IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 149 OF 2017

BETWEEN

NATHAN KHAEMBA MAKOKHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Eldoret, (Kimondo, J.) dated 17th May, 2016

in

HCCRA NO. 199 OF 2011*)*

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JUDGMENT OF THE COURT

Background

1. Nathan Khaemba Makokha, (the appellant) was tried and convicted in the Chief Magistrate's Court at Eldoret for the offence of defilement contrary to ***Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006***. The particulars of the offence against him were that on 23rd day of July, 2010 at [particulars withheld] Farm in Wareng District within Rift Valley Province he unlawfully and intentionally caused penetration with his genital organs namely penis into the genital organ of the complainant, **EMG** (name withheld) a child aged 9 years old.

2. The prosecution called five (5) witnesses while the appellant gave an unsworn statement and called two (2) witnesses.

3. The brief facts leading to the appellant's conviction were that the complainant on 23rd July, 2010 at about 6.00 pm was sent by her mother, **RN (R)** to Mama Abdul's home to return a book. On her way back home, she met the appellant, a teacher at her school, who requested her to accompany him to his house so that he could give her a book that **R** had given to him. When they arrived at the appellant's house, the complainant declined to enter as it was late but the appellant pulled her inside. The appellant then placed her on a table lying on her back and inserted two fingers into her vagina. He then unzipped his trouser and inserted his penis into her vagina. Shortly thereafter, the appellant heard noise at the gate and he let the complainant go. It was the complainant's further testimony in cross examination that on the material night, the appellant's wife was at one **Mama Caro's** house which was about 200 meters from the appellant's house and that the appellant was known to her prior to the incident.

4. The complainant went to her home and reported to **R** what happened to her. R testified that she examined the complainant's private parts and saw that her pant was wet and informed the complainant's father **JGN (J)** that the complainant had been defiled. It was Rose's further testimony that the complainant was born on 7th July 2001 as per the Birth Certificate which was produce as exhibit. The complainant and her parents went to report the matter at Jasho Administration Police Post where they were referred to Kiambaa Police Post. The evidence of James was consistent with that of Rose. He added that he did know the appellant but that he had heard about him from **R** and their children.

5. CPL James Mulama (Cpl. Mulama) who was at the material time attached to Eldoret Police Station testified that on 23rd July 2010 at about 8.30 pm he received a report from the complainant and her parents that the complainant had been defiled by her teacher. **CPL**

Mulama testified that he issued a P3 form and referred the complainant to Moi Teaching & Referral Hospital (MTRH).

6. Dr. Cynthia Chemutai Kibet (Dr. Kibet) a medical officer at MTRH testified that she examined the complainant, and filled the P3 form in which she concluded that the complainant had been defiled based on the physical findings of a torn hymen and inflamed genitalia. Dr Kibet produced the P3 in evidence.

7. In his defence, the appellant gave an unsworn statement. He denied the offence and stated that on the material day he went to his home at about 5:00 pm in the company of his friend, **Dennis Mose** (**Dennis**) whom he was training him to play the keyboard. It was the appellant's further testimony that at 6:30 pm the complainant went to his house alleging that **R** had sent her to collect a book, and that he was in the company of his wife, **Sharon Khaemba (Sharon)** and **Dennis**.

8. Dennis testified that on **23rd August, 2010**, about 4.00 pm, he went to meet the appellant at the school as the appellant was training him to play the keyboard at the appellant's house. It was Dennis' further testimony that from school, the appellant and **Dennis** passed by a church elder's house and thereafter headed to the appellant's house where **Dennis** practiced playing the keyboard until about 9:00 pm. On cross examination, **Dennis** testified that he was not with the appellant on the material day and could not confirm whether the appellant had defiled the complainant or not.

9. Sharon testified that between 6:00 to 7:00 pm on the material day she was at their home with her husband, the appellant, when a girl came and informed them that she had been sent by her mother to collect a book. It was **Sharon's** further testimony that the appellant told her to get the book and give it to the girl which **Sharon** did and the girl left. On cross examination **Sharon** testified that she knew the complainant and **R** but denied knowing **Mama Caro**.

10. The trial magistrate rejected the defence finding the evidence inconsistent and uncorroborated; and ruled that the prosecution had proved its case beyond reasonable doubt. Consequently, the trial magistrate found the appellant guilty, convicted him of the offence and sentenced him to serve 30 years imprisonment.

11. Aggrieved by that decision, the appellant appealed to the High Court on grounds that the investigation into the offence was shoddy; that the learned trial magistrate erred by relying on inconsistent and contradictory evidence; that the learned trial magistrate displayed open bias against the appellant; and that the appellants *alibi* was disregarded.

12. The State opposed the appeal on grounds that the prosecution proved the charge beyond reasonable doubt; that the evidence of the complainant and her mother **"R"** was consistent and was corroborated by medical evidence; that penetration was proved; that the appellant was positively identified; and that his *alibi* was discounted.

13. Upon hearing the first appeal, the learned judge of the High Court (**Kimondo, J.**) found that the evidence of the complainant was largely confirmed by her mother, **R**; that based on the evidence of the complainant, Rose and the birth certificate produced, the complainant was 9 years old at the time the offence was committed; that **Dr. Kibet** corroborated the evidence of the complainant regarding penetration; and that the complainant positively identified the appellant by recognition as her teacher and neighbour and gave graphic testimony on oath about her ordeal, without wavering under cross-examination.

14. The learned Judge further found that the defence alibi weighed against the evidence of the complainant, was unbelievable; that there was nothing on record to show that the appellant had raised any complaint that the trial magistrate was biased or had applied to be heard by another court during the trial; that though the appellant's advocate withdrew in the early stages of the trial, the nature of the charge facing the appellant did not mandate the State to provide him with legal counsel, and the appellant did not seek an adjournment to instruct counsel or intimate to the court that he needed to do so.

15. The learned Judge found that the sentence meted out by the trial court of thirty years imprisonment was unlawful as it contravened ***section 8(2) of the Sexual Offences Act*** which required that the offence of defilement of a child aged 11 years or below attract a mandatory sentence of imprisonment for life.

16. The learned judge concluded that the appellant's appeal had no merit and therefore dismissed it. He also set aside the sentence of thirty years and substituted it with a sentence of life imprisonment.

17. Undeterred, the appellant preferred a second appeal to this Court. The appellant filed a memorandum of appeal on the grounds that the learned Judge erred in law: in failing to re-evaluate the evidence on record as required of the first appellate court; in failing to find that the circumstances in which the appellant was identified was not conducive for a positive identification or recognition nor did it meet the required legal standards; and in failing to consider the appellant's defence.

Submissions

18. Both parties filed written submissions and made oral submissions. When the appeal came before us for hearing. **Mr. Marube**, learned counsel for the appellant submitted that the appellant's right to fair trial was infringed because during trial his appointed counsel withdrew and the appellant was not afforded an opportunity to instruct another counsel. Counsel further urged the court to find that the evidence of the complainant, **R** and **J** was inconsistent and not credible. Counsel argued that when recalled **Dr. Kibet** produced documents in contravention of ***Section 33 and 77 of the Evidence Act***, as she was not the maker of the documents.

19. Ms. R. N. Karanja, Prosecution Counsel, appeared for the State and opposed the appeal. Counsel argued that the appellant had ample time to instruct another counsel and recall witnesses as the entire trial proceeded for several months within which time the appellant was out on bond; that by recalling **Dr. Kibet** to produce the treatment notes, the prosecution laid a proper basis for the medical evidence; that the fact that there was no approximate age of injury on the P3 form did not affect the probative value of the P3 form.

Determination

20. We have considered the record, the rival submissions, the authorities cited and the applicable law. This being a second appeal, our mandate is limited under ***Section 361 of the Criminal Procedure Code*** to consideration of matters of law only. (See ***Chemagong v Republic [1984] KLR 213*** **and** ***Rueben Karari s/o Karanja v Republic [1950] 17 EACA 146***).

21. ***Section 361(1) of the Criminal Procedure Code*** provides that:-

> ***"(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

22. The exception to this rule was clearly set out in the case of ***Karani vs. R [2010] 1 KLR 73*** as follows:-

> ***"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."***

23. The issues for determination are whether the charge against the appellant was proved to the required standard; whether the medical evidence including the P3 form was properly tendered in evidence; and whether the appellant's right to fair trial was infringed due to failure to be given an opportunity to instruct another counsel when his previous counsel withdrew from acting.

24. On the issue of whether the charge against the appellant was proved to the required standard, **Sections 8(1)** and **8(2)** of the Sexual Offences Act provide that:-

> **"8(1). A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

25. Thus, the prosecution had to establish that the appellant committed an act that caused penetration of the complainant; that the complainant was under the age of 11 years: and that the appellant was positively identified as the perpetrator. In the instant appeal there was sufficient evidence adduced by the complainant, her mother **R,** her **father J,** and the medical officer, **Dr. Kibet** which proved that the complainant was born on 7th July, 2001 and was therefore below 11 years at the time she was defiled. The birth certificate which was produced in evidence also confirmed that the complainant was born on 7th July, 2001.

26. Regarding penetration, the complainant testified that she was defiled, and both the trial court and the first appellate court believed that she was telling the truth. **Dr. Kibet** who examined the appellant and filed the P3 form which was produced in evidence confirmed that her findings were consistent the complainant having been defiled, and her evidence provided corroboration of the complainant's evidence on penetration.

27. Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her, that she knew the appellant as *"Mwalimu Nathan Khaemba"* who was her teacher and a neighbour. **R** confirmed in her testimony that the complainant informed her that the appellant had defiled her and that she knew the appellant as the complainant's teacher. The identity of the defiler was therefore clearly established.

28. Moreover, the appellant conceded that the complainant went to his house, and although there were competing versions of what happened at the appellant's house, the learned judge after weighing the defence alibi against the complainant's evidence and that of **Dr. Kibet's**, found the complainant's and **Dr. Kibet's** account believable, and rejected the evidence of **Dennis** (a defence witness) as unbelievable as he faltered on cross examination where he contradicted himself as to whether he was with the appellant on 23rd August, 2010, while the evidence of **Sharon** another defence witness was rejected as not having been corroborated.

29. On our part we have re-examined the evidence and are satisfied that there was sufficient evidence that proved that the complainant went to the appellant's house and that she was defiled by the appellant. We therefore uphold the concurrent findings of the two lower courts, and find that the prosecution proved its case against the appellant beyond reasonable doubt.

30. On the question of whether the medical evidence was properly tendered in evidence, we note that **Dr. Kibet** who filed, signed and produced the P3 form, the primary document, was also its maker. Therefore, nothing turns on the appellant's contention that medical evidence was produced in contravention of ***Section 33*** and ***77 of the Evidence Act***.

31. Regarding the failure to be given an opportunity to instruct another counsel when his previous counsel withdrew from acting, we note from the record that the appellant did not seek an adjournment to instruct counsel or intimate to the court that he needed to do so.

32. The Constitution guarantees an accused person the right to legal representation as well as the right to have an advocate assigned to the accused person by the State and at the State's expense. That right is encapsulated under ***Article 50 (2) (g) and (h) of the Constitution*** that provides as follows:-

> ***"Every accused person has the right to a fair trial, which includes the right;***
>
> ***(g) to choose, and be represented by an advocate and to be informed of this right promptly.***
>
> ***(h) to have an advocate assigned to the accused person by the State and at the States' expense if substantial injustice would otherwise result, and to be informed of this right."***

33. In ***Joseph Kakei Kaswili v R [2017] eKLR*** this Court held that:-

> ***"…although the appellant was arraigned in Court in October, 2010, and therefore after the promulgation of the Kenya Constitution 2010, that apparently guaranteed him free legal aid. But as at that point in time, the said right was merely aspirational. It is only recently that Parliament has put in place legislation to actualize the right guaranteed under Article 50(1) (2) (h), in the form of the Legal Aid Act No. 6 of 2016, effective 20th May, 2016. It is therefore our finding that the State had no obligation to grant free legal aid to the appellant as of right as at the time he was arraigned in court."*** See also ***Thomas Alugha Ndegwa v R [2016] eKLR and Douglas Kinyua Njeru v R. [2015] eKLR."***

34. In the instant appeal, the appellant was arraigned in court on 26th July, 2010 before the promulgation of the ***Constitution of Kenya, 2010***. The impugned judgment was delivered on 7th October, 2011, before the enactment and commencement of the ***Legal Aid Act No. 6 of 2016***. For this reason, we find that the State had no obligation to grant the accused free legal representation at the time he was arraigned in court.

35. Regarding sentence, the appellant was sentenced to 30 years imprisonment by the trial court. Subsequently, the High Court, as a first appellate court, enhanced his sentence to life imprisonment. We note that on 8th October, 2015 the appellant was notified by the respondent that the State intended to apply for enhancement of the sentence imposed by the trial court. The learned judge of the first appellate court also put the appellant on notice that there was a possibility that the sentence imposed by the trial court of 30 years imprisonment could be enhanced if his conviction was confirmed by the first appellate court. The appellant nevertheless, opted to proceed with his appeal.

36. Section 8(2) of the Sexual Offences Act prescribes a mandatory sentence of life imprisonment for the offence of defilement of a child of 11 years and below. In this case, it was established that the complainant was nine (9) years. In ***Francis Karioko Muruatetu & Another v Republic SC Petition No. 15*** as consolidated with ***Petition No. 16 of 2015 (the Muruatetu decision)*** the Supreme Court of Kenya stated that the mandatory nature of the death penalty as provided under Section 204 of the Penal Code denies the Court its legitimate jurisdiction to exercise discretion in sentencing taking into consideration the particular circumstances of each case. This Court in ***Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 (Dismas Wafula Kilwake decision)*** extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing and to take into account the aggravating and mitigating factors in each case. In the instant case, the minor complainant was 9 years old. The appellant offered mitigation in the trial court. He told the Court that the complainant's mother was well known to him and that she framed him. The trial court stated that what the appellant had stated in mitigation amounted to evidence which ought to have been raised during the trial or defence but was not raised. The Prosecutor stated that he had not received the appellant's previous record and that he could be treated as a first offender. There are serious aggravating circumstances in this case. The appellant abused his relationship of trust as the teacher of the minor complainant. He abused that relationship to lure the complainant to his home and sexually assaulted her. The trial court considered the mitigation and noted that the offence for which the appellant was convicted attracts a minimum penalty of life imprisonment. The trial court however exercised its discretion and sentenced the appellant to thirty (30) years imprisonment. The learned Judge enhanced the sentence imposed on the appellant to life imprisonment on the basis that Section 8(2) of the Sexual Offences Act provides for a minimum sentence of life imprisonment. This is contrary to the reasoning in the ***Muruatetu decision*** and the ***Dismas Wafula Kilwake*** decision in regard to the exercise of discretion.

37. This Court in ***Evans Wanjala Wanyonyi v Republic [2019] eKLR*** relied on a ***Christopher Ochieng v R [2018] eKLR*** and ***Jared Koita Injiri v R,Kisumu Criminal Appeal No. 93 of 2014*** where this Court considered the legality of minimum mandatory sentences under the Sexual Offences Act and stated as follows:-"The Supreme Court in ***Francis Karioko Muruatetu and Anor v Republic SC Petition No.16 of 2015*** held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution."

38. Accordingly, guided by the Supreme Court decision in the Muruatetu decision and persuaded by the decisions of this Court in ***Christopher Ochieng v R,*** (supra), ***Jared Koita Injiri v R,*** (supra) and the ***Dismas Wafula Kilwake*** decision as regards sentencing, we are satisfied that the enhanced mandatory life imprisonment imposed upon the appellant by the learned Judge cannot stand as it is evident that the trial Magistrate properly exercised his discretion in imposing the sentence of 30 years. We find it appropriate to intervene and hereby set aside the life imprisonment imposed on the appellant by the learned Judge and substitute the life imprisonment with one of imprisonment for a term of thirty (30) years with effect from the date of sentence by the trial court. We uphold the conviction of the appellant for the offence charged.

39. This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

Dated and Delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

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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.

DEPUTY REGISTRAR