REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: HON. R. MWONGO, J.

CRIMINAL APPEAL NO. 2 OF 2020

JOSPHAT MUTHUI BACHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and sentence of Hon. D. N. Sure (SRM)

in Engineer SPMCR No (S.O.) 43 of 2019 delivered on 16th January, 2020)

JUDGMENT

1. The appellant was charged and convicted with defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. The particulars were that on 4th October, 2019 at [particulars withheld] Centre in Kipipiri Sub-County, Nyandarua, he intentionally caused his penis to penetrate the anus of TNM, a girl aged 11 years. He was acquitted for the alternative charge of intentionally touching his penis on the victim's vagina.

2. The appellant was sentenced to the minimum sentence of life imprisonment. The sentence hearing and sentence, which is also in issue in this appeal, was as follows:

> ***"State Counsel : No records.***
>
> ***Mitigation : I am a widower. My children rely on my mother who is old. I pray for non-custodial sentence. My children are in school.***
>
> ***Sentence (Court) : Mitigation, record duly noted; my hands are tied with Section 8 (2) which provides a minimum sentence - accused is sentenced to life imprisonment……."***

3. The appellant's appeal is against conviction and sentence based on the following issues raised in his grounds of appeal.

> *1. That he was not given the right to a fair trial in that Article 50(2) (g) (h) of the Constitution were violated.*
>
> *2. That there was no proof of penetration.*
>
> *3. That his evidence was coerced from him by threats and beatings.*
>
> *4. That he was charged and convicted under the wrong provisions of law and sentenced under unconstitutional provision.*

Facts

4. The brief evidence is that the Appellant called the victim (PW1) to his repair shop as she passed by on her way home from school after 4.00pm. He gave her Kshs 10/= to buy cake. She went to the nearby shop which was closed. As she left the appellant called her again. She went to him and he pulled her into the back of the shop where he put her on the floor removed her stockings and pants, and pulled up her dress. He then inserted his "thing for urinating" into her anus. After he finished the act she left for home. That night she did not eat due to

the pain she felt.

5. PW2 testified that PW1 was her granddaughter - her son's daughter and lived with her. PW1 came home and she noted that she was walking like a duck. PW2 asked what had happened and beat her. PW1 did not respond. PW1 disclosed what had happened. PW2 took her to hospital the next day and was directed to the police station. They reported there and were given a P3 Form.

On Penetration

6. At Engineer Hospital, Dr. Jackline Rotich (PW3) examined TNM, who had been referred from Kipipiri Police Station. On examination on 7th October, 2019 she found the child had bruises and hypopigmentation around the anal area; and a reduced anal sphincter. She said hypopigmentation is caused by friction. The age of the injuries was about 3 days. She determined that the cause of injury was penile anal penetration. The doctor completed the P3 Form and PRC Form both of which she signed on 7th October, 2019 - She produced them as P. Exhibit 1 and 2.

7. In support of his position that there had been no proof of penetration, the appellant cited the case of **Julius Kioko Kivuva v Republic [2015] eKLR** where it was stated:

> ***"PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."***

8. In my view this case supports the evidence of penetration because TNM testified:

> ***"Accused lay on me with the back facing up. Accused lay on top of me. Accused penetrated my anus. I used it for long calls. He was using his thing for urinating……. That night I did not eat because of pain."***

9. For an 11 year old girl to give evidence of this nature with such specificity of detail, sensory engagement and revelation of trauma, suggests to me that it is very credible evidence. There is no doubt that the event occurred.

10. PW4, PC Adhiambo, was the Investigating Officer. She testified that TNM's mother came with TNM to the police station on 7th October, 2019 to report the incident that occurred on 4th October, 2019. She explained what had happened. After interrogation, PW4 visited the scene but did not recover anything. She also confirmed that there is a cake shop nearby. As the accused was well known nearly as the one who repairs shoes and sufurias, he was arrested, and charged by police from Geta Administration Police Post. PW4 produced the Birth Certificate of the victim showing she was 11 years old.

On breach of Article 50 (2) (g) (h) of the Constitution - Right to Fair trial

11. On this issue, the appellant's core complaint is that he was not accorded a lawyer to represent him despite the right to be promptly informed of that right and to have a lawyer.

12. The DPP responded by citing the Supreme Court Case of **Charles Maina Gitonga v Republic [2018] eKLR**. There the Supreme Court noted that:

> ***"[9] (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;***
>
> ***(c)……..***
>
> ***(d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted through the Legal Aid Act, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged violation of Article 50(2) (g) & (h) of the Constitution of Kenya.***
>
> ***(e) ……;***
>
> ***(f)……."***

Likewise, in this case there was no record that the appellant was unable to meet the expenses of his trial. This grounds thus fails.

Trial under the wrong provisions of law

13. The Appellant correctly argued that the trial Magistrate made the conviction stating:

> ***"Accused guilty as charged for the offence of sexual assault contrary to Section 5 (1) (a) (i) of the Sexual Offences Act and accordingly convict him under Section 215 of the Criminal Procedure Code."***

14. It is clear that the accused was charged with the offence of defilement under **Section 8 (1)** read with **Section 8 (2)** of the **Sexual Offences Act**. This is the offence to which he pleaded and in respect of which he defended himself. As such, the above statement of conviction by the trial Magistrate is an obvious clerical error.This position is supported by the fact that at the time sentencing the trial Magistrate in fact said:

> ***"Mitigation record duly noted, my hands are tied with (sic, by) Section 8 (2) of the Sexual Offences Act which provides a minimum sentence."***

15. Further, at the time of convicting, the trial Magistrate stated:

> ***"Prosecution has proved their case in the main count to the required standards."***

This was the conclusion of the learned trial magistrate and it is clear that she was referring to the main charge in the Charge Sheet which is properly indicated as being under **Section 8 (1)** and **8 (2)** of the **Sexual Offences Act**.

16. As the first appellate court, this Court's role is to re-evaluate the evidence adduced at trial in light of **Section 347 (2)** of the **Criminal Procedure Code**, and reach its own conclusion (**Okeno v Republic [1972] EA 32**). I have no doubt that the offence charged was defilement and that trial was for defilement. The conviction was mistakenly recorded to be under **Section 5 (1) (a) (i)** of the **Sexual Offences Act** whilst the sentence was correctly meted under **Section 8 (2)** of the **Sexual Offences Act**. This was a non-substantive error. The charge sheet was itself not defective.

17. **Section 382** of the **Criminal Procedure Code** provides that unless an error in the judgment has occasioned a failure of justice, the order or sentence of a court shall not be reversed. I hereby invoke the provisions of that section. The Section provides as follows:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The error being non-substantive in all respects it can be corrected without any effect on the defendant. I so find.

Sentencing

18. The appellant argued that he was sentenced to a minimum mandatory sentence of life imprisonment which has been declared unconstitutional. He cited the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** in this regard.

19. The case of **Muruatetu** requires that the trial court should exercise its discretion in respect of mandatory minimum sentences. In the present case, she said her hands were tied by the mandatory provision of **Section 8 (2)** of the **Sexual Offences Act** and sentenced the accused to life imprisonment.

20. In the case of **Dismas Wafula Kilwake v Republic [2018] eKLR** Court of Appeal applied the principles of **Muruatetu** to cases under Sexual Offences Act. In light of these cases, the learned trial Magistrate should have exercised her discretion and not affirmed that she was enslaved by the mandatory term of life imprisonment prescribed under **Section 8 (2)** of the **Sexual Offences Act**. However, I also note that the appellant has not expressed any remorse.

21. Accordingly and in exercise of my discretion, I would review the sentence downwards from life imprisonment to a term of twenty five (25) years.

22. All in all the appeal is dismissed as to conviction, and the court upholds conviction under **Section 8 (2)** as read with **Section 8 (1)** of the **Sexual Offences Act**. The sentence is hereby reviewed from life imprisonment to a term of imprisonment of twenty-five (25) years.

Administrative directions

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 10th Day of December, 2020.

_____

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. Josphat Muthui Bachia - Appellant in person - present in Naivasha Maximum Prison

3. Court Clerk - Quinter Ogutu