IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 29 OF 2018

(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, JJ. A.)

BETWEEN

SOSPETER WANJAU WANGUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya

at Nairobi delivered by Ngenye-Macharia, J. dated 22nd July 2015

in

H.C.CR.A. No. 45 of 2013.)

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JUDGMENT OF THE COURT

1. This is A second appeal by Sospeter Wanjau Wangui (appellant) who was convicted and sentenced to life imprisonment for the offence of defilement contrary to the provisions of section 8(1) as read with section 8(2) of the Sexual Offences Act before the Chief Magistrates' Court at Kibera.

2. The particulars of the offence were that on the 13th day of October 2010 at Dagoreti Corner in Riruta within Nairobi Area Province, the appellant intentionally and unlawfully committed an indecent act by inserting his genital organ (penis) into the male genital organ (anus) of ***IM***, a child aged 9 years against the order of nature.

3. The brief facts giving rise to this appeal are that on the material date, ***PW1*** (the complainant), a boy aged 9 years old, was at his mother's friend's house, Maria ***(PW3)***, at about 8.00 p.m. when he suddenly heard someone shout "*Maria, open this door or I break it*." The assailant made good his threat and broke the wooden window and managed to get into the house. The house had a lantern lamp which was lit. It was PW1's testimony that the man started ransacking the house after which he forcefully removed his shirt and boxers, held his throat tightly and indecently assaulted him. He also inflicted some injuries on his body. PW1 was able to recognise his assailant with the aid of light from the lantern lamp; he was dressed in a pair of jeans and a short sleeved shirt.

4. When Maria came back, PW1 narrated the same ordeal to her. He was then rushed to Nairobi Women's Hospital after reporting the matter to Riruta Police Station. ***PW2***, the complainant's mother, testified that that she knew the appellant, who hailed from within the area. On that material day she had received a call from PW3 who informed her that her son had been raped by 'Ras'. She was able to identify the appellant at Riruta Police Station after he had been arrested. She also examined PW1 and noticed that his anus was tender and swollen. He also had bruises on his neck. PW3 and PW4 corroborated the complainant's testimony in all material aspects.

5. ***PW8***, Dr. Demeke, testified on behalf of Doctor Liku of Nairobi Women's Hospital who examined the complainant. He produced the medical report that was prepared by Dr. Liku on 15th October 2010. He testified that according to the medical report, there were lacerations on his anal region which was tender upon touch. Diagnosis was sodomy.

6. After considering the evidence by the prosecution witnesses, the appellant was found to have a case to answer and on being put on defence, he gave an unsworn statement and did not call any witnesses. His defence was that on the material day he had his camel grazing around when it hit the complainant. On 16th October 2010, he was in Corner Area when the residents ganged up and started beating him up.

The police were called and there after he was arrested and charged with the offences.

7. After considering the evidence in its entirety, the learned magistrate was satisfied beyond any shadow of doubt that it was the appellant who defiled PW1 and proceeded to convict and sentence him to life imprisonment. His appeal before the High Court was unsuccessful.

8. The appellant is now before this Court raising four grounds in his amended memorandum of appeal filed on 18th March 2019 which is predicated on the grounds that; *the trial commenced without the charges being read and explained to him as per the provisions of Section 207(1) of the Criminal Procedure Code (CPC); that he was unable to prepare his defence properly as no charges were read to him during the commencement of the trial on 4th June 2012; that the High Court failed to consider the entire evidence on record therefore reaching a wrong conclusion; and that his conviction was manifestly unsafe and unjustified.*

9. During the hearing, the appellant who appeared in person, argued the appeal through his written submissions. On the first issue of non-compliance with ***section 207(1)*** of the ***CPC***, the appellant submitted that the learned magistrate ordered the case to start afresh on 4th June 2012. According to him, it was expected that the substance of the charge must be read and explained to him and asked whether he admits or denies the truth of the charge in accordance with ***section 207(1)*** of the ***CPC***. It was his submission that when the trial commenced *de novo,* no fresh plea was taken, yet the initial plea taken on 22nd October 2010 was invalidated by the court order directing the trial to start afresh. In his view, a *de novo* trial is one that ought to start afresh as though there had been no trial at all.

10. Relying on the case of ***Charo v Republic*** *[1982] KLR* where it was held that: ***"It is a fatal omission not to explain to the accused person all the ingredients of the charge"***, the appellant emphasised that the omission to read and explain to him the substance of the charge when the trial was ordered *de novo* was a fatal omission that was prejudicial to him. He also faulted the learned judge for failing to subject the entire evidence to a thorough and exhaustive scrutiny and as a result arriving at a wrong decision.

11. As regards the issue of the complainant's age, the appellant contended that the High Court failed in its duty by not making any adverse inference as to the prosecution's failure to prove the age of the complainant. He further contended that the learned judge was alive to the fact that during the trial none of the witnesses brought forward by the prosecution had any documentary evidence to prove the age of the complainant.

12. The appellant also faulted the judge for failing to comply with ***section 200(3)*** of the ***CPC*** for the proposition that where one magistrate ceases to conduct a trial and the succeeding magistrate takes over, the accused's rights have to be explained to him by the presiding magistrate or judge. He maintained that Hon. Ann Mwangi commenced the trial on 4th June 2012 without having heard his response to the three charges. He faulted the High Court for failing to observe that the trial was conducted un-procedurally, hence his rights to a fair trial as enshrined in ***Article 25*** and ***50*** of the ***Constitution*** were grossly violated. He urged that the appeal be allowed, conviction quashed and sentence set aside.

13. As far as this appeal is concerned, ***section 361 (1) (a)*** of the ***CPC*** limits our jurisdiction to only matters of law. In ***Karani vs. R*** *[2010] 1 KLR 73* this Court stated as follows:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."***

14. Having considered the evidence on record, submissions and the law, the core issues that are discernible for our determination are:

> **i. Whether failure to take a fresh plea in a *de novo* trial is fatal to the trial;**
>
> **ii. Whether the age of the complainant was established;**
>
> **iii. Whether the offence was proved to the required standard.**

15. On the first issue, the appellant contents that **section 207(1)** of the ***CPC*** was not complied with thereby occasioning him a miscarriage of justice. He opined that since the matter was ordered to start *de novo*, then a fresh plea ought to have been administered to him in accordance with the said provision. According to him, he was not aware of the charges he was answering to, because the substance of the charges was not read and explained to him. He also argued that because of the failure to take a plea, he was unable to prepare his defence sufficiently.

16. ***Section 207(1)*** of the ***CPC*** provides as follows:

> ***"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement."***

17. The purpose of the process of taking plea was elaborated in ***J. A. O v. Republic*** *[2011] eKLR* by this Court as follows:-

> ***"The requirement under Section 207 of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as***

if a plea of not guilty was entered."

18. It is not in dispute that the appellant was arraigned in court on 22nd October 2010 before ***Hon. Nzioka (SPM)*** where the substance of the charges was read to him and he pleaded not guilty to the three counts. On 21st March 2012, the succeeding magistrate ***Hon. Ann Mwangi (RM)*** took over conduct of the matter and ordered that the matter be heard afresh.

19. A perusal of the proceedings shows that the substance and every element of the three Counts were read to the appellant and he pleaded not guilty, whereupon the learned trial magistrate recorded: "*Plea of not guilty entered*." When the succeeding magistrate took conduct of the case, all the witnesses who had testified were recalled. The appellant's concern however is that he did not take plea again when the trial started *de novo* after Hon. A. Mwangi (RM) took over conduct of the matter from Hon. Nyakundi. It is notably clear that this issue was not raised before the first appellate court. Nevertheless, it will be necessary to address and determine the issue as it raises a point of law.

20. ***BLACK'S LAW DICTIONARY**, **4th Edition*** defines trial *de novo* as:

> ***"a new trial or retrial in which the whole case is gone into as if no trial whatsoever had been heard in the court below."***

21. ***Section 200(3)*** of the ***CPC*** which was applicable when Hon. Mwangi (RM) took over the trial as aforesaid stipulates as follows:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

22. It is very clear from the aforesaid provision of the law that there is no requirement for an accused person to take plea afresh when a succeeding magistrate or judge takes over a matter that has been partly heard by another judge or magistrate. The only right that an accused has under **section 200(3)** of the ***CPC*** is to have the witnesses who had been heard by a previous magistrate or judge re-summoned and reheard by the succeeding magistrate or judge.

23. The record shows that the trial magistrate gave directions that the case should start afresh. The case then started *de novo* and all the prosecution witnesses who had testified were recalled. The appellant's rights were not prejudiced in any way.

24. On the second issue of the age of the complainant, it is trite law that in cases of defilement of children age of the child must be proved as this determines the sentence to be imposed. We note that the first trial magistrate conducted a *'voire dire'* examination for PW1. The Complainant said he was eight (8) years at that time. The second trial court also conducted a *voire dire* examination on 4th June 2012, nearly two years later, and PW1 said he was ten (10) years old. PW3, the complainant's mother, also testified that he was born in the year 2002 on 23rd January. The P3 form indicates the age of the complainant as nine (9) years old.

25. We note that the evidence of PW1 on his age was corroborated by his mother's testimony and the doctor who examined him, which shows that at the date of defilement he was nine (9) years of age. We are satisfied that both trial courts properly conducted the *voire dire* examination and ascertained the intelligence of the minor and his understanding of the need to tell the truth. The age was thus established.

26. Lastly is the issue of whether the case was proved to the required standard. The testimony of the complainant is clear that he was able to narrate his ordeal to PW1, PW2, PW3, PW4 and PW8, that the person who defiled him was the appellant who he recognised. PW3 testified that the appellant was well known to him because he was the boyfriend to her friend, Kendi, and he was able to recognise him on that night. PW6, the Investigating Officer, testified how she took the complainant to Nairobi Women's Hospital for examination. It was also her testimony that the appellant's pair of jeans short and the child's under pants were recovered in the house where the offence was committed.

27. We are thus convinced that that the appellant was identified by way of recognition. It is noteworthy that identification by recognition is more reliable because it is based on the witness' familiarity with the assailant. The two courts below accepted the account of events by the prosecution witnesses.

28. As per the provisions of the ***Sexual Offences Act*** and the proviso to ***section 124*** of the ***Evidence Act***, the trial court can convict on the basis of the complainant's evidence, if satisfied that the complainant is a truthful witness. We find that the offence was proved beyond reasonable doubt.

29. The final issue is on sentence. In his submissions, the appellant wants us to review the same, in line with the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR.*** In ***Christopher Ochieng v R [2018] eKLR***, and in ***Jared Koita Injiri v R**, **Kisumu Criminal Appeal No. 93 of 2014, this Court*** considered the legality of minimum mandatory sentences under the ***Sexual Offences Act*** and stated:-

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another -v- Republic** (supra), **we would set aside the sentence to life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."***

30. Taking into account the holding in the ***Muruatetu case***, the trial court is required to consider mitigating factors before imposing a suitable sentence. Our perusal of the record reveals that the trial court did consider the mitigation offered by the appellant and the pre-

sentencing report and proceeded to hold that:-

> ***"I have perused the pre-sentencing report. I have noted that the accused is alleged to be a 1st offender. The victim statement was not so much about the victim but clearly he was a young boy of 9 years old. The impact of the offence would be life-long. The section 8(2) provides for a minimum sentence of life imprisonment. The accused person is sentenced to life imprisonment."***

The learned magistrate also declared the appellant a dangerous sexual offender under ***section 39(1)*** of the **Sexual Offences Act**.

31. We find that the trial court was properly guided, and the sentence passed was lawful. However, the trial court could not exercise any discretion in view of the mandatory provisions of the law as it then stood. In the circumstances of this case, we are inclined to interfere with the sentence of life imprisonment as imposed by the two courts below and reduce it to 30 years' imprisonment from the date of the sentence. It is so ordered.

Dated and delivered at Nairobi this 20th day of November, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR