IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, MAKHANDIA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 71 OF 2016

BETWEEN

ROBERT WAFULA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 4th February, 2016

in

HC. CR.A. No. 176 of 2014)

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JUDGMENT OF THE COURT

This is a second appeal and by dint of **section 361(1) (a)** of the **Criminal Procedure Code** we are mandated to deal only with issues of law but not matters of fact that the two courts below have made findings upon unless it is shown that there has been a misdirection in the treatment of facts or findings of facts are not based on evidence. This statement of the law has been stated and re-stated in many decisions that have come forth from this Court such as **Thiongo v Republic [2004] 1 EA 333.**

We bear that mandate in mind as we consider what is raised in this appeal.

At about 6 p.m. on 5th November, 2012 **JN (PW1)**, a pupil at a local school was sent by her mother **SNS (PW2)** to go and buy paraffin at a local shop near Malava town. She was dressed in her school uniform. It was a rainy evening and this made PW1 to shelter at the shop where she had bought paraffin. According to her as she sheltered, the appellant came to her, picked her up and carried her to a house nearby. He locked the door, placed her on the bed, removed her clothes and defiled her at least 3 times in the course of the night. In the morning he locked her in the room and left for work. Meanwhile, the previous evening and night her mother PW2 upon her daughter not returning home from the errand she had sent her for mounted a search with neighbours around their home and at the shops. But they did not find her. They retired to bed, woke up at 5 a.m. the following morning when they resumed the search. She went to report the matter to the police and while at the police station two people arrived and stated that they had heard a child crying in a house. The mother, neighbours and police went to the house and forced the door open. They found the girl child sitting on the bed dressed in the school uniform and rescued her.

In testimony before the trial court, SNS produced her daughter's birth certificate **Serial No. 775499** showing that JN was born on 10th August, 2003. According to this witness upon reporting the incident to the police the appellant disappeared from the area and was not arrested until May 2013.

There was then the evidence of **LM (PW3),** a farmer in the area who testified that on the morning of 6th November, 2012 the appellant went to her house, woke her up and instructed her to make tea and take it to his house because there was a visitor there. She did as instructed and when she took tea to the appellant's house she was surprised to find that the visitor was a child in school uniform. She questioned the child but the child remained silent. This witness went to the neighbouring house which belonged to the landlady of the house where the child was and reported the incident. A village elder and police were informed and that is how the child was rescued.

That evidence was backed by the evidence of **EOA (PW5).** She testified that she was the appellant's landlady and that LNS had visited her house and reported the incident where upon taking tea to the appellant's house she had found a child in school uniform. EOA questioned the child but the child did not speak to her.

DB (PW6) was also one of the neighbours and on hearing news of a child in the appellant's house also visited the house and found the child there. He is the one who informed a village elder and the news reached the police.

INW (PW7) was an elder in Malava township. He is the elder who was informed about the presence of a child in the appellant's house. On visiting the house he found it locked and he proceeded to Kabras Police Station where he made a report and when they went to the appellant's house the police forced the door open and the child was rescued.

Kizito Sifuna the Clinical Officer at Malava District Hospital received the complainant the following day on 6th November, 2012. She was escorted by her parents. On examination he found the hymen open and there was spermatozoa cells in the complainant's private parts. He concluded that the complainant had been defiled and he produced P3 Form into the evidence.

Constable Geoffrey Kemboi of Kabras Police Station was the **Investigations Officer** in the case. He received the report of a child who had been abducted and defiled. He arrested the appellant and charged him with the offence of defilement contrary to **section 8 (1) (4)** of the **Sexual Offences Act No. 3 of 2006** particualrs being that on 5th November, 2012 at a place named in the charge sheet the appellant unlawfully and intentionally caused his penis to penetrate the vagina of JN a child aged 12 years. There was an alternative charge of indecent act with a child contrary to **section 11 (1)** of the said **Act**, particulars being that he had touched the vagina of the child.

In the trial which was conducted by the Senior Resident Magistrate, Butali the appellant was found to have a case to answer and was put on his defence. He gave a sworn statement where he stated that he worked in a hotel and had been arrested by people he did not know when he was in a lorry. According to him he was a witness in a case and that he was accused by a witness in that case for betraying him. He was put in a pick up and taken to a hotel where he was forced to take tea. While taking tea he saw police arrive. He was arrested and taken to a police station where he stayed for 3 days. While at the police station a woman came and said that she was his landlady.

The trial court considered the prosecution evidence and the defence offered and found that the offence had been proved to the required standard. The trial magistrate sentenced the appellant to serve 15 years imprisonment.

The appellant filed a first appeal in the High Court of Kenya at Kakamega and in a judgment delivered by Sitati, J. on 4 th February, 2016 the appeal on conviction was found to have no merit and was dismissed. The learned judge found that the sentence imposed by the trial court was unlawful, set aside the same and imposed a sentence of 20 years imprisonment.

Those are the facts and background that have provoked this appeal which is premised on a homemade memorandum of appeal where 4 grounds of appeal are set out. The first ground relates to the age of the victim which according to the appellant was not proved; the appellant then faults the two courts below for not finding that the charge sheet was defective; that the first appellate court erred in failing to establish the authenticity of the birth certificate and, finally, that the High Court failed to consider the appellant's additional submissions.

The appeal came for hearing before us on 1st August 2019 when the appellant who had all along been unrepresented appeared in person. He adopted written submissions which he had filed in the appeal. We have perused those submissions. The appellant submits that the birth certificate produced before the trial court does not match the evidence given by PW1 and PW2 and that there was no age assessment of the victim. He also questions the authenticity of the birth certificate saying that it was part of fabricated evidence. The appellant further submits on medical evidence which revealed presence of spermatozoa in the vagina of the victim that the same should have been subjected to DNA analysis and in the absence of such analysis it is not reliable evidence. In the final part of the submissions the appellant says that the evidence produced was contradictory and was not reliable.

Mr. Peter Muya, learned **Prosecution Counsel** for the respondent had also filed written submission on 29th July, 2019. In those submissions we are reminded of our mandate in a second appeal. He submitted for the State that for the offence of defilement to be proved penetration must be shown and the age of the child should be established and, finally, evidence must be led that the accused was positively identified as the perpetrator of the offence. It is submitted that the age of the complainant was proved through a birth certificate as 9 years at the time of defilement. The respondent further supports the High Court in enhancing the sentence citing **Section 354** of the **Criminal Procedure Code** which allows the High Court to alter a sentence. On the sentence that was enhanced from 15 years to 20 years imprisonment Mr. Muya submits that it was lawful for the High Court to enhance that sentence.

We have considered the record and the submissions made.

As we identified at the outset of this judgment our mandate is limited to a consideration of issues of law only if we find that there are such issues raised in this second appeal.

We agree with the appellant that age of the victim in a defilement case is a legal issue which we are entitled to revisit. This is because under the **Sexual Offences Act** the sentence imposed on an accused person who is convicted in a defilement case is determined by the age of the victim.

Upon consideration of the record and the evidence that was placed before the trial court as evaluated by the High Court the appellant was positively identified as the person who abducted the complainant, took her to his house and defiled her the whole night. In the morning when leaving to go to work he locked her in the house obviously with the intention of coming back later to continue with the act. He had the audacity to instruct a neighbour to prepare and take tea to the complainant. The complainant was found in the house by LM who was alarmed because she found that the appellant's visitor was actually a young girl who was dressed in school uniform. LM informed other witnesses and this is how the child victim was rescued by her parents, neighbours and police. So the two courts below were right to find that the appellant was properly identified as the person who had defiled the complainant and the conviction is sound. There is no merit in the appeal against conviction.

There is then the issue of sentence.

As we have said the appellant had been sentenced by the trial court to 15 years imprisonment but this was enhanced by the High Court on the first appeal to 20 years imprisonment.

We have perused the record of the proceedings before the judge.

On 22nd June, 2015 the judge gave directions that the appeal be heard by a single judge and the appellant be furnished with a copy of the proceedings and the appellant was then remanded in prison custody. When the appeal proceeded for hearing on 29th November, 2015 before the said judge, the appellant presented written submissions which he highlighted in an address to the court. The State Counsel appearing for the Republic made submissions in opposition to the appeal. At no time was the issue of sentence raised before the judge. The issue was raised by the judge who had not invited the appellant or the State to make submissions on the issue.

It has been stated in various decisions of this Court that although the law allows an appellate court to enhance sentence that can only be done when an appellant has been warned of the consequences of proceeding with an appeal when sentence may be altered to his disadvantage. In the case of **Josiah Kibet Koech v Republic [2009] eKLR** which was an appeal regarding a sentence which had been enhanced by the High Court on first appeal it was observed that because the State had not given any notice of enhancment of sentence to the appellant such enhancement was without jurisdiciton.

In **J.J.W. v Republic [2013] eKLR** this Court dealing with an appeal where the appellant had been sentenced to 7 years imprisonment but that sentence had been enhanced to 10 years imprisonment without notice to the appellant and without a cross appeal by the State, it was observed thus in that appeal:

> ***"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 decision 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."***

In the judgment appealed from there was no cross appeal by the State and there was no warning to the appellant that the sentence may be enhanced. In fact the issue of altering sentence was not raised at all in the hearing of the appeal but was taken up by the judge in the judgment. Without such warning it was wrong for the High Court to alter the sentence to the appellant's disadvatage when no warning had been given in that respect. To that extent only does this appeal succeed against sentence.

The appeal on conviction is hereby dismissed but we allow the appeal on sentence by setting aside the sentence of imprisonment for 20 years imposed by the High Court and substituting thereof imprisonment for 15 years as had been imposed by the trial court. The sentence to run from the date of conviction.

Dated and delivered at Kisumu this 21st day of November, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR