REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

(CORAM: A.K. NDUNG'U)

CRIMINAL APPEAL NO. 38 OF 2018

JOHN GICHURE MAINA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D.M. Kivuti (S.R.M.)

dated the 4th day of May 2018 in Murang'a S.O. 15 of 2018)

JUDGEMENT

1. The appellant, **JOHN GICHURE MAINA**, was convicted and sentenced to 20 years imprisonment on his own plea of guilt for committing the offence of defilement contrary to **Section 8(1)** as read with **8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on the 1st day of May 2018 at [Particulars Withheld] village, in Kangema Sub-County within Murang'a County, he intentionally caused his penis to penetrate the vagina of JMG a child aged 16 years.

2. The substance of the charge and the elements thereof were read to the appellant in Swahili, who being asked whether he admitted or denied the truth of the charge replied ***"Ni Ukweli."***

3. The facts of the charge were expounded by the prosecution to the appellant as follows;

> ***"Prosecutor: On fact, on 1st May 2018 around 13:00 hours, the complainant who is 16 years run away from house, the mother of the victim tried to look for her in vain, she never came back.***
>
> ***On 2nd May 2018, the mother of the complainant received a phone call from the accused, this made her make a follow up to accused home at*** [Particulars Withheld]***, where he found that the accused was staying with the daughter, she reported the case to the police and the two were arrested, the victim said that she had sexual intercourse with the accused, I wish to produce P3 form, as Exhibit No. 1. The birth certificate indicated she was born on 4th November 2012 meaning she was 16 years, Exhibit No. 2.***
>
> ***That is all."***

4. The appellant's response to the above facts was recorded by the trial court thus;

> ***"Accused: The facts are correct.***
>
> ***Court: The accused is informed that the offence he is facing carries a severe sentence as a penal notice.***
>
> ***Accused: I still insist that the facts are correct."***

5. The trial court proceeded to convict the appellant on his own plea of guilty. The proceedings after conviction read as follows;

> ***Prosecutor: We have no records.***

Mitigation: I am seeking for forgiveness. I will stop this habit of seducing school going children. I am 20 years old.

Court: I direct victim impact assessment on this matter to establish consensual sex.

Minor: JMG

<u>On Voire Dire</u>

I am a student at "X" Secondary School, am 16 years old, am in form 2, the Accused tricked me to having sex with him and I stayed with him, I know the purport of speaking the truth.

Court: She may be sworn.

Minor: Sworn in Swahili and states. I am called J. M. I engaged with the accused as a boyfriend, my mother discovered that I was living with him, he had tricked me.

Court: I have considered the accused mitigation, the Victim Impact assessment, the circumstance of the offence, I must state that this is a sexual episode involving a young man aged 20 years and a young gal (sic) aged 16 years old of course I am alive to the new emerging jurisprudence of consensual sex between the person approaching age of majority, there is an authority by Justice Waweru that has enunciated that position Ref: (sic) however the peculiar circumstance of this case makes me thing a bit liberal in that the victim is school going at Form 2, the accused has since dropped out of school, encouraging consensual sex to prevail would in essence be sending a wrong signal to the society, the girl child needs to be protected and the accused choose to engage with the victim knowing she was still in school and a minor.

Consequently the law sets minimums for the offence which the accused has admitted despite being cautioned for the consequence.

The accused is sentenced to serve 20 years (twenty) imprisonment as a deterrence sentence to other likeminded elements in the society.

Right of appeal 14 days."

6. I have reproduced the proceedings before the trial court at length as this appeal majorly pertains to the explicitness of the plea of guilt by the appellant.

7. The grounds of appeal set out in the appellant's amended petition of appeal, were that the trial court had erred in convicting him yet the sexual episode involved persons approaching the age of majority. He contended that the critical component of *mens rea* was missing as he had no intention of committing a crime and was merely engaging in a normal sexual encounter with his girlfriend.

8. The appellant also challenged the sentence for the reason that the trial court had sentenced him to a higher sentence above the mandatory minimum under **Section 8 (4)** of the **Sexual Offences Act** without stating reasons for doing so despite the fact that he was a first offender. The sentence was also challenged on the grounds that the trial court had, in sentencing the appellant to 20 years imprisonment, departed from the emerging jurisprudence of consensual sex between persons approaching the age of majority. The appellant's counsel also argued that a copy of the birth certificate was produced in disregard of Section 67 of the Evidence Act on the production of secondary evidence.

9. Counsel for the State filed written submissions opposing the appeal. He argued that the charges had been read to the accused in a language he understood and his response recorded in the words used by the appellant. Even after the facts were read over to the appellant and he was cautioned on the sentence, the appellant insisted that it was true. He submitted that it was proper for the court to require the complainant to outline to the court the facts upon which the charge was founded as provided in **Section 207 (2)** of the **Criminal Procedure Code**. According to the counsel, the issue of *mens rea* was inconsequential in this case. He however conceded that the sentence was unlawful as the minimum sentence for the offence is 15 years imprisonment.

<u>ANALYSIS AND DETERMINATION</u>

10. The law on taking a guilty plea from an accused is set out in **Section 207(1)** and **(2)** of the **Criminal Procedure Code** thus;

207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

11. According to **section 348** of the **Criminal Procedure Code** once an accused pleads guilty, he is not allowed to appeal against the conviction based on his plea except as to the extent or legality of the sentence. An appeal may however be brought against the manner in

which a trial court took or recorded a plea of guilty to show that it was equivocal. The Court in the matter of ***Adan v Republic(*1973) EA 445 at 446** outlined the procedure for plea taking thus:

> *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 guilty, 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, off course, be recorded.* ***(Emphasis added)***

12. From the proceedings which I have set out above, it can be seen that the charge was read to the accused in a language he understood and the facts of the case explained to him by the prosecution. On both occasions, the accused affirmed the accuracy of the charge and the facts of the charge he faced. Even after being warned of the severity of the sentence, he still insisted that the facts were correct. After entering a guilty plea, the court went ahead to take the statement of the complainant which it referred to as a victim impact assessment.

13. The trial court is empowered under the proviso to section 207 of the Criminal Procedure Code to permit the complainant to outline the facts upon which a charge is founded after a conviction on a guilty plea. This is, in my considered view, quite distinct from a victim impact assessment.

14. Where additional statements of facts are taken by the trial court, the accused has a right to dispute, explain or add onto the additional facts. The trial court should carefully analyze the statement made by the accused to determine whether he raises a question as to his guilt. If he does, the trial court should change the plea of guilty to "not guilty" and hold a trial. The trial court in this case did not accord the appellant an opportunity to challenge the facts given by the complainant, who , instead of giving an impact assessment report as sought by the court, went ahead to give an explanation of how the offence occurred. It was required of the court to give the appellant a chance to confirm if the facts as set out by the complainant were true before convicting the appellant. The record shows a clear misapprehension of what constitutes facts of a case and a victim impact assessment report. The process for taking victim impact assessments is a separate and distinct procedure laid out in **Part IXA** of the **Criminal Procedure Code** and the **Victim Protection Act No. 17 of 2014.**

15. The appellant has, in this appeal questioned the complainant's statement of facts. He is particularly aggrieved by the failure of the trial court to give him an opportunity to cross examine the complainant on her statement that he tricked her into having sex with him.

16. It is a defence under **Section 8 (5)** of the **Sexual Offences Act** that a child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the commission of the offence and that the accused reasonably believed that the child was over the age of eighteen years.

17. The appellant has referred me to the case of ***Duncan Mwai Gichuhi v Republic [2015] eKLR*** where the court cited with approval the decision of Chitembwe J. in **Salim Owino Chitech vs Republic [2012]eKLR** who held as follows;

> *"Although the act of sexual intercourse did occur between the appellant and PW1, I do not find that the appellant had the intention of committing an offence of defilement……Given a situation where the alleged complainant testified that she was not forced or lured in to the offence and he would still want to live with the accused person, it becomes difficult for the court to simply make a finding that the complainant is under eighteen and could not consent to the act and thereby convict the accused person. This is not a situation where the accused alleges that the complainant consented while the complainant denies such allegation. The complainant in this case maintains that she wanted to get married and wanted to live with the accused as her husband. …..The medical evidence shows that she seemed to have had sex before and her sexual organs were normal.*
>
> *Given the circumstances of this case and there no being evidence that the appellant induced, lured, or manipulated PW1 into having sex with him, I do find that the defence provided for under Section 8 (5) and (6) of the Sexual Offences Act is available to the appellant. ……Justice would not be served if the appellant is put behind bars for 15 years…..the appellant cannot be held to be someone who lures children, He believed he was in serious relationship with someone who was ready to get married"*

18. The court also relied on the case of ***Mohamed Makhokha vs Republic [2013]eKLR*** where Chitembwe J similarly held;

> *"It is clear from the prosecution evidence that the complainant and the appellant had sex by consent. The relationship resulted to pregnancy. The trial court found that the complainant was still under 18 years old, and, could not have given consent and proceeded to sentence the appellant. While testifying the complainant referred to the appellant as her husband. She informed the trial court that she was married to the appellant. PW2, the complainant's mother testified that she had removed the complainant from the appellants' house several times. Although the trial court found that the appellant did not believe that the complainant was above 18 years old, I do find that the mere fact that the complainant made the appellant her boyfriend, had sex by consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girl ready to get married. It is also clear that the parents of the complainant were aware of that relationship. An abstract application of Sections* **42, 43** *and* **44** *of the Sexual Offences Act will lead to the conclusion that a girl who is under 18 years old cannot give her consent. Each case has to be evaluated according to its own circumstances. In this age where young girls are maturing fast and engage in sex knowingly and being aware of consequences, it will be unfair to sentence the boyfriend to 15 years imprisonment yet the two parties were aware of what they were doing. I do therefore find that the appellant herein does qualify to come within the ambit of the defence provided under Section* **8 (5)** *of the Sexual Offences Act. The appellant was made to believe that the complainant was over 18 years and was ready to be married"*

19. A reading of the trial court's decision indicates that the court was aware of the jurisprudence set out in the foregoing authorities. It referred to an uncited decision by Justice Waweru where the Judge had held that there may be consensual sex between persons approaching the age of majority. The trial court nonetheless proceeded to convict and sentence the appellant without giving him an opportunity to respond to the complainant's statement that her sexual encounters with the appellant were through treachery and not consensual. The right of an accused person to challenge evidence is a right enshrined in **Article 50 (2) (k**) of the **Constitution**. The appellant was denied his right to challenge the complainant's statement of facts. The trial court proceeded to impose a severe deterrent sentence on the appellant based on the unchallenged statement of facts by the complainant. It is therefore my finding that the conviction and sentence were unsafe.

20. Having evaluated the circumstances and the facts of this case, I am convinced that the appropriate recourse to be had is a retrial. I am guided by the decision of **Yusuf Sabwani Opicho v. Republic [2009] eKLR** where the Court of Appeal set out the following principles on the factors to be considered in ordering a retrial:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."*

21. A retrial will normally be the appropriate order when the accused has not had a satisfactory trial and the prosecution's case would have otherwise had a chance of securing a conviction. Am satisfied that an order for retrial would serve the interests of justice in this case.

22. For these reasons, the appeal against the conviction and sentence of the appellant by the trial court on 4th May 2018 is allowed. The conviction is quashed, the sentence set aside and a re-trial is hereby ordered to be held by another magistrate other than D.M. Kivuti (S.R.M.)

Dated, Signed and delivered at Murang'a this 11th day of November, 2020.

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A. K. NDUNG'U

JUDGE