IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

KISUMU CRIMINAL APPEAL NO. 164 OF 2015

BETWEEN

JUSTIN KUBASU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Busia (F. Tuiyott, J.)

dated 10th *October 2013* ***in H.C.CR.A. No. 28 of 2012)***

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JUDGMENT OT THE COURT

1. The appellant, Justin Kubasu, was arrested and arraigned before the Chief Magistrate's Court at Busia on 11th January, 2010 on a charge of incest, contrary to **section 20(1)** of the Sexual Offences Act. The particulars of the charge were that:-

> **"On the 5*th* day of December 2009 at [Particulars Withheld] village, Marachi East Location in Busia District within Western Province, unlawfully and intentionally caused his penis to penetrate the vagina of LAO a girl aged 8 years."**

2. He faced an alternative charge of indecently assaulting the child by unlawfully and intentionally rubbing his penis against her vagina without her consent. It would appear however that the charge was subsequently substituted on 19th August, 2010 with one for defilement of a girl. Although the charge was changed from incest to defilement, the rest of the particulars, including the section of the law the charge was pegged on remained the same. We shall advert to that issue later in this judgment.

3. The appellant denied the charges leading to a trial in which the prosecution called seven (7) witnesses. It was the prosecution's case that on 5th December, 2009 while the child, LAO, was sleeping, the appellant went into their homestead, under the guise of visiting her ailing guardian and had sexual intercourse with her, as he had previously done on several occasions. Later that day, LAO reported the matter to PW2's ailing husband, who was in the main house close to where she was sleeping, but no action was taken.

4. She told the court that on a subsequent occasion the appellant sexually assaulted her in a maize plantation. It was her testimony that on this incident, PW3 had spotted her and the appellant leaving the maize plantation around the same time but heading in different directions and informed PW2 of his suspicions of the appellant's conduct. That this prompted PW2 to later take her to the hospital and to the police station after inquiring from her what had happened. She testified that no one else had ever done this to her except the appellant.

5. According to PW2, PW3 informed her of his suspicions of the appellant's conduct after he spotted PW1 emerging from the maize plantation and the appellant emerging shortly after. Upon enquiring from the appellant as to what was happening, the appellant told him that he had called PW1 and requested her to return the hoe he was using in the shamba back home. It was her testimony that on PW3's advice she investigated the matter through PW1 who confirmed the incident and further informed her that the appellant had sexually assaulted her on several previous occasions. Based on that revelation, PW2 took the child to Busia District Hospital for medical attention and later to Nambale Police station where they reported the matter and recorded their statements, after which the appellant was arrested.

6. It was PW4's testimony that on 28th December, 2009 at around 10.44 a.m., PW2 while in the company of PW1 informed her that PW1 had been defiled by the appellant on several occasions the most recent one being on 5th December, 2009. She deposed that she recorded PW1, PW2 and another witness's statements and issued PW1 with a P3 form. Thereafter, the appellant was arrested by administration police

at Butala in her presence after PW1 identified him.

7. According to Sammy Obukhuna, a clinical officer at Busia District Hospital, the medical examination and resultant report were done by his colleague, one Lekomel, who had since been transferred to Cheptais Hospital. He told the court that as per the medical report, PW1 had a foul vaginal discharge and her hymen was broken but there were no sperms or pus cells. He concluded that she had been defiled.

8. An age assessment examination on the child conducted by Dr. Zachary Njau revealed that PW1's age was between 8-9 years. The doctor completed a report dated 16th August, 2010 and produced it as exhibit.

9. When placed on his defence, the appellant gave sworn evidence but called no witnesses. Denying having defiled the child, the appellant claimed that the charges leveled against him were as a result of foul play following a disagreement between him and PW2 over a debt of Kshs. 5,000 which he had loaned her to take her ailing husband to hospital. In addition, he claimed that PW2's husband had a grudge against him following the death of his son who was his friend.

10. Upon assessing and analyzing the evidence tendered before him, the learned trial magistrate (**W.N. Nyarima, SPM**), delivered a judgment dated 23rd March, 2012 whereby he found the appellant guilty of the charge of defilement, convicted him and sentenced him to serve fifteen (15) years imprisonment.

11. Aggrieved, the appellant preferred an appeal against both conviction and sentence to the High Court at Busia (**F. Tuiyott, J.**) who, by a judgment delivered on 10th October, 2013 found the appeal devoid of merit and dismissed the same and being satisfied that the sentence was illegal enhanced it from 15 years' imprisonment to 25 years' imprisonment, which decision provoked the present appeal.

12. In his memorandum of appeal, the appellant raised, *inter alia*, the following grounds of appeal on the basis of which he asked this Court to quash the conviction and set aside the sentence:-

> **"1. That the learned trial magistrate and the first appellate court judge both erred in law and fact by failing to appreciate that the age of the complainant pw1 was not proved or established by either producing documentary evidence of birth certificate, baptismal card or any p3 for age assessment by any doctor hence leading to an injustice as age was approximated as 8 - 9 years old.**
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> **2. That the two courts below both erred in law and fact by basing the conviction on evidence of speculation and conjecture alone of pw1 and pw3 hence misguided.**
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> **3. That the first appellate court judge erred in law and fact to enhance the sentence not withstanding that the charges were duplex in nature and that the appellant could not comprehend to make his defence since at the time section 200 of the c.p.c was put in place, pw1 was never called upon to testify leading to fetter of administration of justice.**
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> **4. That the two courts below both erred in law and fact by failure to observe that the appellant's arresting officer pw5 failed to inform him in a language that he could understand of the true ground or reasons of arresting as contained in article 49(1)(a)(i) of the constitution of Kenya 2010.**
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> **5. That the two courts below both erred in law and fact by failing to observe that there was no D.N.A test carried out to see if there was any nexus connection to the alleged crime of defilement hence an injustice.**
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> **6. That the two courts below both erred in law and fact by failing to evaluate the appellant's sworn defense of alibi, rejected the same without giving cogent reasons for the rejection and failed to analyze or evaluate the grudge existing between the appellant and pw2, hence prosecution failed to comply with section 212 of the c.p.c to call evidence to rebut the defense case hence prejudiced."**

13. In his written submissions filed on 23rd September, 2019, the appellant in sum submitted that the prosecution failed to prove that he was the one who defiled PW1 maintaining that the conviction was based on uncorroborated and inconsistent evidence. He argued that since the medical examination was not done within a period of 72 hours it was not possible for the clinical officer to draw conclusive evidence that he was the perpetrator. Further, the fact that PW2 took a long time to take action against him for the alleged offence, cast doubt on the prosecution's case.

14. This being a second appeal, the role of this Court is as was succinctly set out in **Chemagong v. Republic (1984) KLR 213 at page 219** wherein this Court pronounced itself thus:-

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)."**

15. Having considered the record in its entirety and submissions on record and having in mind this Court's mandate, we identify the two main issues falling for our determination as:-

> **i. Whether the first appellate Court erred in law by failing to find that the prosecution had failed to prove its case beyond reasonable doubt.**

ii. Whether the first appellate Court erred in law by enhancing the appellant's sentence by substitution his 15-year prison term with a 25-year prison term.

16. On the first issue, it was the appellant's argument that the prosecution had failed to prove its case as PW1's age was not proved by evidence; DNA tests were not done to prove that the he was the perpetrator and that his evidence of an existing grudge between him and PW2 who was PW1's guardian was not considered by both courts below.

17. It is evident that both courts in their analysis of the evidence before them found that the prosecution's case against the appellant was watertight. The concurrent factual findings of the two courts below are not within our remit to revisit. Both courts found that the appellant had on several occasions defiled the child both inside the house and in the maize plantation. We also accept that the medical evidence availed in court clearly established that the child had been defiled. The act of defilement was therefore proved to the required standard.

18. On the question of age, it was the appellant's argument that the child's age was not proved as no documentary evidence was adduced in the trial Court to ascertain the same. We note however that the medical report completed and produced in evidence by Doctor Kamau clearly gave the child's age as between 8-9 years. We also note that the child's guardian (PW2) confirmed that the child was between 8 and 9 years old.

19. In **Edwin Nyambogo Onsongo v. Republic (2016) eKLR** citing with approval the case of **Mwolongo Chichoro Mwanyembe v. Republic, Mombasa Criminal Appeal No. 24 of 2015**, this Court held that:-

> **"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."** (Emphasis supplied)

20. As regards the issue of identification and lack of a DNA test, being conducted **section 124** of the Evidence Act, provides as follows:-

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

21. Expounding on section 124 (supra), this Court in **Williamson Sowa Mbwanga v Republic [2016] eKLR**, this Court held as follows:-

> **"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 of 2012 (Nyeri):**
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> **'Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.'"** (Emphasis supplied)

22. It is evident from the proceedings that PW1 identified the appellant as the perpetrator of the offence. Further, the mere fact that she identified him by name means that he was a person well known to her. It is also apparent from the evidence that the violations were repeated acts by the appellant. From the evidence of PW1, it is also clear that she had met the appellant on several occasions when he visited their homestead to visit PW2's ailing husband. The trial court believed the evidence of the minor to be true and relied on the same.

23. Further, as correctly observed by the learned Judge of the High Court, the evidence of PW1 was not tested in cross-examination as the appellant did not raise any questions hence PW1's evidence was not impeached in any manner whatsoever. It is evident from the judgment that the trial magistrate believed and accepted PW1's evidence as truthful and the first appellate court did not find any reasons to depart from such findings. We have no reason to depart from those concurrent findings of fact by the two courts below.

24. The lack of DNA testing could not have been prejudicial to the prosecution's case as there was overwhelming evidence on record pointing to the appellant as the perpetrator of the offence. A DNA test result was not the only evidence that was capable of placing the appellant at the scene of crime. That ground of appeal on this account therefore fails.

25. On the issue of sentencing, the appellant faults the learned Judge for enhancing his sentence from 15 years to 25 years' imprisonment. It appears from the record that the first appellate Court was urged by the prosecution to invoke the power vested on it under **section 354(3)(a)(ii)** of the Criminal Procedure Code to enhance the sentence. The record shows that the issue was addressed orally during submissions made to the court by the prosecution. We have not been able to find any written notice of enhancement on record. It is however correct to state that the issue of enhancement was urged on the basis that the sentence was unlawful as the charge had been substituted to defilement of a girl

under the age of 8 years as opposed to the earlier charge of incest.

26. Let us now consider the jurisprudence pertaining to enhancement of sentence. In **J.J.W v Republic, Kisumu Criminal Appeal No. 11 of 2011** this Court in interrogating the manner in which the first appellate Court exercised its discretion in enhancing a sentence imposed by the trial court expressed itself as follows:-

> **"It is correct that when the High Court in 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.**
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> **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. Oftentimes 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 to 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."** (Emphasis added)

27. Expounding further on the issue, this Court in **Gushashi Lelesit v. Republic [2016] eKLR** expressed:-

> **"[t]he obligation on an appellate court to forewarn or caution an appellant 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."**

28. In the instant appeal, the prosecution urged enhancement of sentence but the record shows that they did not file a cross-appeal seeking to enhance the appellant's sentence. The question of enhancement of the sentence was first raised by the prosecution during oral submissions made before the High Court but there is no evidence of prior written notification to the appellant, or even a verbal warning directed at the appellant by the Court before or at the commencement of the hearing of his appeal. There is no evidence on record to show that the appellant had been properly notified of the consequences of his appeal on the sentence should his appeal be dismissed. The issue of enhancement came towards the tail end of the arguments on appeal and the appellant did not therefore have a chance to ponder over the issue and make an informed decision as to whether to proceed with the appeal or not.

29. Moreover, as pointed out earlier, after the charge was substituted, there was no introduction of section 8(2) of the sexual offences Act that prescribes for the enhanced sentence of life imprisonment for the offence of defilement. It was not clear therefore whether the enhanced sentence was based on section 8(2) of the Sexual Offences Act or section 20(1) of the same Act. To some extent, the appellant has a point when he says that the charge was duplex in nature. That in our view did not nonetheless affect the conviction but had a bearing on the sentence.

30. In view of the foregoing, it is clear to us that the learned Judge improperly exercised his discretion to enhance the sentence and in our view, **section 354(3)(a)(ii)** of the Criminal Procedure Code was not properly invoked. Given the above irregularities the learned Judge had no basis to enhance the sentence.

31. Having considered the record, the grounds of appeal and the submissions by the appellant and the learned state counsel, we come to the conclusion that the appeal on conviction lacks merit and it is hereby dismissed. However, we find the appeal on sentence well grounded. We therefore allow it with the result that the sentence of 25 years' imprisonment is hereby set aside and in its place, the sentence of 15 years' imprisonment is reinstated. The 15 years to run from the date of conviction by the trial court.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR