IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 27 OF 2012

JESSE ONYIMBO OCHIENG.....APPELLANT

versus

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisumu (H. K. Chemitei J) delivered on 5th March 2012

in

Kisumu HC Cr. Appeal No. 108 of 2011)

****

JUDGMENT OF THE COURT

1. The appellant, Jesse Onyimbo Ochieng, was charged with the offence of defilement contrary to Section 8 (1) and (3) of the Sexual Offences Act. The particulars were that on diverse dates between 13th May 2011 at [particulars withheld] within Nyanza Province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PAO, a juvenile aged 15 years.

2. In support of the prosecution case, PAO (PW1) testified as follows:

> *I am a pupil at xxx Primary School. I am in class 6. I was born in 1996….. I do recall on 13th May 2011 at 9.00 pm., I left with Atieno and another to a funeral. Atieno and the other disappeared at that funeral. There was a disco. I decided to go to the disco. Jesse Onyimbo came to me and told me to go with him to his home. Jesse found me at the beach where I had gone with the other girls. These other girls disappeared and left me. Jesse met me at the beach where there was a disco. This was at 11.00 pm. Jesse forced me to go to his house. He took me to his house. I told him that I wanted to go back. Jesse insisted that he wanted to sleep with me. He removed my skirt and pant. He then removed his trouser and short (sic). He then inserted his penis into my vagina. I started crying when he penetrated me. He did it thrice…... I stayed in the house for two days. He locked me in the house for two days as he went to the beach. On the third day, he took me at 6.00 am to his grandmother. We found her sleeping. He woke her up. My father came to his grandmother and when he asked him, Jesse said I was his wife. This was after two weeks. I stayed at his grandmother's place for two weeks. The grandmother gave us a house where I stayed for these two weeks.*
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> *When my father came, we were taken to Mageta Patrol base. I was taken to Mageta dispensary. I was issued with a white form by the police…..This was the first time I was having sex. I did not agree to have sex. I can see Jesse over there in court. He detained me against my will.*

3. In his sworn statement of defence, the appellant in relevant excerpts testified as follows:

> *It was on a Friday evening. I had earlier on met with PAO (PW1). On that Friday PAO sent a boda boda that she wanted money so that she would come to where I was. I did not give out any money but told the boda boda man to tell her to use her own money and come. On reaching 9.30 pm, I heard a knock on my door. I opened the door and saw my neighbor who informed me I had a visitor. I went to the neighbour's house where I found PAO. I took her to my house. That night I slept but did not touch her. <u>On Saturday, the following morning, we slept. I had sex with her that night</u>. I had protective sex. The following morning, which was a Sunday, she told me that she wanted to be my wife. I decided to take her to my grandmother which was not far…..*
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> *On 20th May 2011, I heard a knock on the door. Two people entered the house. One of these people sat down while the other just stood. The man standing asked PAO who I was to her. PAO told him that I was her husband. The man told us that he will use the*

authorities so that we would say how we got one another……

My mother told them that if there was any issue we should try and resolve it. These men refused to listen saying they were forwarding the issue to the authorities…... (Emphasis supplied)

4. Grounded *inter alia* on the evidence of PW1, the trial magistrate convicted the appellant for the offence of defilement as charged. He was sentenced to 15 years' imprisonment. In sentencing the appellant, the magistrate stated *"I have noted what the accused has said. However, he ought to have known when he took a 16-year-old girl and confined her in his house defiling her. He deserves no mercy (sic)."*

5. Aggrieved by the conviction and sentence meted upon him, the appellant lodged a first appeal to the High Court. His appeal was dismissed. In dismissing the appeal, the learned judge expressed himself thus;

I have carefully read through the entire proceedings and the grounds of appeal advanced by the appellant…..One thing that runs through this case is that the appellant had sexual intercourse with the complainant for several days. The estimated age of the minor was fifteen (15) years. The learned trial magistrate put it at sixteen (16) years.

The prosecution therefore established the ingredients of Section 8 (1) of the Sexual Offences Act namely that the complainant was a child and that there was a penetration…..There was no reason to belief that the appellant did not know that the complainant was a minor (sic). In her evidence she said that when the appellant goes away during the day she would play with other children. Surely, this was a child. A wife cannot do this. Consequently, I shall dismiss the appeal and order that the appellant shall serve fully the sentence imposed upon him.

GROUNDS OF APPEAL

6. Aggrieved by the High Court judgment, the appellant has proffered the instant second appeal citing the following grounds:

(i) The first appellate court failed to reassess, re-analyze and re-evaluate the evidence tendered by the prosecution so as to arrive at its own independent conclusion.

(ii) The two courts below erred in failing to appreciate and give effect to **Articles 49 (10 (a) (ii) (c) and (d)** as well as **Article 50 (2) (h)** of the **Constitution**.

(iii) The judge erred in failing to take into account the provisions of **Section 26 (2) of the Penal Code.**

(iv) The judge erred in failing to appreciate the provisions of **Article 1 (3) and 50 of the Constitution.**

(v) The Sexual Offences Act is unconstitutional in so far as it sets out mandatory sentences without regard to the circumstances under which the offence was committed; it deprives the trial court the exercise of its judicial function in sentencing and it does not take into account the mitigating factors or the mitigation by a convict.

(vi) The judge erred in failing to observe and appreciate the provisions of **Section 364 of the Criminal Procedure Code.**

(vii) The judge erred in failing to appreciate that the sentence meted on the appellant was unconstitutional.

7. At the hearing of this appeal, learned counsel Mr. Richard B. O. Onsongo appeared for the appellant. The prosecution was represented by Mr. Kakoi, Principal Prosecution Counsel. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

8. The appellant submitted that the two courts below erred in failing to ascertain the age of the complainant PW1; that PW1 testified that she was born in 1996 and no birth certificate was produced. It was submitted under the Sexual Offence Act, sentences are graduated based on the age of the victim; that this places the burden of establishing the exact age of the victim on the prosecution; that in the instant matter, the prosecution did not establish the exact age of the complainant; that the two courts below overlooked and erred in law by failing to appreciate that the prosecution had not proved the age of the complainant.

9. The appellant further faulted the two courts below in ignoring the provisions of **Article 2 (6) of the Constitution** that stipulate that an international treaty or convention ratified by Kenya form part of the laws of Kenya; that pursuant to the African Union, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, the appellant had a right to legal aid and assistance; that A **rticle 49 (1) (a) (ii), (c) and (d) of the Constitution** confer upon the appellant a right to communicate with an advocate; that in the instant case, the appellant was not given legal assistance and this violated **Article 49 (1) (a) (ii); (c) and (d) of the Constitution**. Counsel cited comparative jurisprudence from the United States Supreme Court in **Gideon – v- Wainwright, 372 US 335 (1963)** where it was held that the right to be heard is of little value if it did not encompass the right to counsel. It was submitted that in the instant matter, the two courts below erred in not according the appellant his constitutional right to counsel given that he faced a charge whose sentence had a minimum set by statute.

10. On the 15-year term of imprisonment meted upon the appellant, it was submitted the Sexual Offences Act was unconstitutional as it imposed a mandatory minimum sentence without taking into account the peculiarity and unique circumstances of each case; that such minimum sentences amount to inhuman and degrading treatment. It was further submitted that the Sexual Offences Act was unconstitutional to the extent that it violates the provisions of **Article 25 of the Constitution** which *inter alia* stipulates the right against inhuman and

degrading treatment cannot be restricted.

11. Counsel submitted that following the Kenya Supreme Court decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR,** trial courts are now flexible on sentences and this leaves the mandatory minimum sentences under the Sexual Offences Act to be unconstitutional.

12. Counsel submitted that taking into account the circumstances in this matter from the conduct of both the appellant and the victim, it is proper to depart from the imposition of minimum sentence and for this Court to declare the Sexual Offences Act to be unconstitutional in so far as it leads to a breach of Article 25 (a) of the Constitution.

RESPONDENT'S SUBMISSIONS

13. The respondent in opposing the appeal underscored that the issue of unconstitutionality of the Sexual Offences Act was neither canvassed before the trial magistrate nor at the High Court; that this Court has no jurisdiction to consider and determine constitutionality of the Act because the issue never arose in the High Court; the constitutionality of the Act was not part of the grounds of appeal to the High Court and neither is it a ground of appeal set out in the present memorandum of appeal. The respondent submitted that if this Court were to consider and determine the constitutionality of the Sexual Offences Act, the Court will be acting as a court of first instance and not an appellate court; that in constitutional matters, this Court is not a court of first instance.

14. It was further submitted that the respondent in this appeal is the Office of Director of Public Prosecution; the respondent is not the Attorney General; that constitutionality of statutes is a matter within the mandate and docket of the Office of the Attorney General and in the instant appeal, the appellant has not sued the correct respondent.

15. On the contestation that the two courts below erred in failing to take into account the provisions of Section 26 (2) of the Penal Code, it was submitted that the provisions of the Penal Code do not override the provisions of the Sexual Offences Act. Section 26 (2) of the Penal Code provides that "Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term." We note that **regulation 2 of the First Schedule to the Sexual Offences Act** stipulates the provisions of the Act supersede the provisions of any other law with respect to sexual offences.

16. On the 15-year imprisonment term meted upon the appellant, the respondent citing Section 8 (4) of the Sexual Offences Act submitted that the sentence was legal and lawful. Section 8 (4) of the Act expressly provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years; that in this matter, the sentence meted upon the appellant was the minimum and this Court should not interfere with the same.

17. In relation to the sworn statement of defence made by the appellant, it was submitted that there was no evidence on record to show that the complainant deceived the appellant to believe that she was over 18 years of age; that the complainant's conduct showed she was a minor.

18. Submitting on the contention that the appellant's constitutional right under **Article 50 (2) (j)** was violated through failure to be supplied with witness statements; it was submitted that this was an afterthought as the issue was never raised before the High Court.

ANALYSIS and DETERMINATION

19. We have considered the appellant's grounds of appeal as well as the submissions made by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal Procedure Code****, a second appeal is confined to* matters of law. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219:

> *"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 C/O Karanja -vs- R (1956) 17 EACA 146)"*

20. The appellant submitted that his constitutional rights under Articles 2 (6), 25, 49 and 50 of the Constitution were violated. The respondent submitted in response that this Court had no jurisdiction to consider allegations of constitutional violation as the allegations were neither raised nor canvassed in the High Court. It was stated in **Securicor (Kenya) Ltd v. EA Drappers Ltd and Anor. (1987) KLR 338**, that this Court has discretion to admit a new point at appeal but that the discretion must be exercised sparingly; for a new point to be admitted in appeal the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below. Similarly, in **Attorney General - v - Revolving Tower Restaurant, (1988) KLR 462**, this Court reiterated the principle that an appellate court has discretion to allow an appellant to take a new point before it if full justice can be done to the parties. (See also **Openda - v - Ahn (1983) KLR 165**). In **Kenya Commercial Bank Ltd - v - Osebe (1982) KLR 296** and **Nyangau v. Nyakwara (1986) KLR 712,** this Court held that it would allow a point to be raised for the first time on appeal where it was an issue going to jurisdiction.

21. In the instant appeal, we have considered the record of appeal particularly the proceedings before the trial court and the High Court. There is nothing on record to show that violation of any of the appellant's constitutional rights was an issue that had been raised, canvassed and determined by the courts below. Subject to very few and limited exceptions, it is a trite principle of law that in an appeal, this Court will not consider and determine an issue that was neither raised nor canvassed in the courts below.

22. In this appeal, the appellant has not demonstrated to our satisfaction why we should exercise our discretion and allow a new point of law to be urged in the appeal. There is nothing in the grounds of appeal to show that the two courts below lacked jurisdiction to hear and determine the criminal case against the appellant. We thus agree with the respondent that we have no jurisdiction to consider a matter that was neither raised nor canvassed and determined by the two courts below. In addition, the constitutional issues raised do not go to the

jurisdiction of the two courts which heard and determined the appellant's criminal trial.

23. We are cognizant that the constitutionality of the Sexual Offences Act is a constitutional issue that has the potential to be a preliminary point of law that determines constitutionality of the offences under the Act. Notwithstanding the constitutional dimensions of the appellant's submission, it is manifest that such an issue must first be raised and canvassed before a court of first instance before an appeal can be lodged before this Court. We thus find the appellant's grounds of appeal alleging violation of his various constitutional rights have no merit.

24. We now consider the ground that both the trial court and the first appellate court erred in law in failing to consider and determine the age of the complainant which is a critical factor in offences under the Sexual Offences Act. The appellant submitted there was no evidence on record establishing the exact age of the complainant (PW1); that in her own testimony, PW1 stated she was born in 1996; that on the other hand, the medical report tendered in evidence by the clinical officer showed that the age assessment of the complainant as 15 years. Due to this apparent inconsistency, the appellant submitted the age of the victim as an essential ingredient in the offence of defilement was not proved beyond reasonable doubt.

25. The respondent in rebutting the appellant's submission stated that age is a question of fact and this being a second appeal, this Court cannot delve into determining matters of fact. It was further submitted that the complainant's father testified that she was born in 1996 and this proved and established the age of the complainant as a minor and a child under 18 years of age. The respondent cited the comparative Ugandan case of **Francis Omuroni – v – Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** where it was held *inter alia* that in defilement cases, the age of the victim can also be proved by the victim's parents or guardians or by observation and common sense. Relying on this case, the respondent submitted that the age of the complainant was proved to the required standard through the testimony of her father.

26. We have considered the rival submissions on the age of the victim. It is apposite that under the Sexual Offences Act No. 3 of 2006, age of the victim is paramount in determining the sentence to be meted out on a convicted person and therefore is a matter of law and not fact.

27. In **Isaac Wafula - v- Republic [2017] eKLR,** the age of the complainant in a defilement case was not proved. In this context, in **Isaac Wafula (supra)**, the court stated:-

> *[19] However, the trial court did not establish the age of the complainant, and proceeding to convict of the main charge, which charged (sic) defilement of a child under 11 years and proceeding to sentence in a case where the child is between 12 and 15 was without evidential basis. I agree with the DPP that it is prejudicial for appellant to serve a sentence of 20 years which is based on section 8 (3) of the Sexual Offence Act on the assumption which was not proved that the girl was 14 years.*
>
> *[20] Although, there was on the evidence penetration with (sic) the meaning of section 8 (1) of the Sexual Offences Act, the want of credible evidence to base a finding on the age of the complainant makes the conviction of the appellant unsafe as the girl could have been over 15 years, which was the court's apparent age, for which penalty would be 15 years. This uncertainty must go to the benefit of the accused.*

28. In the comparative Uganda case of **Mutagubya Godfrey –v- Uganda, Cr. Appeal No. 8 of 1998 ,** it was stated that:-

> *"A Court of justice is under a duty to ensure that people who commit crimes are punished in accordance with the process of the law. This includes proper process of investigations and proof by satisfactory evidence that the suspect is guilty.*

29. In this appeal, the two courts below made a determination that the complainant was below the age of 18 years. If at all we are to agree with the appellant's submission that the age of the complainant was 16 years, then the penalty section that comes into play is Section 8 (4) of the Sexual Offences Act which imposes a minimum sentence of 15 years. On the other hand, if we were to follow the medical report which places the age of the complainant as 15 years, then the minimum sentence will be a term of imprisonment for 20 years. We are satisfied that in this appeal the appellant did not suffer any prejudice by the two courts below arriving at a determination of the fact that the victim was born in 1996 and thus 16 years of age at the time of the alleged offence.

30. We now consider whether the learned judge properly considered and re-evaluated the evidence on record in confirming and upholding the conviction and sentence meted out on the appellant. The duty of the first appellate court was explained by this Court in ***Kariuki Karanja - V- Republic [1986] eKLR 190*** as follows:

> *"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."*

31. Relevant to this appeal is the dicta in **Elias Kiamati Njeru - v - Director of Public Prosecution [2015] eKLR**, in which the High Court in a defilement case expressed itself as follows:

> *The appellant in his defence denied the offence. He told the court that he did not know the complainant although he knew her parents. He said he could not recall owning up to the offence and promising to pay any money. He further testified that he paid the father of the complainant PW2 some money which he had earlier lent to the appellant to buy medicine. The appellant said that on 19/12/2011 he was at Kanyariri and not in Muraru where the offence allegedly occurred…..*
>
> *I have perused the judgment of the learned magistrate and note that although she dealt with the evidence of the complainant at length she did not record the reasons which made her believe her evidence. Section 124 requires that the reasons be recorded in case of conviction of the accused where the court is satisfied that the alleged victim is telling the truth. Failure to record the reasons was a misdirection on the part of the magistrate. (Emphasis supplied)*

32. Central to this appeal is whether the two courts below considered and evaluated the sworn statement of defence made by the appellant. In his sworn statement, the appellant testified that he neither detained nor compelled the complainant to stay in his house; that the complainant when asked about her relationship with the appellant stated he was her husband; that he did not lock up the complainant in his house; that he took her to his grandmother where she stayed for two weeks.

33. In evaluating the probative value of the appellant's sworn statement, the learned judge made a finding that the appellant detained the complainant at his house. In our considered view, this finding is not supported by the evidence on record. The record shows that the complainant was free to leave the house and was even playing with other children outside the house; there is no evidence of detention or restriction of the movement of the complainant for the two weeks she stayed with the appellant's grandmother. However, we observe that detention of a victim is not an ingredient in the offence of defilement and nothing much turns on this erroneous finding. Notwithstanding, on the issue of detention of the complainant, we find the two courts below arrived at a conclusion not supported by the evidence on record.

34. The turning point in this appeal is whether the learned judge considered the appellant's sworn statement that the complainant stated she was his wife. In **Meshack Nyongesa – v- R, Eldoret Criminal Appeal No. 74 of 2015**, this Court expressed as follows:

> *8…. From the appellant's evidence in court and that of the complainant, it is clear to us that the appellant seduced the complainant and took her as his wife…...*
>
> *11. We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances….it is our considered view that where a young man is charged with defiling a girl child…., the trial court should ascertain whether he had reason to believe that the girl was 18 years or above…...In the peculiar circumstances of this case, we allow the appeal…..…*

35. In the instant matter, the learned judge made a finding that the appellant's defence was basically a mitigation; that there was no reason for the appellant not to have known the complainant was a minor. We have considered this finding by the judge. There is no analysis and re-appraisal of the defence evidence. The judge simply stated there was no reason for the appellant not to believe the complainant was a minor. The basis of the belief or non-belief is not stated. Failure to consider and properly re-evaluate the appellant's sworn statement of defence renders the conviction unsafe and we hereby quash it.

36. In this matter, the error in law is failure by the learned judge to properly consider and re-evaluate the defence evidence. The error is fatal and we find the learned judge erred in affirming and upholding the conviction of the appellant. Accordingly, we set aside the conviction of the appellant and the sentence meted upon him by the two courts below. The upshot of our consideration of the grounds of appeal is that this appeal has merit and is hereby allowed. The appellant be and is hereby set at liberty unless otherwise lawfully held. Consequently, we find no reason to consider severity of the sentence imposed on the appellant.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR