with, and she felt pain. This description of the aggressors conduct, including the sexual act itself, was too graphic in details that it cannot be wished away as childhood fantasies. Moreover, it was supported by the observations made by the mother who noted that the vagina was open and covered in fluids.

14. This observation was then corroborated by the medical findings of PW5 and upon urinalysis being carried out established the presence of red blood cells and multiple pus cells. PW5 also found that regarding the injured state of the minor's genitalia, the labia majora was bruised, there were lacerations in the labia minora and the hymen was torn. He further noted that the bruises were fresh and the hymen was freshly torn, leading him to conclude that there was evidence of forced penetration and classified the injury as grievous based on the fact that her hymen was torn and that she had lost her virginity. I find no error on the finding by the trial court that penetration was proved.

Identification

15. I note that the appellant did not deny that he was well known to the complainant and her mother (who in fact said he was a cousin). I agree with submissions made by the prosecutor that the appellant was known to the victim and she even identified him by his name during the trial and she knew the appellant as their neighbour. The opportunity to commit the act presented itself because the complainant's mother (PW3) was away and defiled her, and the person who defiled her took advantage of that. PW3 confirmed that they were using a solar **D-lite**, which I consider to produce sufficient light. The appellant was said not to live too far from the home. Identification was therefore by way of recognition which is the best form of identification.

Age

16. PW3 the complainant's mother told the court that indeed PW2 was her daughter and that she was born on **14th June, 2008**, however a clinic card and birth notification form produced as prosecution exhibits 1(a) and I(b) indicated that the complainant was born on **3rd June, 2009** meaning that the complainant was 8 years, 8 months old at the time of the incident. PW5 who examined the complainant estimated her age to be 10 years at the time of the commission of the offence. This discrepancy in age does not alter the nature of the offence and still places her under the ambit of **Section 8(2) of the Sexual Offences Act**.

Defence

17. The appellant complained that the trial court did not consider his defence. Miss Okok contends that he offered an unsworn statement of defence which was a mere denial and not strong enough to rebut the prosecution case and that the trial court was right in disregarding the same. The court is urged to find that the conviction was safe as the evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated and that if there was any contradiction as alleged by the appellant the same did not go to the root of the case.

SENTENCE

18. The appellant was sentenced to life imprisonment on 15th November, 2019. The position by his counsel is that he was a minor, and that the trial magistrate erred in sentencing him without considering that he was a minor at the time the offence was committed.

The DPP argues that he was given a chance to mitigate and he prayed for a lenient sentence stating that he was 19 years old and a student at **Kaptabuk Mixed Day Secondary School**. The prosecution informed the court that the appellant was a first offender, and the life imprisonment imposed on the appellant is the minimum sentence provided by law. In sentencing the appellant, the court stated thus "the offence herein provides for a life sentence." The DPP is however alive to emerging jurisprudence that now grants the courts discretion in sentencing where previously the law provided for mandatory/minimum sentences, and acknowledges that from the fore-going, it is clear that the trial magistrate did not exercise her discretion while sentencing.

19. In the instant case, the minor complainant was eight years old at the time of the incident. It is pointed out that it is evident that the appellant abused the trust that was bestowed upon him by society. He took advantage of a child of tender years and committed a heinous crime which occasioned severe trauma and suffering to the complainant.

He was a neighbour and also a relative (going by PW3's evidence) and ought to have taken care of the complainant. That there was no evidence adduced during the trial to prove the age of the appellant and there is no telling whether the appellant was really a minor at the time when the offence was committed.

This court is urged to confirm the life imprisonment imposed by the trial court is a sufficient and deterrent sentence and dismiss the appeal in its entirety.

If indeed the appellant was a minor at the time he committed the offence, then **Section 190 of the Children Act No 8 of 2001** places a restriction on punishment on child offenders to the effect that:

(1) No child shall be ordered to imprisonment or to be placed in a detention camp.

(2) No child shall be sentenced to death.

(3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school.

20. Section 191 of the Act gives court a guide on Methods or options available in dealing with a child offender. It is therefore my duty that before making a pronouncement on the issue of sentence, the appellant's current age must be established through medical age assessment to help this court work out backwards, what his age was at the time of the offence. I direct that the officer in charge of the facility where the appellant is held arranges for the appellant to be subjected to an age assessment, and a report be filed in this court on **27th May 2021**

VIRTUALLY DELIVERED AND DATED THIS 13TH DAY OF MAY 2021

H. A. OMONDI

JUDGE