IN THE COURT OF APPEAL

NAIROBI

(CORAM: E.M. GITHINJI, H. OKWENGU & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 56 OF 2015

BETWEEN

RAYMOND WAWERU MWANGI......................................APPELLANT

AND

REPUBLIC ....RESPONDENT

(An Appeal from the Judgement of the High Court of Kenya

*at Nairobi (**M. Mbogholi, J.**) dated the 7th day of December, 2011*

in

H.C.CR.A. NO. 327 OF 2009)

****

JUDGMENT OF THE COURT

[**1**] This is an appeal against the judgment of the High Court in its appellate jurisdiction dismissing the appellant's appeal against conviction and enhancing the sentence to one of life imprisonment.

[**2**] On 5th August 2005, the appellant was charged before Senior Resident Magistrate's court, Makadara with the offence of **Defilement** of a girl contrary to **section 145(1)** of the **Penal Code.** He was also charged with an alternative count of **indecent assault of females** contrary to **section 144(1)** of the **Penal Code**. The particulars of the main offence of defilement stated that on 24th July, 2005 the appellant had carnal knowledge of a girl (name withheld) aged five and half years. He pleaded not guilty to the offence. On 15th August 2006, ***EW,*** the complainant's mother gave evidence after which the trial was adjourned. On 17th August, 2007 when the trial resumed, the prosecutor applied for leave to substitute the charge. The application was allowed and the charge was substituted. In the new charge, the appellant was charged with the offence of **defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act** and with an alternative charge of committing an **indecent act with a child contrary to section 11(1) of the Sexual Offences Act**. The new charges were read to the appellant who pleaded not guilty. After trial, the appellant was convicted of the main offence of defilement and sentenced to 15 years imprisonment. He appealed to the High Court against the conviction and sentence. The High Court dismissed the appeal against conviction and relying on section 8(2) of the Sexual Offences Act, enhanced the sentence to life imprisonment.

[**3**] The prosecution case was briefly as follows:

> On 24th July, 2005 at about 4.p.m. the appellant who was running a kiosk near the house of ***EW***, the complainant's mother held the hand of the complainant and two other girls and took them away saying that he was taking them to the gate and they would come back. The appellant took the three girls to a house and told the other two girls to leave. He was left in the house with the complainant and he laid her on a bed and defiled her. The complainant went home. On the following morning the complainant was crying as she was being bathed and complained of stomachache and headache. On 27th July, 2005, the complainant's mother and ***IW,*** a neighbour checked the complainant and noticed some mucus on the complainant and her pant. The matter was reported to police and the complainant was taken to Nairobi Women Hospital. On examination, ***Dr. Ketran Muhombe*** found that the complainant's private parts had a tear on the hymen. The appellant was arrested on 27th July, 2005 and later charged.

[**4**] The appellant gave sworn evidence at the trial and stated that on 24th July, 2005 he was in his mother's kiosk the whole day and never

saw the complainant. He called one witness, ***Emily Muthoni Mungai,*** who testified that the appellant was on the material day in his mother's kiosk and even slept there, and that he did not see the appellant go out with the complainant.

[**5**] The trial magistrate made a finding that the complainant was a credible witness; that evidence of defilement was corroborated by two doctors; that the complainant was sexually assaulted; that the complainant knew the appellant very well; that there was no reason to incriminate the appellant and that the defence of the appellant was not credible. The trial magistrate ultimately convicted the appellant. The High Court evaluated the evidence and made a finding thus:

> **"The appellant was well known to the complainant; in fact, complainant called him uncle. The offence took place at 4.00 p.m.; the complainant sufficiently identified the appellant to the satisfaction of the court and I am also satisfied in that regard. No corroboration was required but the Doctor's evidence provided this. There is no reason why this young innocent girl aged 5½ years could implicate the appellant with such a serious offence. In my assessment, the offence was proved beyond any reasonable doubt. The conviction was well founded."**

[**6**] The appeal is against conviction and sentence. ***Mr. Amutallah Robert***, learned counsel for the appellant relied on the grounds in the further supplementary memorandum of appeal. However, counsel for the appellant abandoned grounds No. 5 and 6, which in essence question the sufficiency of the prosecution evidence.

In the remaining grounds of appeal which were argued together, appellant faulted the High Court for failing to note that the trial court applied the law retrospectively; that the charge was defective; and for enhancing the sentence. The appellant also complained that the High Court failed to properly re-evaluate, and re-analyse the evidence.

[**7**] The appellant's counsel submitted, among other things, that the trial court applied the law retrospectively; that the Sexual Offences Act came into operation on 21st July, 2006 after the date of the commission of the offence; that the substitution of the charge was not proper; that by section 48 of the Sexual Offences Act, proceedings under the Penal Code had to be concluded under the Penal Code; that by Article 50(2) (p) of the Constitution, one cannot be convicted for an offence which was not in existence; that the sentence of 15 years imprisonment was not provided for by the law; and that the court should take into account that the appellant has served 9 years imprisonment and acquit him.

[**8**] ***Mr. Omirera,*** the prosecution counsel conceded the appeal on sentence and submitted that it was wrong to convict the appellant for an offence which was not in existence and that the amendment of the charge was erroneous. He however asked the Court to pass the appropriate sentence. In reply, the appellant's counsel submitted that the trial was unfair and that the sentence cannot be substituted because the charge was a non-starter.

[**9**] The ground that the High Court failed to evaluate and re-analyse the evidence was not elaborated on by the appellant's counsel. Furthermore, having abandoned the grounds in which the appellant complained that the prosecution did not prove the case against the appellant beyond reasonable doubt, this ground has no merit. Moreover, it is clear from the judgment of the High Court, a portion of which has been quoted in paragraph 5 above, that the High Court indeed re-evaluated the evidence and reached its independent decision.

[**10**] The substance of the appeal is on retrospective application of the Sexual Offences Act. The appellant's counsel has helpfully cited the judgment of this Court in **Joshua Otieno Oguga v Republic [2009] eKLR** which considered the application of the Sexual Offences Act to offences which were committed before it became operative. In that judgment, the Court noted that section 145(1) of the Penal Code under which the appellant was charged was itself amended by Act No. 5 of 2003 to read:

> **"Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of felony and liable to imprisonment with had labour for life."**

The repealed section provided: -

> **"Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and liable to imprisonment with hard labour for fourteen years together with corporal punishment."**

The Sexual Offences Act commenced on 21st July 2016. In s**ection** 8(1), it created the offence of Defilement in terms that:

> **"Any person who commits an act which causes penetration with a child is guilty of an offence termed as defilement."**

As **section 8(2)** provides, the sentence of defilement with a child aged eleven years and or less, is a minimum and mandatory sentence of imprisonment for life.

By **section 48** of the **Sexual Offences Act,** the transition provisions in the First Schedule would apply. Clause 3 of the First Schedule provided:

> **"Any proceeding commenced under any written law or part thereof repealed by this Act shall, as far as practicable be continued under this Act"**

That transitional provision was amended by **Act No. 7 of 2007** to provide that;

“Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.”

Section 49 of the **Sexual Offences Act** as read with the Second Schedule repealed section 145 of the Penal Code.

[**11**] **Clause 77(4)** of the former Constitution which was operative at the time the appellant was charged provided:

“No person shall be held to be guilty of an act or omission that did not at the time it took place, constitute such an offence and no penalty shall be imposed for a criminal offence that is severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.”

Moreover, **section 23(3)** of the Interpretation and General Provisions Act provides:

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not –

(a) –

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) …

(d) …

(e) affect an investigation, legal proceedings or remedy in respect of a right privilege obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made”.

[**12**] The Constitution of Kenya, 2010 in Article 50(2) entrenches a right of accused person to a fair trial which includes:

“(n) not to be convicted for act or omission that at the time it was committed or omitted was not –

(i) an offence in Kenya

(p) the benefit of the least severe prescribed punishment for an offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

It is also appropriate to refer to **section 186** of the Criminal Procedure Code which provides:

“When a person is charged with defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”

Lastly, **section 361(4)** of the Criminal Procedure Code provides:

“Where the party to an appeal has been convicted of an offence and the subordinate court or the first appellate court could lawfully have found him guilty of some other offence, and on the finding of the subordinate court or the first appellate court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may instead of allowing or dismissing the appeal, substitute for the conviction entered by the subordinate court or by the first appellate court a conviction of guilty of that other offence and pass such sentence in substitution for the sentence passed by the subordinate court or by the first appellate court as may be warranted in law for that other offence.”

[**13**] In the instant appeal, the appellant was charged and convicted for the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act for an act committed on 24th July, 2005 before the Sexual Offences Act commenced on 21st July, 2006. The sentence imposed by the trial magistrate on 15th July, 2009 was 15 years imprisonment. The High Court upheld the conviction and enhanced the sentence to mandatory life imprisonment on 7th December. 2011. This was after the Constitution of Kenya, 2010 had come into force.

Section 186 of the Criminal Procedure Code is apparently out of date. It refers to a person charged with defilement of a girl under the age of 14 years. **Section 145(1)** of the **Penal Code** was amended by Act No. 5 of 2003 where the age for purposes of defilement was increased to under 16 years. It is also inconsistent with clause 3 of the First Schedule to the Sexual Offences Act as amended by Act No. 7 of 2007 which authorised proceedings commenced under the repealed Penal Code to continue to their logical conclusion under the Penal Code.

Moreover, the Sexual Offences Act created sexual offences of a different nature and wider in scope and imposed more severe sentences than the Penal Code. Therefore, conviction for offences under the Sexual Offences Act where a person is acquitted for defilement of a girl below the age of 14 years under the Penal Code would be in conflict with the right to fair trial under Article 50(2) (p) as it would, among other rights, deny an accused person the benefit of the least severe sentence. Contrary to provisions of section 186 of the Criminal Procedure Code, an accused person could only lawfully be convicted for other offences than were provided under the Penal Code and as provided in sections 179 and 180 of the Criminal Procedure Code such as a minor offence or an attempt to commit the offence charged. So section 186 of the Criminal Procedure Code could not justify the enhancement of the sentence.

[**14**] Upon our consideration of the appeal, we find that by Clause 77(4) of the former Constitution, and by provision of section 23(3) of **The Interpretation and General Provisions Act** and Clause 3 of the First Schedule to the Sexual Offences Act as amended by Act No. 7 of 2007, convicting and sentencing of the appellant under the Sexual Offences Act was unlawful.

For the same reasons, the High Court erred in law by upholding the conviction and imposing the mandatory minimum sentence of life imprisonment under the Sexual Offences Act. For those reasons, the appeal against conviction under the Sexual Offences Act has merit.

[**15**] The problematic question is whether this Court in a second appeal can enter a conviction under the Pena Code and pass an appropriate sentence in substitution for the sentence passed by the trial magistrate or by the High Court. The problem is compounded by the fact that the offence of defilement under the Penal Code does not now exist for it was repealed by the offence of defilement under the Sexual Offences Act. Nevertheless, we are satisfied that even without restoring the original charge under the Penal Code, the Court has discretion under **section 361 (4)** of the Penal Code to enter a conviction for an offence for which the appellant would have been lawfully convicted, if the Court is satisfied that the requirements of that section are fulfilled. In both **Joshua Otieno Ogunga v Republic** (supra) and in **Joseph Lolo v Republic [2014] eKLR**, this Court substituted a conviction under the Penal Code for a conviction under Sexual Offences Act and passed the appropriate sentence. That is the lawful cause to take.

[**16**] In this case, there were concurrent findings of the two courts below that the offence of defilement was committed by the appellant. The appeal against the finding of guilty has been abandoned. In the premises, it is just for the Court to invoke its discretion under section 361(4) of the Criminal Procedure Code. The defilement was committed on 24th July, 2005 after the amendment of Section 145(1) of the Penal Code which increased the sentence to life imprisonment. The appellant was charged on 5th August, 2005, nearly fourteen years ago and was convicted on 15th July, 2009. The trial magistrate had imposed a sentence of 15 years imprisonment.

[**17**] For those reasons the appeal against conviction is allowed.

> **(i) The conviction for defilement under section 8(1) as read with section 8(2) of the Sexual Offences Act is quashed and the sentence of life imprisonment set aside.**
>
> **(ii) In substitution, the appellant is convicted for defilement under section 145(1) of the Penal Code as amended by Act No. 5 of 2003 and is sentenced to 15 years imprisonment with effect from the date he was sentenced by the magistrates court, that is, 15th July, 2009.**

Dated and delivered at Nairobi this 6th day of August, 2019.

E. M. GITHINJI

....

JUDGE OF APPEAL

HANNAH OKWENGU

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR