IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 20 OF 2016

BETWEEN

FRED WANJALA NATEMBEA ....APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal from the judgment of the High Court of Kenya

*at Kakamga **(Bwonwonga, J)** dated **9th October, 2015***

in

HCCRA NO. 108 OF 2014)

****

JUDGMENT OF THE COURT

This case leaves a bitter taste in the mouth. It is yet another reminder of the depravity of some of the people to whom the safety of the young and vulnerable is entrusted. It also speaks to the fact that some institutions of learning, especially those charged with the education and care of children with disabilities, do not do quite enough to vet with the requisite vigilance, the persons they allow to come into contact, interact and otherwise deal with the children in their care. Too often the supposed shepherds turn on the sheep and the protector becomes the rapacious pest.

The appellant, **Fred Wanjala Natembea** was employed at the [particulars withheld]. His duties involved according to the school head teacher **Gibson Ikumu Munanga**, sleeping at the boys' dormitory as, alas, *"a house father, to assist the boys in case they have a problem at night."* **(PW3)** had also assigned the appellant, who had been at the special school for less than two months, *"the right to remind the children on treatment to take their medicine."* This latter role apparently gave him access to a store to which children of both sexes could come for him to give them medicine and, in the pretext of going to remind the children about the medicine, he had access to the girls' dormitory as well. He also played the role of serving the children their food.

So it was that on 6th February, 2014 at about 6.00p.m. **F. A. (PW1)** a 15-year deaf girl went to the said store to collect medicine. The appellant, whom she described as *"one who serves students food at the school,"* gave her the medicine and proceeded to have sex with her still clad in school uniform on the floor of the store. She stated, that *"it was not the first time that I had sex with the accused as we were doing so often."* She took a bath afterwards but feeling pain, she cried. On the following day she reported the incident to two of her teachers **Madam Noel** and **Washuka.**

Nor was **FA** the only girl to fall victim to the appellant's rapacity. **EN** also deaf and aged 16 years at the time was having dinner on 1st February, 2014 when the appellant, who had *"given [her] a lot of food,"* called her and talked to her declaring himself her friend. She went to sleep but early the next morning at about 6.00a.m., the appellant went to her bed, and called her. She followed him to the bathroom where he had sex with her on the floor. She too afterwards reported the incident to teacher Noel.

Noel Luyakha(PW4) in her testimony stated that she was a Boarding Mistress at the school. She received word that some two class 8 students **M** and **R** had seen the appellant touching the breasts of **PW2,** a class 4 child with whom he had a relationship. He used to buy her *mandazi* and serve her extra food. PW2 then recounted the events leading to the sex in the bathroom. She also revealed that the appellant had had sex with PW1 at the medicine store. PW1 on being called confirmed this. PW4 reported the matter to the headmaster, PW3, and took the

two minors to the Kakamega Provincial General Hospital. They were examined by **Bertha Otieno (PW5),** a Senior Clinical Officer who found that they both had the hymen missing consistent with defilement. She also assessed their ages to be 15 and 16 years old.

The appellant was accordingly arrested and charged with two counts of defilement contrary to **section 8(1)** of the **Penal Code** which each had an alternative count of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**.

After hearing the foregoing prosecution witnesses, and the appellant in his defence who denied the charges and claimed that he was being framed up for demanding his salary from the head teacher (PW3) who he had been told does not pay people their salaries, the trial magistrate rather curiously, in our view, acquitted the appellant in the main counts of defilement. That court was of the view that penetration was not medically proven against the appellant. He was, however, found guilty and convicted on the alternative counts of indecent act with a child for which he was sentenced to serve 10 years imprisonment each. The sentences were to run concurrently.

Dissatisfied, the appellant appealed against both conviction and sentence. His first appeal was heard by Bwonwonga J, who, by a judgment delivered on 9th October, 2015, dismissed it. What is more, the learned Judge enhanced the sentence imposed to run consecutively, and not concurrently as had been ordered by the trial court.

In the present appeal, the appellant in his supplementary memorandum of appeal filed by the firm of **Orege & Company Advocates** raises two grounds of complaint namely that;

> ***"1. The honourable Judge erred in law by upholding the decision of the trial court that the prosecution had proved beyond reasonable doubt in the alternative counts that the appellant had committed indecent acts with FA and EN.***
>
> ***2. That the honourable judge erred in law by failing to observe that the appellant's right to a fair hearing was violated."***

In written submissions filed but not orally highlighted, **Mr. Rodi**, learned counsel for the appellant contended, citing the provision of **section 111** of the **Evidence Act** and the case of ***PIUS ARAP MAINA -vs- REPUBLIC*** **[2013] eKLR,** that the appellant was entitled to an acquittal as the prosecution did not prove their case beyond reasonable doubt. He took particular issue with the conviction of the appellant based on hearsay evidence contrary to **section 63** of the **Evidence Act**. He urged that the courts below should have made the necessary adverse inferences from the prosecutions failure to call the girls who are said to have seen the appellant touching PW2's breasts. Counsel cited ***BUKENYA & OTHERS -vs- UGANDA [1972] EA 549*** in support of this contention.

As this is a second appeal, we would not be entitled to interfere with the concurrent findings of fact of the two courts below unless there was no evidence upon which such findings could reasonably be based. See ***KARINGO -vs- REPUBLIC [1982] KLR 213, NJOROGE -vs- REPUBLIC [982]*** and ***GICHURU -vs- REPUBLIC [2005] 1 KLR 685.***

As we have already intimated, we think that the appellant was most fortunate to have escaped conviction on the main counts of defilement given the evidence of record. There never was a challenge to the acquittal however, and we shall say no more. On the whole, however, we think that both courts below were perfectly entitled to find that the appellant's alternative charges were well-proved against the appellant.

On sentence, we note that in enhancing from concurrent to consecutive, the learned Judge expressed himself as having issued a notice to the appellant *suo motu* on 9th October, 2015 to show cause why the sentence of 10 years imprisonment should not be enhanced. The learned Judge then proceeded to indicate that given the aggravating circumstances extant in the case namely the hearing disabilities, the repeated sexual assaults and the appellant's abuse of trust, the appellant was deserving of a stiffer sentence.

This aspect of the case has troubled us. Even though the learned Judge gave the appellant a notice to show cause, we note that the said notice was given by the court on its own motion after the appeal had been argued in full and a judgment date had already been set. In fact it was after judgment had been written given it that was delivered on the afternoon of the same day. With great respect, a notice at that late hour was merely formalistic and amounted to an empty ritual. This is because, by long established practice, where there is no cross-appeal and there is a possibility that sentence may be enhanced on appeal, the appellant should be issued with a warning so that he considers whether or not to tempt the gods by pursuing the appeal that could leave him worse off than at the beginning. For such warning to be meaningful, it ought to be given before or at the very beginning of the hearing of the appeal, never at the tail end of or after the appeal has been heard. What we have said is consistent with a long line of authorities of this Court, some of which we recently considered in ***MONEI KIPSHAN -vs- REPUBLIC, Kisumu Criminal Appeal No. 159 of 2015***. They included ***J.J.W. -vs- REPUBLIC [2013 eKLR*** where it was stated;

> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."***

The same was echoed in ***GUSHASHI LELESIT -vs- REPUBLIC [2016] KLR thus;***

> ***"[t]he obligation on an appellate court to forewarn or caution an appellants before enhancing a sentence imposed against him by a trial court is not anchored on any legal provision but in practice that has now gained such notoriety that it is proper that an***

> ***appellant be warned of the consequences of proceeding with his appeal in circumstances where such proceeding may likely result in the sentence being enhanced to his disadvantage. It is simply to enable him to weigh the options available and then make a decision that suits his best interests, especially in circumstances where like in the instant appeal an appellant is disadvantaged for not being schooled both in the law and legal procedures he may be confronted with during the course of the trial of his appeal."***

It is apparent therefore that the enhancement of sentence in the circumstances of this case was improper and visited great prejudice upon the appellant. And we must perforce interfere and reverse the enhancement.

The upshot is that the appeal against conviction fails and is dismissed.

As the enhancement was improper however, the order that the 10 year imprisonment sentences run consecutively is set aside and that of the trial court that they run concurrently is hereby restored.

Orders accordingly.

This judgment is rendered under **Rule 32(2)** of the **Court of Appeal Rules**, Odek, JA having sadly died before he could sign it.

DATED and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.