REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 45 OF 2018

MERCY CHEMUTAI KOSGEI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. H.M. Nyaberi, SPM in Iten SPM's Criminal Case No. 474 of 2015 delivered on 19th day of June 2018)

JUDGMENT

[1] This is an appeal arising from the conviction and sentence passed by Hon. H.M. Nyaberi, SPM, in **Iten Senior Principal Magistrate's Criminal Case No. 474 of 2015: Republic vs. Mercy Chemutai Kosgei**, in which the appellant was charged with the offence of child prostitution contrary to **Section 15(a)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that on the 4th day of March 2015 at about 5.00 p.m. at [Particulars withheld] Village within Elgeyo Marakwet County, the appellant knowingly permitted **DCK,** a girl aged 17 years to remain in premises belonging to one **Kipyator** for the purpose of being sexually abused.

[2] The appellant denied those allegations and upon a trial of the facts, the learned trial magistrate was satisfied that the Charge had been proved by the Prosecution beyond reasonable doubt. He concluded thus:

> **"In view of the prosecution evidence, the accused lured the complainant into Kipyator's house and locked her therein knowing very well that she was likely to be sexually abused by [her] brother Kipyator. Her acts of omission or commission makes her culpable. Further, from the evidence of PW2, I am satisfied that the prosecution established that the complainant was aged sixteen (16) years [and] that she is a child as defined in the Children Act.**
>
> **In view of the entire evidence, I am satisfied beyond any shadows of doubt that the accused is guilty as charged and convict her accordingly under Section 215 of the Criminal Procedure Code."**

[3] Thus, the learned trial magistrate proceeded to sentence the appellant to 10 years' imprisonment for the offence; and in his pre-sentence remarks, he stated thus:

> **"The accused is not a first offender and pleads for forgiveness. The report filed by the Probation Officer is unfavourable. The accused although a single mother of three has no parental responsibility. All her children are being taken care of by her guardians. The offence the accused has been convicted attracts a mandatory custodial sentence. In the premise, the accused is sentenced for 10 years in prison…"**

[4] Being aggrieved by her conviction and sentence, the appellant preferred this appeal on **3 July 2018** on the following grounds:

> **[a]** That the honourable magistrate erred in law and fact in finding that the appellant was guilty of child prostitution.
>
> **[b]** That the honourable magistrate erred in law and fact in convicting the appellant in the absence of evidence disclosing an offence of child prostitution.
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> **[c]** That the honourable magistrate erred in law and fact in holding that the charge of child prostitution had been proved to the required standard against the appellant.

[d] That the honourable magistrate erred in law and fact in holding that the appellant knew that the complainant was likely to be abused by her brother in the absence of any evidence to that end.

[e] That the likelihood of the complainant being sexually abused by the appellant's brother fell short of proving a charge of prostitution;

[f] That the benefit of doubt ought to have been resolved in favour of the appellant.

[g] That as a whole the conviction is unsafe and the conviction and sentence ought to be set aside.

[5] With the leave of the Court, the Petition of Appeal was amended on **30 May 2019** to include the following three additional grounds:

[a] That the appellant's constitutional right to a fair hearing was violated in that her right to legal representation was not explained to her.

[b] That the proceedings were conducted in a language not familiar to the appellant.

[c] That the honourable magistrate erred in law and fact in holding that the complainant was a minor.

[6] Accordingly, the appellant prayed that her appeal be allowed, the conviction quashed and the sentence of 10 years' imprisonment set aside. The appeal was urged on her behalf by **Mr. Momanyi, Advocate**, vide his written submissions dated **18 July 2019**. He took the view that it was imperative for the Prosecution to lead evidence to demonstrate that the appellant knew that the complainant would be sexually assaulted; which was not done. He pointed out that the only evidence which was led before the lower court was that the appellant allowed the complainant to be in the premises, and not that the appellant allowed her to remain in the premises.

[7] Mr. Momanyi further submitted that the trial court completely ignored the fact that no sexual assault took place; and that what was proved was an attempt. According to him the charge ought to have failed on that score. With regard to the age of the complainant, **Mr. Momanyi** urged the Court to note the variance between the particulars of the Charge, in which the complainant's age was stated to be 17 years, and the evidence of the complainant. He pointed out that, whereas in her testimony on **26 September 2017** the complainant told the lower court that she was 20 years old, she did not indicate when she turned 20, or how old she was as at **4 March 2015**. Thus, it was the submission of **Mr. Momanyi** that no credible proof was offered by the Prosecution to demonstrate that the complainant was a child for purposes of the offence charged.

[8] Mr. Momanyi also impugned the age assessment report adduced before the lower court, to the effect that the complainant was aged about 16 years at the time of the offence. He pointed out that it was incredible that in the report, reference was made to 37^{th}, 38^{th}, 47^{th} and 48^{th} teeth and yet the complainant was said to have only 28 teeth at the time; and that in any case it is common knowledge that an adult human being would have only 32 teeth. On this account, he submitted that the age assessment report is was of no evidential value to the lower court and therefore ought to have been disregarded had the trial magistrate noted and given due consideration to the anomaly.

[9] Sub-articles (2)(g) and (2)(m) of **Article 50** of the **Constitution** were also cited by **Mr. Momanyi** in support of his argument that the appellant was not accorded her constitutional right to a fair hearing. Counsel pointed out that although the appellant had the right to be represented by an advocate, the trial court did not inform her thereof. Additionally, he faulted the trial court for not having conducted the proceedings before him in a language of the appellant's choice, namely, Keiyo language. Counsel accordingly urged the Court to allow the appeal and quash the conviction recorded against the appellant.

[10] Mr. Chacha, learned counsel for the Respondent defended the conviction and sentence imposed by the lower court. In his written submissions dated **29 July 2020, Mr. Chacha** took the posturing that sufficient and credible evidence was adduced by the Prosecution before the lower court to support the allegations against the appellant. In particular, he submitted that the lower court judiciously applied **Section 124** of the **Evidence Act**, in connection with the evidence of the complainant and gave reasons for believing her testimony. As for the age of the minor, **Mr. Chacha** urged the Court to note that she testified almost 3 years after the incident; and therefore that she was indeed a minor when the incident happened. According to **Mr. Chacha**, credible medical evidence, by way of P3 Form and age assessment report, were presented before the lower court to demonstrate that the complainant was indeed a minor at the material time.

[11] Lastly, **Mr. Chacha** submitted that for the three years that the appellant's case proceeded before the lower court, she was always afforded the opportunity to express her wishes; and that at no point was her right to legal representation infringed on. Likewise, he urged the Court to find that she participated fully in the trial; an indication that she was fully facilitated in terms of fair trial rights. In the premises, **Mr. Chacha** prayed for the dismissal of the appeal on both conviction and sentence.

[12] I have given careful consideration to the appellant's Grounds of Appeal. I have also taken into account the written submissions made herein by the learned Counsel for the appellant and the State in the light of the proceedings and Judgment of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions on the basis thereof. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the**

witnesses..."

[13] The Prosecution called 5 witnesses before the lower court, one of whom, **PW3**, was the complainant. She testified that on the **4 March 2015**, she was selling vegetables from house to house within Chebokokwa village. In that process she sold to the appellant vegetables worth Kshs. 40/= but that the appellant did not have change. That the appellant then asked her to accompany her to the house of her brother, one **Kipyator**, in search of change. As there was nobody in the house, the appellant encouraged her to go in and wait for **Kipyator's** wife. The appellant then walked out and locked the door behind her; and that immediately three men, namely **Kiplimo, Kipkogei** and **Kipyator**, emerged from the inner room. They jointly gagged her, tore her clothes and made an attempt at defiling her. Her screams for help attracted the attention of Kiplimo's wife who opened the door, and confronted her husband; questioning what he was up to. It was in that process that the complainant escaped and ran home naked and reported the occurrence to her sister, E; and that E took action by reporting the matter to the police.

[14] The complainant's sister, **EK (PW5),** testified and confirmed that, at about 5.30 p.m. on **4 March 2015**, she had given the complainant some vegetables to sell within the neighbouring homesteads; and that the complainant returned home crying at about 6.00 p.m. and reported to her that, after selling vegetables to the appellant worth Kshs. 40/=, the appellant told her she did not have change; and so she took her to the house of her brother **Kipyator** and locked her therein; and that **Kipyator**, **Timothy** and **Kipkosgei** attempted to defile her before she was rescued by **Kipyator's** wife. She confirmed that the complainant returned home without some of her inner clothes; which were then brought by the appellant along with the sack of vegetables that she had sent the complainant to sell. She also confirmed that she caused the matter to be reported to the police for appropriate action. She added that, whereas T**imothy** and **Kipkosgei** were arrested, **Kipyator** escaped and could not be traced.

[15] The investigating officer, **Cpl. Lucy Sambu** testified on **10 July 2017** as **PW1** and confirmed that she was on duty on **4 March 2015** at about 10.30 p.m. when the complainant was presented to her by her mother on allegations that she had been defiled by a group of young men in the company of the appellant. She accordingly issued the complainant with a P3 Form which was duly filled, signed and returned to her. She then recorded the statements of the witnesses and arrested the suspects, including the appellant. She then took the complainant for age assessment and it was ascertained that she was 16 years old at the time. **PW1** also visited the scene and recovered clothing items which she produced before the lower court as exhibits.

[16] The Prosecution called **Dr. Edward Siriya**, a dentist based at Iten County Referral Hospital as **PW2**. His evidence was that he was on duty on **23 March 2015** when the complainant was brought to the hospital with a request for age assessment. He examined her dental formation and formed the opinion that she was aged about 16 years. He produced the Age Assessment Report that he prepared and signed as an exhibit before the lower court (the **Prosecution's Exhibit 9).**

[17] Wilson Talam, a clinical officer attached to **Iten County Hospital** also testified before the lower court and confirmed that the complainant visited their facility on the night of **4 March 2015** with a history of having been defiled; and that he examined and treated her and thereafter filled her P3 Form which he produced as the Prosecution's Exhibit 1 before the lower court. From his findings, he formed the opinion that the complainant had been subjected to penetration.

[18] On his part, the appellant opted to give an unsworn statement in which she conceded that the complainant went to their home with vegetables for sale; and that she bought vegetables from her worth **Kshs. 40/=** and tomatoes for **Kshs. 10/=** for which she gave the complainant **Kshs. 50/=.** She further stated that the complainant then asked to be shown the way to the next homestead, which she did. The appellant further stated that she left thereafter to take her sick child to hospital; and that when she returned at about 6.00 p.m. she received a report that the complainant had been defiled by **Timothy, Kipkogei** and **Kipyator** at around 5.00 p.m. She also stated that she was arrested the following day at about 2.00 p.m. along with **Timothy Kiplimo** and taken to the police station. She denied having participated in any way in the alleged defilement of the complainant.

[19] The offence of benefiting from child prostitution is provided for in **Section 15(a)** of the **Sexual Offences Act,** which stipulates that:

> **"Any person who—**
>
> > **a. knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show … commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than 10 years."**

[20] It is plain therefore that the prosecution was under obligation to prove:

> **[a]** that the complainant was then a child for purposes of the **Sexual Offences Act;**
>
> **[b]** That the appellant knowingly permitted her to remain in the house of **Kipyator** for the purpose of causing her to be sexually abused.

[21] In Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010 the Court of Appeal underscored the point that the age of the victim for purposes of the **Sexual Offences Act** is a critical component which must be proved by credible evidence. Accordingly, it was imperative for the Prosecution to prove, by credible evidence, that at the material time, the complainant was a child. And, in **Section 2** of the Act, the word **"child"** is defined as having the meaning assigned thereto in the **Children Act, No. 8 of 2001.** In turn, the **Children Act**, states, in **Section 2**, that **"child"** means any human being under the age of eighteen years.

[22] In her testimony, which was given on **26 September 2017**, the complainant told the lower court that she was then 20 years. She did not produce any document in proof of her exact age or date of birth. Thus, going by the evidence of the complainant, which was uncontroverted,

she was 17 years old going 18 as at **4 March 2015.** In the P3 Form produced before the lower court as the Prosecution's Exhibit 6 by **PW4,** the complainant's age was estimated to be 15 years. Hence, to prove the age of the complainant, **PW1** caused her to be taken for age assessment; which was conducted by **PW2**. His evidence was that, upon an oral cavity examination of the complainant, he noted that she had 28 permanent teeth present; and that though her wisdom teeth had not yet erupted, the eruption bulges were present. He further told the lower court that he requested for 2 oral x-ray covering the region for teeth No. 37, 38 and 47, 48; and that the x-ray film showed that teeth No. 37 and 47 were fully developed; adding that they usually erupt between the age of 13-14 years depending on the sex.

[23] It was therefore the evidence of **PW2** that, since teeth No. 37 and 47 erupt early in girls and at about 14 years for boys, he formed the opinion that the complainant was 16 years as at the time of age assessment, which was on **23 March 2015**, on the basis that the aforementioned teeth eruption at age 13, to which he added 3 years as is their practice. **PW2** produced not only his Age Assessment Report (**the Prosecution's Exhibit 8)** but also the x-ray films upon which the report was premised. It was marked the **Prosecution's Exhibit 9.**

[24] I note that the evidence of the dentist was not challenged; and that no questions were put to him in cross-examination by the appellant; which is understandable because she was unrepresented at the time and may not have had the basis for confronting the basis for **PW2's** expert opinion. **Mr. Momanyi** however took issue with that report on appeal, contending that He pointed out that it was incredible that reference was made in the report to 37^{th}, 38^{th}, 47^{th} and 48^{th} teeth and yet the complainant was said to have only 28 teeth at the time. He further submitted that it is common knowledge that an adult human being would have only 32 teeth; and therefore that the report was of no evidential value to the lower court and therefore ought to have been disregarded had the trial magistrate noted and given due consideration to the anomaly.

[25] First and foremost, **Section 48** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, provides that:

> **"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."**
>
> **(2) Such persons are called experts."**

[26] And, as was pointed out by **Potter JA** in **Mutonyi vs. Republic** [1982] KLR 203 at page 210, it is the duty of an expert to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of his/her conclusions, so as to enable the judge or jury to form their own independent judgement by the application of those criteria to the facts put in evidence. There was no dispute before the lower court that **PW2** is a practising dentist who was then based at **Iten County Referral Hospital**. He furnished the lower court with the criteria for reaching the conclusion he reached; and it was on the basis thereof that the learned trial magistrate based his conclusion that the complainant was 16 years old as at **4 March 2015**; and therefore a child for purposes of **the Children Act.**

[27] The Court of Appeal made the point thus in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko** [2007] 1 EA 139, albeit in the context of a civil dispute:

> **"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

[28] In the instant appeal, the evidence of **PW2** was not challenged before the lower court. No contrary opinion was presented before the lower court to impugn or detract from the scientific basis of the opinion of **PW2** as set out in the Age Assessment Report or warrant a departure from that opinion. The report has been impugned on appeal only on the basis that the since the complainant was found to have 28 teeth, the reference to teeth No. 37 and 47 is erroneous, granted that the number of teeth an adult human has is only 32 teeth. The submission, with due respect to counsel, was made in misapprehension of the applicable science; for which dentist would not be alive to this foundational fact?

[29] I therefore consulted **Wikepedia** and here is what it states on dental notation systems:

> **"Dental professionals, in writing or speech, use several different dental notation systems for associating information with a specific tooth. The three most common systems are the ISO System (ISO 3950, the FDI World Dental Federation notation), Universal Numbering System, and Palmer notation method. The ISO system is used worldwide, and the Universal is used widely in the United States. The ISO System can be easily adapted to computerized charting…The International Standards Organization Designation System (ISO System) by the World Health Organization notation system is widely used by dental professionals internationally to associate information with a specific tooth. Based on the Fédération Dentaire Internationale (FDI)... Thus the ISO System uses a two-digit numbering system in which the first digit represents a tooth's quadrant and the second digit represents the number of the tooth from the midline of the face. For permanent teeth, patient's upper right teeth begin with the number, "1". The upper left teeth begin with the number, "2". The lower left teeth begin with the number, "3". The lower right teeth begin with the number, "4". For primary teeth, the sequence of numbers goes 5, 6, 7, and 8 for the teeth in the upper right, upper left, lower left, and lower right respectively. When speaking about a certain tooth such as the permanent maxillary central incisor, the notation is pronounced "one, one". Beware of mixing up the teeth in written form such as 11, 12, 13, 14, 15, 16, 17, 18 between the Universal and ISO systems. For example: retention of a primary molar tooth in the otherwise regular intact lower right jaw, position 5, would be noted as: 41, 42, 43, 44, 45, 46, 47, 48…"**

[30] In the premises, the submission by **Mr. Momanyi** that the Age Assessment Report is worthless and ought to have been rejected by the

lower court is baseless and is hereby rejected. It is therefore my finding that there was credible evidence before the lower court to prove that the complainant was aged 16 and therefore a child for purposes of both the **Children Act** and the **Sexual Offences Act.**

[31] In proof of the second element of the charge, the Prosecution set out to demonstrate that the appellant knowingly permitted the complainant to remain in the house of **Kipyator** for the purpose of causing her to be sexually abused. Credible evidence was adduced to the effect that the complainant had been sent by her sister, **PW5** to sell vegetables from home to home in their neighbourhood; and that it was in that process that she sold vegetables to the appellant on **4 March 2015**. The appellant conceded as much in her statement of defence. She however denied that she caused the complainant to be locked up in the house of **Kipyator** for the purpose of being defiled.

[32] There were two versions presented before the lower court as regards what transpired after the sale transaction. According to the complainant, she sold to the appellant vegetables worth Kshs. 40/=, but that the appellant did not have change; and that the appellant then asked her to accompany her to the house of her brother, one **Kipyator**, in search of change. The complainant further told the lower court that, as there seemed to be nobody in the house, the appellant encouraged her to go in and wait for **Kipyator's** wife. She further stated that, to her surprise, the appellant then walked out and locked the door behind her; and that immediately thereafter three men, namely **Kiplimo, Kipkogei** and **Kipyator**, emerged from the inner room and jointly gagged her, tore her clothes and made an attempt at defiling her. She added that had she not been rescued by **Kiplimo's** wife who opened the door in response to her screams, and confronted her husband; questioning what he was up to, she would have been defiled.

[33] The appellant on the other hand took the stance that after buying vegetables from the complainant, she showed her the way to the next homestead and later took her child to hospital from where she returned at about 6.00 p.m. She was therefore categorical that she had no knowledge of the alleged defilement.

[34] Given these two divergent positions, it was the duty of the lower court to satisfy itself as to which version to believe; and the learned magistrate chose to believe the Prosecution version. Upon a re-evaluation of the entire evidence, I find no reason to fault the trial magistrate, noting that the account given by the complainant was corroborated by the evidence of her sister **PW5**; whose evidence it was that the complainant escaped and ran home naked and reported the occurrence to her. **PW4** also mentioned that as the complainant was narrating her ordeal, the appellant went to their home with the bag of vegetables and the torn pant, petticoat and biker belonging to the complainant, which remained at the scene when the complainant fled for safety.

[35] The complainant's account was further augmented by the evidence of the clinical officer **(PW4),** whose evidence was that the complainant complained of pains and weakness on the lower limbs. **PW4** produced the P3 Form as an exhibit to buttress his evidence. Accordingly, the conclusion reached by the lower court was premised on sound basis. It is to be remembered that the lower court was best placed to assess the credibility of the witnesses on the basis of the impression formed by the trial court from their demeanour; and hence take a decision on which version to believe. Thus, in **Shantilal Maneklal Ruwala vs. Republic** [1957] EA 570, it was held that:

> **"...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses..."**

[36] That the accused locked the door behind her in the manner she did, thereby causing the complainant to remain in her brother's house at a time when the said brother happened to be in his house with two other young men, is proof enough that the appellant's action was deliberate and was done knowingly. There was no other justification for locking the door from outside if the complainant was simply waiting for her to find the change needed. She therefore afforded the opportunity for the three young men to sexually abuse the complainant; and there is credible evidence that an attempt was made in that regard by **Timothy Kiplimo** which was foiled by the wife of the said **Kiplimo**. Needless to say, that for the purposes of the charge, penetration was not a necessary ingredient; it was sufficient that the intention of the appellant was manifest from her conduct. Accordingly, I am satisfied that all the elements of the offence of benefiting from child prostitution, as envisaged by **Section 15(a)** of the **Sexual Offences Act,** were proved beyond reasonable doubt.

[37] Turning now to the argument that the trial before the lower court was conducted in disregard of the fair trial rights safeguarded under **Article 50(2)(g) and (m)** of the **Constitution,** I have given consideration to the submissions made herein in that regard. **Mr. Momanyi** pointed out that although the appellant had the right to be represented by an advocate, the trial court did not inform her thereof. Additionally, he faulted the trial court for not having conducted the proceedings before him in a language of the appellant's choice, namely, Keiyo language. He accordingly urged the Court to find that the omissions automatically vitiate the trial; and that the appellant is entitled to have the conviction recorded against her quashed and the sentence set aside on that basis.

[38] Counsel for the State, on the other hand, was of the posturing that for the three years that the appellant's case proceeded before the lower court, she was always afforded the opportunity to express her wishes; and that at no point was her right to legal representation infringed on. Likewise, he urged the Court to find that she participated fully in the trial; an indication that she was fully facilitated in terms of fair trial rights.

[39] Article 50(2)(g) and (h) of the Constitution provides that:

> **"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;**

[40] There is, thus, a distinction between the right under Sub-article (2)(g) and the right envisaged by **Sub-article (2)(h)** of the **Constitution**. This distinction was well captured in the words of **Hon. Mrima, J.** in **N M T alias Aunty vs. Republic** [2020] eKLR thus:

> **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."**

[41] In respect of **Article 50(2(g)** of the **Constitution,** the record confirms that the appellant was never informed of her right to legal representation at the earliest opportunity; which was before her plea was taken. As for the right to legal representation at the expense of the State, needless to say that it is not in every case that legal representation at the expense of the state is accorded at the expense of the state. Accordingly, in **David Njoroge *Macharia vs R*epublic** [2011] eKLR the Court of Appeal expressed the view that:

> **"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused 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...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."**

[42] Hence, the Court of Appeal made it clear that other than capital offences, the right to legal representation at the expense of the State would only be considered and granted in cases involving complex issues of law or fact present, or in situations where the accused is unable to conduct his own defence, or where public interest requires that legal aid be provided. It is also instructive to note that the legal framework for the implementation of **Article 50(2)(g) and (h)** of the **Constitution** was not in place as at **20 April 2015** when the appellant was arraigned before the lower court. The **Legal Aid Act No. 6 of 2016**, an Act of Parliament to, *inter alia*, give effect to the aforementioned provision of the Constitution, came into effect on **10 May 2016**. And even then, **Section 40** of the Act places an obligation on the accused person to make an application for legal aid. (see **Thomas Alugha Ndengwa v Republic** [2016] eKLR)

[43] Thus, while it is true that the lower court did not explain to the accused her **Article 50(2)** rights on the date of her arraignment or thereafter, it is noteworthy that on her second court appearance, the appellant had the presence of mind to request for copies of witness statements. She did not seek to be assigned an advocate or otherwise complain that she was not in a position to handle her defence on her own or afford to hire the services of a lawyer.

[44] In the case of **Karisa Chengo & 2 Others vs. Republic**, Criminal Appeal No. 44,45, and 76 of 2014, the Court of Appeal held that:

> **"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."**

[45] In the premises, I am far from convinced that the failure by the trial court to inform the appellant of her rights under **Article 50(2)(g)** of the Constitution necessarily vitiates the entire proceedings. The appellant was not here faced with a death sentence or an offence carrying life imprisonment as the penalty; and therefore the appellant would not have qualified for legal representation under the substantial injustice test. In the same vein, it is manifest from the record of the lower court that the appellant was able to effectively communicate in Kiswahili and to cross-examine witnesses and to make his defence. The same language was used in the appeal after she confirmed to the Court that she understands Kiswahili. As such, it cannot be said that she suffered any prejudice because her preferred language, namely Keiyo, was not used. (see **Josphat Njue Solomon vs. Republic** and **Kyalo Kalani vs Republic**, [2013] eKLR).

[46] In the light of the foregoing, I find no merit in the appeal against conviction. As to the sentence, the record shows that the appellant was not a first offender, going by the pre-sentence remarks by the trial magistrate, a first offender; and that although the lower court called for a probation report, the same turned out to be unfavourable to the appellant. Nevertheless, the trial court proceeded on the basis that the sentence of 10 years' imprisonment was mandatory; which was a misdirection. In **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR the Court of Appeal held that:**

> **"... we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v-**

Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution...

In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."

[47] Accordingly, granted that the circumstances of the subject offence; and the fact that the appellant has so far served two years of her sentence; I would reduce the appellant's sentence of 10 years' imprisonment to the period served. It is hereby ordered, therefore, that the appellant be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF NOVEMBER, 2020

OLGA SEWE

JUDGE