REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 112 OF 2013

PATRICK MWENDWA MAKAU……....…APPELLANT

VERSUS

REPUBLIC…….……..…RESPONDENT

(An appeal arising out of the judgment and sentence of M.K. Mwangi PM in Criminal Case No. 1414 of 2011 delivered on 5th September 2012 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant has appealed against his conviction for defilement and causing grievous harm. He was sentenced of twenty (20) years imprisonment for the first count of defilement, and one (1) year imprisonment for the second count of causing grievous harm, and both sentences were to run concurrently.

The Appellant was charged in the trial Court with the first count of defilement contrary to section 8(1)(2) of the Sexual Offences Act, the particulars of which were that on the 15th day of September 2011 at [particulars withheld] Village, Kiima Kimwe location in Machakos County of Eastern Province, he intentionally and unlawfully caused his penis to penetrate the anus of B M M, a child aged 8 years. The Appellant had also been charged with an alternative to this count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006.

The particulars of the second count of grievous harm contrary to section 234 of the Penal Code, were that on the 15th day of September 2011 at [particulars w withheld]Village, Kiima Kimwe location in Machakos County of Eastern Province, he unlawfully did grievous harm to B M M.

The Appellant being aggrieved by the judgment of the trial magistrate has appealed his conviction and sentence in a Petition of Appeal and initial grounds of appeal filed in this Court on 18th February 2013. He later filed Amended Grounds of Appeal and submissions dated 7th June 2016 and further submissions dated 22nd November 2011. His amended grounds of appeal are as follows:

1. THAT the purported identification of the Appellant by PW2 and PW4 was unprocedural, defective and inconclusive, and was in contravention of such a process as required by law pertinent to ID parades.

2. THAT the arrest of the Appellant was premised on a basis of mistaken identity.

3. THAT the prosecution side failed to prove the alleged claims beyond a reasonable doubt.

4. THAT, the police failed to institute a proper and procedural identification parade process to test the credibility of the prosecution witnesses PW2/PW4.

5. THAT, Appellant should have been accorded legal representation due to the gravity of the charges against him pursuant to constitutional Article 50/2(h).

The Appellant submitted on the grounds raised as to his identification that PW1 arrested him on the morning of 17th September 2011 who then escorted him (the Appellant) to his house where PW4 was then woken up and PW4 proceeded to identify the Appellant as the person alleged to have committed the instant offence. That was on the basis of this identification that Appellant was then handed over to the police and subsequently charged respectively. Further, that other than a vague description by PW2 and PW4 that the person responsible for the offence who cuts wires, no other details were advanced as to the description of Appellant and /or the purported assailant.

According to the Appellant it is from this vague sketch that PW1 formed the conclusion that the Appellant was the chief suspect, and proceeded to execute the civilian arrest. In addition, that the two children at no time made any reference to someone by name of Mwendwa, and also no conclusive evidence was adduced to confirm that PW1, PW2 and PW4 were incontrovertibly referring to the same individual namely the Appellant.

Reliance was placed on the cases of **Kiare vs Republic** and **Republic vs Turnbull** (1976) 3 ALLER 549 on the possibilities of mistakes being made in single witness identification and recognition cases, and it was argued that the Appellant's identification by a child at 3am in the morning, and in the absence of an identification parade was unreliable

On the ground that the Appellant should have been accorded legal representation, it was submitted that cases under the Sexual Offences Act are profoundly and technically subtle with grave consequences in their outcomes, and that substantial injustice is occasioned due and owing to the ignorance and legal naivety of the accused. Subsequently that it would be in the interests of justice for courts to strictly observe Article 50(2)(h) of the Constitution which provides for legal representation for an accused person, and which requirement is mandatory and absolute rather than discretionary. It was also argued that the subsequent injustice is further underscored by the state's provision of qualified prosecution agents for and on behalf of the complainant, thus rendering the contest manifestly discriminatory and unjust.

Lastly, on the ground that the offence was not proved beyond reasonable doubt, it was urged by the Appellant that the health immunization card produced as the Prosecutions Exhibit 3 cannot be relied on as proof of age, as it is not registered according to the provisions of any law and is not a birth certificate or age assessment, and that PW6 did not say how she came to possess it. Further, that penetration by a genital organ was not proved.

Ms. Rita Rono, the learned counsel for the Prosecution, opposed the appeal and filed written submissions dated 8th August 2016. It was urged therein that the charges against the Appellant were proved beyond reasonable doubt. It was further submitted on the ground of identification of Appellant that he was identified positively by PW4 as person who cuts wires, and also PW2 knew the appellant not by name and stated he was a neighbor and thus knew him very well. It was further submitted that the ordeal took place at around 3pm which was in broad daylight, and the issue of mistaken identity therefore does not arise as the Appellant was previously known to the complainant and PW4. In addition that there was also no need of an identification parade in this instance.

It was also submitted that that there was overwhelming evidence required to prove defilement since PW7 also confirmed that the complainant had injuries on right neck and swelling on the head, and that he had reduced anal tone passing stool irregularly which is consistent with sodomy. On the issue of proof of age it was submitted that an immunization card was produced showing the age of the complainant, and that the court was guided on the proper age as assessed by the right person in reaching its conclusion. On the last ground raised by the Appellant of not being assigned an Advocate contrary to Article 50 (2)(h) of the Constitution, it was contended that the state only assigns advocate in capital offences of murder and cases

that involves children.

I have considered the grounds of appeal and submissions and evidence given in the trial court, and find that there are three issues for determination, which are firstly whether the Appellant's right to a fair trial was infringed by not being accorded an advocate to represent him during his trial; secondly, whether there was positive identification of the Appellant; and lastly whether the Appellant's conviction for the offence of defilement and grievous harm was based on consistent, sufficient and satisfactory evidence.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

On the first issue as to whether the Appellant's right to a fair trial was infringed by not being accorded an advocate to represent him during his trial, Article 50 (2) (h) of the Constitution provides the right to a fair trial includes the right of an accused person to be accorded to legal representation. This right was the subject of the Court of Appeal's decision in the case of **David Macharia Njoroge vs Republic [2011] e KLR,** *which Court* after reviewing the past and current law stated that as follows:-

> *"**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."***

In the present appeal, the charge the Appellant was facing did not carry a penalty of loss of life, and the Appellant did not suffer from any of disability that prevented him from understanding the proceedings. He alleges that his trial involved complex issues of law arising under the Sexual Offences Act, however a perusal of the trial court record shows that the Appellant did not raise this issue nor request for an Advocate on account of not being familiar with the law. His allegation that his right to a fair trial was infringed on account of lack of legal representation is theefore found not to have merit.

On the second issue of the Appellant's identification, this Court is guided on by the law as stated in **Mwaura v Republic [1987] KLR 645**, where the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

Evidence of visual identification can thus be the basis of sustaining a conviction in a criminal case. In addition, there is a distinction in law between identification and recognition has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566.** It was held therein that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger, because it depends upon some personal knowledge of the assailant in some form or other.

PW2 and PW4 are the ones who gave evidence as to the identity of the Appellant. PW2 who was the complainant, testified as follows in this regard.

> "**On 15th September, 2011, I and S and K were watching goats in the bush in Kyangulu. The person who cuts wire came and asked our names and we told him our names.He then called asked me to carry a small piece of tree. I carried it but on the way accused held me hit my**

head against a rock.I fell and then he removed my clothes then he put his penis inside my anus and defiled me.I was lying on the stomach."

During cross-examination PW2 testified that the time was after 1.00pm after he had come from school, and that he did not know the Appellant's name before, but that S knew him.

His evidence was corroborated by that of PW4 who was S, and who also placed the Appellant at the scene of the crime. PW4 confirmed that on that day and time the Appellant met him with PW2, talked to them, left with PW2 and later came back and told PW4 that PW2 had gone home. PW4 was categorical in his evidence that he knew the Appellant from before and his testimony in this regard was as follows:

"I used to see accused stealing fencing wire of a neighbouring farm. I had known accused before"

The identification of the Appellant was therefore safe as it was on the basis of visual identification by more than one witness, which identification was not in difficult circumstances as the said witnesses saw him during the daylight, had opportunity to talk with him, and more importantly knew him from before as the person who cuts wires. This description was enough in my view to identify the Appellant even if he was not known by name by the witnesses, as it was on this basis that the witnesses recognized him.

On the last issue as to whether the conviction of the Appellant was based on sufficient and satisfactory evidence, the Appellant questioned the evidence produced as regards penetration and as regards proof of the complainant's age, which was a health immunization card which was produced by PW6 who was the investigating officer in the case.

This Court in determining this issue is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

"Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

This Court has already found that the Appellant was positively identified by PW1 and PW2. The evidence on penetration was given by PW2 who testified as follows in this regard:

" Accused removed my clothes which was checked shorts and he removed his shorts and put his penis inside my anus and he clinched on my buttocks and put his penis. I felt a lot of pain as he defiled me. When he inserted penis I felt pain he moved up and down on me. Then he finished and wore clothes and left me. I went home and told PWl who is my uncle."

The said evidence is in my view clear and consistent that the Appellant inserted his penis into the complainant's anus. In addition the said evidence was corroborated by PW5 who produced a P3 form filled on 15th September 2011 as the Prosecution's Exhibit 3 and which showed that the complainant had a swelling on the right head, bruised neck and tenderness on the stomach. Further, that there was damage to his anal muscles and loss of control of stool passage.

As regards the proof of age, the immunization card was produced by PW6 as the Prosecutions' Exhibit 5. PW6 correctly produced the same as an exhibit, because as the investigating officer the immunization card was part of the evidence collected during investigations. The immunization card showed that the

complainant was born on 26th July 2003 and was therefore just over eight (8) years old as at the date of the defilement on the 15th September 2011.

The law on proof of age in defilement cases has been stated in various decisions of this Court and the Court of Appeal. ***In Kaingu Elias Kasomo vs R Malindi Cr. App. No. 504 of 2010*** *the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.*

In the case of **Gilbert Miriti Kanampius -V- Republic (2013) e KLR,** , Gikonyo J. while relying on the case of **Fappyton Mutuku Ngui vs Republic, Machakos H.C.Cr. Appeal No. 296 Of 2010**, noted as follows;

> ***"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."***

In addition the Court of Appeal in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.***

Therefore, the Court has discretion to find what the apparent age of a victim is from the documents presented to it and from the victim's testimony, when the only inconsistency as regard the age of a minor is as regards the various categories of ages provided by section 8 of the Sexual Offences Act for purposes of sentencing. This was also the position taken by the Court of Appeal in **Stephen Nguli Mulili vs Republic, Criminal Appeal No 90 of 2013**. I accordingly find that the health immunization card was properly produced as an exhibit and could be used to find the apparent age of the victim which was 8 years.

Lastly, this Court notes that the Appellant in his Petition of appeal also appealed against the sentence. This Court in this regard further notes that the Appellant was charged with, and convicted of the offence of defilement under section 8(1)(2) of the Sexual Offences Act, which provides as follows:

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

It is evident from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment, and while sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

I am therefore in the circumstances compelled by law to increase the sentence imposed upon the Appellant in exercise of the powers granted to this Court by section 354(3) (a) and (b), as the sentence of

20 years imprisonment imposed upon him for his conviction was unlawful.

I accordingly uphold the conviction of the Appellant for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. I set aside the sentence of 20 years imprisonment for this conviction, and substitute it with a sentence of life imprisonment.

I also uphold the conviction of the Appellant for the offence of grievous harm contrary to section 234 of the Penal Code, and uphold the sentence of one (1) year's imprisonment for this conviction. Both sentences shall be served concurrently and shall run from the date of conviction by the trial Court.

The Appellant's appeal is accordingly dismissed.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 6th DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE