IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL NO. 9 OF 2017

BETWEEN

ABDALLA SWALLEH AWATH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kapenguria (Githinji, J.) delivered on 30th November, 2015

in

HCCRA NO. 7 OF 2015)

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JUDGMENT OF THE COURT

[1] The appellant, **Abdallah Swalleh Awath** was tried before the Principal Magistrate's Court at Kapenguria, of the offence of defilement contrary to **section 8(1**) as read with **section 8(3)** of the **Sexual Offences Act**, with an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. He was convicted of the alternative charge and sentenced to serve twenty (20) years imprisonment.

[2] Being aggrieved by his conviction and sentence, the appellant appealed to the High Court. His appeal was heard and dismissed. The appellant is now before us in this second appeal.

[3] The evidence adduced against the appellant, was that "**EC"** (name withheld), a minor, who was alleged to be five years old was playing outside their house when the appellant, a neighbor approached the child and asked where her father was, and upon establishing that he was not in, lured the child into his house and defiled her.

[4] A C, the mother to EC the minor victim, was resting in her house, as she was unwell. She could hear EC playing outside. She became alarmed when she realized that she could no longer hear EC playing. She called out to SM, another child aged seven years to look for EC. SM knocked the appellant's door, pushed the door, and entered. He found the appellant and EC lying on the bed. Upon getting out of the house EC who was in pain and whose clothes were dressed inside out explained to her mother that the appellant had blocked her mouth and done *"bad manners"* to her. The child was taken to Kapenguria District Hospital where Dansone Litole a clinical officer examined her. The clinical officer confirmed that there was slight opening of the vagina, but there were no bruises on the labia. He explained that the opening was normal and that there was no sign of penetration. The matter was reported to Kapenguria Police Station and the appellant was arrested and charged.

[5] When put to his defence, the appellant gave an unsworn statement explaining how he was arrested from his house. He denied having committed the offence.

[6] In his judgment, the trial magistrate noted that the evidence of the clinical officer who examined EC confirmed that EC was not penetrated. However, the trial magistrate was satisfied that the appellant was found lying naked in bed with EC, and that he intentionally caused his genital organs to come into contact with EC's genital organs. The trial magistrate therefore found the alternative charge of

indecent act proved.

[7] In his appeal to the High Court, the appellant challenged the judgment of the trial court on the grounds that the trial magistrate erred in convicting the appellant on contradictory and doubtful evidence; and improperly shifting the burden of proof to him. The learned judge of the High Court having heard the appeal dismissed it as having no merit.

[8] This being a second appeal, we reiterate what this Court stated **in Dzombo Mataza vs. R, [2014] eKLR*:***

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32.***
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> ***By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

[9] In his memorandum of appeal, the appellant faults the learned judge of the High Court for upholding his conviction on doubtful and contradictory evidence; failing to appreciate that the trial magistrate had shifted the burden of proof to the appellant; failing to appreciate that the prosecution had failed to prove their case to the required standard; and failing to find that the sentence imposed upon the appellant was excessive.

[10] It is evident from the memorandum that the appellant has raised legal issues concerning the standard and burden of proof in the prosecution case. He has also raised an issue regarding identification and the sentence.

[11] In regard to the issue of proof, both the trial court and the first appellate court made concurrent findings that the appellant was found in bed with EC; that both were naked; and that EC complained that the appellant had slept on her and done "tabia mbaya". While the issue of penetration was negated by the evidence of Danson Litole, the Clinical Officer who examined EC and found that there were no bruises or sign of penetration, the learned judge like the trial magistrate came to the conclusion that the action of the appellant of lying naked on the bed with the child was sufficient to prove the alternative charge of indecent act with a child.

[12] We note that **section 11(1)** of the **Sexual Offences Act** states:

> ***"that any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child, and is liable upon conviction to imprisonment for a term of not less than ten (10) years."*** *(Emphasis added)*

[13] Under **section 2** of the **Sexual Offences Act:**

> ***"indecent act' means any unlawful intentional act which causes –***
>
> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration."***

[14] From the facts that were established before the trial magistrate, it is evident that there was contact between the appellant and EC, as they were both lying naked in bed. This contact was intentional on the part of the appellant. It was also an indecent act as there was contact between the appellant and the genitals of EC. Contrary to the contentions of the appellant, the evidence of EC and SM was consistent with that of EC's mother, and that of the clinical officer who confirmed that though there was no penetration, there was evidence of contact with EC's genitals.

[15] We have noted with concern that the evidence of SM during the initial trial and the *de novo* trial, had a slight difference. During the initial trial, SM explained that he found the appellant talking with EC, and that EC was eating PK (chewing gum) and having another in her hands. SM also talked of EC coming from the bedroom but did not explain whose bedroom. Under cross-examination the witness SM explained that he knocked at the door of the appellant's house and the complainant came out of the house holding one PK and chewing another.

[16] This version was different from the evidence given in the *de novo* trial to the extent that SM testified to knocking the appellant's door, going inside the house and finding the appellant and EC in bed both being naked. We appreciate that the trial court had to go by the evidence adduced in the *de novo* trial. However, the evidence adduced by SM was very crucial in the establishment of the offence alleged against the appellant, and was in fact relied upon by the trial magistrate in convicting the appellant of the offence of indecent act with a child. The credibility of the evidence of SM was therefore important.

[17] We note that the second version of SM's evidence was actually consistent with the evidence of EC who was consistent, both in her evidence in the initial trial and in the de novo trial, that the appellant removed her clothes and put her on his bed, and that the appellant had also removed his clothes. Both the lower courts made concurrent findings that EC was truthful and that her evidence was reliable. We are satisfied that the finding that the appellant was on the bed with EC and that both were naked was supported by evidence.

[18] In his defence, the appellant simply denied having committed the offence. In light of the evidence that was before the trial judge, that defence was rightly rejected as all the ingredients of the offence of indecent act with a minor were established. We find that the prosecution proved its case to the required standard, and there is no substance in the appellant's contention that the trial magistrate shifted the burden of

proof to him or that the 1st appellate court erred in upholding his conviction.

[19] As regards the sentence, **Section 11** of the **Sexual Offences Act** quoted above (paragraph 12) provides that a person who commits an indecent act with a child is:

> ***"liable upon conviction to imprisonment for a term of not less than ten years."***

[20] In ***Opoya v Uganda [1967] EA 752,*** it was held that the words "shall be liable on conviction to suffer death" in section 273(2) of the then Uganda Penal Code provided a maximum sentence only and the court had discretion to impose the maximum sentence of death or the lesser sentence of imprisonment. In our view, the appellant's case is distinguishable from the Opoya case as the words *"is liable"* and *"not less than"* in section 11 of the Sexual Offences Act must be read conjunctively, and this means that the trial magistrate is obliged to impose a minimum sentence of ten years but can exercise discretion in imposing a sentence that is more than the minimum of 10 years that has been provided in the statute.

[21] We are fortified in our view by section 26(2) of the Penal Code that provides as follows:

> ***"26.***
>
> ***(1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.***
>
> ***(2) 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.***
>
> ***(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:***
>
> ***Provided that –***
>
> ***(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;***
>
> ***(ii) Repealed)"***

[22] Section 26(2) of the **Penal Code** is applicable herein as the Sexual offences Act has clearly provided a penalty that provides for a minimum of ten (10) years, and this gave the trial magistrate the discretion to sentence the appellant to a term of imprisonment of ten years and above. The trial magistrate having heard the appellant's mitigation, sentenced the appellant to twenty years imprisonment stating as follows:

> ***"I have considered what the accused has told the Court in his mitigation. The offence herein is however serious and the survivor is a child under the age of ten years."***

[23] The sentiments expressed by the trial magistrate reveal the considerations that he took into account in exercising his discretion as he imposed the sentence on the appellant that was double the minimum provided. Under section 361 of the Criminal Procedure Code severity of sentence is a matter of fact, and therefore not open to consideration by this Court on a second appeal. Nevertheless, in this case there is an issue that arises from the sentence other than the severity. This is whether the trial magistrate properly exercised his discretion in imposing double the minimum sentence provided by the statute. This was a legal issue that the first appellate court ought to have addressed.

[24] We note that in dismissing the appeal against sentence the learned judge of the first appellate court did not address the exercise of discretion by the trial magistrate in order to determine whether there was any justification for the first appellate court to interfere with the sentence on that ground. This was an error on the part of the learned judge.

[25] The exercise of discretion in sentencing is a judicial function that must be exercised rationally and fairly, and not arbitrarily. While an appellate court would not ordinarily interfere with the exercise of discretion, it will interfere if it is apparent that the trial magistrate took into account extraneous matters or failed to take into account relevant matters. In the appellant's case, the Sexual Offences Act under which he was charged provided a minimum sentence. It is clear from this statute that the legislature taking into account the nature of the offence, and the fact that the victim of the offence is a child, tampered the discretion of the trial magistrate by providing a minimum sentence of ten (10) years.

[26] While the trial magistrate had discretion to impose a sentence that was more than the minimum provided, there had to be some justification for the exercise of that discretion. In this case there was no evidence of any aggravating circumstances to justify the enhancement of the minimum sentence provided by statute. Indeed, the reasons for the minimum sentences provided by the statute were precisely the same factors that the trial magistrate took into account in imposing a sentence that was way beyond the minimum.

[27] In ***Sajile Salemulu and another vs Republic [1964] EA. 341***, a three-judge bench of the High Court allowed an appeal against sentence holding that it was wrong to increase a minimum sentence provided under a statute merely because the offender had a previous conviction. Biron J in the leading judgment stated, *inter alia*, as follows:

> ***"In assessing the appropriate sentence, the chief determining factor is the offence itself. Where there is no prescribed minimum or maximum penalty, the court has complete discretion as to what sentence it considers appropriate. Where there is a prescribed maximum and minimum, the court's discretion as to what is the appropriate penalty is limited to the range between the two extremes. The prescribed minimum penalty is the appropriate one where there are no aggravating features. And even where there are aggravating features, the prescribed minimum penalty may still be adequate."*** (Emphasis added).

[28] We find that in enhancing the minimum sentence that was provided by statute, the trial magistrate did not properly exercise his discretion, as he failed to appreciate the justification for the minimum sentence. In enhancing the minimum sentence to double the minimum provided the trial magistrate prejudiced the appellant as the sentence had the effect of punishing the appellant twice. In the circumstances, we find it appropriate that we interfere with the improper exercise of discretion in sentencing.

[29] Accordingly, we allow the appellant's appeal against sentence and set aside the sentence imposed on the appellant of twenty (20) years imprisonment and substitute thereto a sentence of ten (10) years imprisonment. The appellant's appeal against conviction is dismissed.

Those shall be the orders of the Court.

Dated and delivered at Eldoret this 20th day of September, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

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.