REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 169 OF 2016

F N K….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Molo Senior Principal Magistrate's Court Criminal Case NO. 1002** of **2014** by **Hon Rita Amwayi (RM)** on **27/10/2016)***

J U D G M E N T

1. The Appellant, **F N K** was charged and convicted of the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act, and sentenced to twenty (20) years imprisonment.

2. Aggrieved, he appealed on grounds that the charge was fatally defective, he was not provided with prosecution witness statements and any other documentary evidence prior to the commencement of the trial and his defence was dismissed without any cogent reasons.

3. That at the time of commission of the offence he was a minor, a fact that was not considered and he was not provided with an advocate at the State's expense and/or he was not informed of the right to representation.

4. Facts of the case were that on the **14th April, 2014, J M** the complainant, a boy aged 13 years old took a bicycle to his brother's house where he found the appellant who closed the door, gagged him using a blanket, tied his legs and having put on a condom penetrated him through the anus. On accomplishing his mission he hit the complainant's penis with a fist inflicting a cut wound that he bled from. Acting in a bizarre manner he tapped the blood which filled up the cup. He threatened to kill him if he disclosed what happened. **PW2 A K,** the complainant's brother went home to find the house locked from outside. He knocked and when the door was ultimately opened he sought to know what happened but both of them remained mum. He noticed the cup that was full of blood. He interrogated his brother who started crying. He pulled him inside that is when he divulged the information to him. He established that his brother was bleeding from the anus and also the penis. He called his friends who arrested the appellant and took him to the Police Station. Subsequently he was charged.

5. When put on his defence the appellant who made an unsworn statement gave his age as twenty (**20) years old.** He testified that on the material date he went to work at a hotel. At 3.00pm while in the course of his duties he was sent to collect some utensils. All over a sudden he heard a knock on the door and it turned out to be the complainant who had a bicycle. The complainant fell down and he was told to assist him but he declined. Suddenly people gathered and alleged that he had defiled the child. He denied having committed the act.

6. At the hearing of the appeal the appellant canvassed the appeal through written submissions. The State through **Mr. Kemo,** the Senior Assistant Director of Public Prosecutions opposed the appeal. He urged that the age of the child was proved as it was established that he was fourteen (14) years old. Evidence of the complainant regarding the injuries inflicted was corroborated by PW2 who found him traumatized and shocked. That penetration was established by the doctor who examined the complainants and the sentence imposed was the minimum prescribed one.

7. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

8. It is the contention of the Appellant that the charge was fatally defective as the particulars of the offence were captured thus:-

> ***"… within Nakuru County intentionally did cause his genital organ namely penis to penetrate the anus of …"***

9. It has been held that a charge sheet is fatally defective if it does not state the essential ingredients of the offence (see ***Yosefa versus Uganda [1969] E.A. 236; Sigilani versus Republic [2004] 2KLR 480).***

10. The Appellant was charged with the offence of defilement which was clearly stated in the statement of the offence. This is a charge that is known in law as provided in the **Sexual Offences Act**. The particulars of the offence as captured are well stated. They disclose the act the appellant was alleged to have done such that it enabled him to participate in proceedings. He cross examined the complainant extensively. Had he failed to understand the charge he would not have cross examined the witnesses as he did. He even prepared for his defence and defended himself appropriately. In the circumstances the charge sheet was not defective.

11. Secondly, he faults the court for not providing him with witness statements prior to the commencement of the case. **Article 50(2) (c)** of the **Constitution** stipulates thus:-

> ***"Every accused person has the right to a fair trial, which includes the right -***
>
> ***c) to have adequate time and facilities to prepare a defence."***

12. He urged that he should have been furnished with witness statements at the point of plea taking to enable him to adequately prepare for his defence. When the plea was taken on **14/4/2014** a mention date was set when pre-trial directions were taken. The matter did not proceed until the **1st September, 2014,** these were five months later at that point in time the appellant was prepared to proceed with the matter. It is not mandatory that copies of prosecution witness statements should be provided at the point of plea taking. They can be furnished any time prior to the prosecution presenting its case. What is of importance is the appellant being granted the opportunity to prepare for his defence. In the circumstances the appellant was not disadvantaged.

13. It is contended further, that the Appellant was prejudiced for failure to get legal representation. **Article 50(2) (h)** of the Constitution cited provides thus:-

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(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."***

14. What is envisaged by that provisions of law is that if substantial injustice will arise then the accused should be assigned an advocate at the expense of the State.

In the case of David ***Macharia Njoroge versus Republic, Criminal Appeal No. 497 of 2007(2011) eKLR*** the **Court** of **Appeal** stated 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 court 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."***

15. The charge the appellant faced is not a capital offence. There was no threat of loss of life therefore it was not mandatory for him to be provided with a legal representation at the expense of the State. That ground of appeal therefore fails.

16. Further, it is urged that the appellant was a minor at the time of commission of the offence. This meant that he should not have been convicted and sentenced as provided by the Children Act. The charge sheet gave the apparent age of the Appellant as "***adult***". At the outset after he pleaded to the charges, the court on its own motion ordered for assessment of his age. On the **27/5/2014** a report was filed by **Dr. Omuok J., Medical Superintendent Provincial General Hospital, Nakuru** who remarked thus:-

> ***"Since the above teeth empt at between 17-25 years… dental age can be estimated at about 17 years".***

Because of the uncertainty the court directed the parents of the accused to avail his birth certificate –two (2) birth certificates were availed. The first birth certificate serial No. 817420 issued on **10th March, 2011** indicates the date of birth of the appellant as **15/4/1996;** a child health card issued to the appellant at birth was adduced in evidence which has the date of birth as **15/4/1996.** The document cannot be doubted. Therefore the second birth certificate serial **No. 241136** issued on **12th June, 2014** which indicates his date of birth as **15/11/1997** is not authentic. At the point of commission of the offence the Appellant was eighteen (18) years old. The appellant testified in his defence **two (2) years** later and gave his age as **twenty (20) years.** This means that at the time the offence was committed he was an adult. Therefore the learned trial magistrate did not fall into error by reaching a finding that he was excluded from the provision of the **Children Act** in as far as sentencing was concerned.

17. It is the contention of the appellant that he went to assist the complainant who was wounded having fallen of the bicycle.

18. The complainant was subjected to medical examination by PW5, **Doctor Denver Manga.** He found him having active bleeding on the penis pulse. The anal area had bruises. It was inflamed and swollen. The sphincter was loose and tender on palpitation. He opined that the bruises on the anus were due to something penetrative. He concluded that there was penetration.

19. PW2 found the complainant and appellant inside his house. He corroborated the evidence of the complainant in respect of the nature of injury he sustained. When given the chance to cross examine him the appellant did not challenge his allegations.

20. A child health card was adduced in evidence. This was proof of the fact that the complainant was born on the **10/2/1999.** At the time of the offence he was **fifteen (15) years** old hence a child.

21. The act of penetration was established and the perpetrator of the Act was identified as the Appellant. The defence put up by the appellant was analyzed and rightly disregarded.

22. Regarding sentence, the learned trial magistrate imposed the minimum prescribed sentence provided for the offence.

23. In the premises the appeal lacks merit and is dismissed in its entirety.

24. It is so ordered.

Dated, Signed and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

L. N. MUTENDE

JUDGE