IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL NO. 89 OF 2016

BETWEEN

ALEX KIPCHIRCHIR KIPTOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret, (C. Kariuki, J.) delivered on 24th July, 2015

in HCCRA NO. 51 OF 2012)

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JUDGMENT OF THE COURT

[1] Alex Kipchirchir Kiptoo, who is the appellant herein, was tried and convicted of the offence of defilement of a girl contrary to **section 8(3)** of the **Sexual Offences Act** No. 3 of 2006. The victim of the alleged offence was CK (name withheld) a child aged 12 years. The appellant was sentenced to serve thirty (30) years imprisonment. Being aggrieved, he appealed to the High Court against his conviction and sentence. His appeal was heard and dismissed by the High Court (C. Kariuki J).

[2] The appellant is now before us in a second appeal against the judgment of the High Court. In his memorandum of appeal filed in person, the appellant has raised four (4) grounds. He contends that his conviction was improper as no birth certificate was produced by the prosecution to prove the age of the CK; that the evidence of the prosecution fell short of proving the case against the appellant, as the appellant was not properly identified; that the learned judge erred and misdirected himself in finding that the appellant was identified by a mark on his face and chest; and that the learned judge erred in upholding the appellant's conviction by relying on the evidence of a witness who had not named the appellant in the first report.

[3] During the hearing of the appeal the appellant filed supplementary grounds and written submissions, which he relied upon. The supplementary grounds were: that the appellant was prejudiced during the trial as the magistrate failed to inform him of his right to representation; that he also suffered further prejudice as he was not given statements of prosecution witnesses who testified at the trial; that there was no DNA test carried out on the appellant and the victim; that the investigations were poorly conducted; that the first appellate court failed to properly evaluate the evidence that was adduced before the trial court; or to find that his *alibi* defence was rejected without proper reasons.

[4] In his written submissions, the appellant maintained that he was disadvantaged during the trial, as he did not have a lawyer to represent him; that on several occasions he asked for statements of prosecution witnesses, but despite the court making orders for him to be supplied with the statements, none was supplied. The appellant maintained that this was breach of his right to a fair trial under **Article 50(2)** of the **Constitution.**

[5] Another issue taken up by the appellant in the submissions, was the alleged failure by the trial magistrate to comply with **section 36(1)** of the **Sexual Offences Act** that required the court to direct that appropriate samples be taken from the appellant for the purposes of forensic and other scientific testing. The appellant maintained that no post rape report or forensic expert evidence having been adduced, the prosecution case was not proved beyond reasonable doubt.

[6] Further, the appellant took issue with the evidence of CK, questioning why she took long to report the matter to the police, and why it took long to have the appellant arrested. He contended that it was obvious that CK was not sure of who the assailant was and was dependent on other people to implicate the appellant. Further the appellant challenged the evidence of Luka Kipchumba (Luka) who purported to have identified him (appellant) questioning why the witness never gave the name of the appellant to the family of CK or to the Chief or police.

[7] Finally, the appellant pointed out that he gave an alibi defence which was not shaken by the prosecution evidence and that the first appellate court failed to properly evaluate the evidence. He urged the Court to give him the benefit of doubt, accept his *alibi* defence and allow his appeal.

[8] Mr. Zachary Omwenga, Senior Assistant Prosecution counsel, who appeared for the State submitted that the incident occurred in broad daylight; that the victim knew the appellant by appearance and was able to identify some peculiar features on the appellant; that the evidence of the victim was confirmed by her mother and Luka who was the one who rescued the victim; that Luka testified that he saw the appellant as he ran away; and that Luka identified the appellant whom he knew well.

[9] On the issue of age, Mr. Omwenga submitted that the victim gave her age as twelve (12) years, and that this was confirmed by her mother. Counsel urged the court to reject the appellant's contention that he was denied a fair trial and dismiss his appeal.

[10] We have carefully considered this appeal and the respective submissions made before us. Our mandate as a second appellate Court is by virtue of section 361(1) restricted to matters of law only. We are also alive to the fact that in considering this appeal, we must give deference to the concurrent findings of the two lower courts.

[11] In arguing the appeal, the appellant raised several legal issues that we identify as follows: whether there was breach of the appellant's right to a fair trial; whether the first appellate court properly re-evaluated the evidence that was adduced in the trial court and arrived at its own conclusions; whether the ingredients of the charge against the appellant were established; whether the case against the appellant was proved to the required standard; and whether the appellant's defence of *alibi* was given due consideration.

[12] Article 50(2) of the **Constitution** provides that every accused person has a right to a fair trial and this right includes several aspects of the criminal trial. Of importance are the following rights in the criminal trial process:

> ***"(a) to be presumed innocent until the contrary is proved;***
>
> ***(b) to be informed of the charge with sufficient detail to answer it;***
>
> ***(c) to have adequate time and facilities to prepare defence;***
>
> **…**
>
> ***(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 State's expense, if substantial injustice would otherwise result, and to be informed of this right promptly; …***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

[13] During the first appeal, the appellant raised eight (8) grounds in his memorandum of appeal. We reproduce the same herein verbatim as follows:

> **"(i) That the trial magistrate erred in law and facts by failing to consider that the prosecution witnesses did not give a satisfactory identification as per the forces standing orders Chapter 46.**
>
> **(ii) That the trial magistrate erred in law and facts in convicting me on contradictory and inconsistent prosecution evidence that was legally inadmissible.**
>
> **(iii) That the trial magistrate erred in both law and facts by failing to put into account that his instant case was not given an exhaustive and conclusive investigation to link me to the alleged offence e.g. no vital witnesses testified (the elder & Kyalo). No DNA or any forensic examinations done to ascertain my involvement in the said offence.**
>
> **(iv) That the trial magistrate erred in law and facts by not considering the questionable mode of arrest of 1 of the appellant and the motive of the complainant's failure to promptly reporting the alleged incident to the authority.**
>
> **(v) That the trial magistrate erred in law and facts by failing to independently analyze and evaluate the evidence before drawing conclusion as required by law.**
>
> **(vi) That the trial magistrate erred in law and facts by imposing a very harsh and improper sentence in the circumstance without the prosecution providing its case beyond reasonable doubts.**
>
> **(viii) That the trial magistrate erred in both law and facts by rejecting my defence in totally without giving concise reasons**

for doing so.

(ix) I pray to be furnished with a copy of certified trial proceedings in advance to prepare my supplementary grounds".

[14] It is evident that the appellant did not raise the ground of the alleged violation of his right to fair trial in the first appellate court. We have perused the record of the trial court and have also noted that the appellant did not raise any issue regarding his need for representation in the trial court. Moreover, the hearing of the appellant's case proceeded from 22nd March, 2011 to 6th March, 2012 when the judgment was delivered. Under **Article 261(1)** of the Constitution as read with the 5th Schedule to the Constitution, the right to fair hearing under Article 50 was to be implemented within four (4) years. Article 50(2)(g)&(h) were given effect through the Legal Aid Act No. 6 of 2016 whose date of commencement was 10th May, 2016. This means, that even assuming that the appellant was likely to suffer substantial prejudice, no legislation had been passed to implement Article 50(2)(g)&(h) at the time of the appellant's trial. The appellant's right to have an advocate assigned to him by the State and at State's expense could not therefore be actualized. We would accordingly reject this ground of appeal.

[15] In regard to re-evaluation, of the evidence the first appellate court was alive to this responsibility and directed itself as follows:

> ***"In other words, the first appellate court must weigh conflicting evidence and draw its own conclusions. It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".***

[16] The following extract from the judgment reveals the examination carried out by the learned judge:

> ***"From PW1's evidence which was collaborated (sic) by PW6 (i.e. the Doctor), it is clear that there was penetration. Indeed PW1 in her evidence stated that the appellant removed 'his thing and … he did bad manners to my private parts (points to vagina) I felt pain when he did that to me.' The medical examination confirmed there was penetration. This was the evidence of PW6 who examined PW1 and produced the P3 form. Further, PW1's evidence was sufficiently collaborated (sic) by the evidence of PW3 who saw the appellant running from the scene and found PW1 crying. He helped by ferrying her to her home. To me all this evidence is cogent and was not rebutted and is sufficient to show that there was penetration, an essential element of an offence of this nature. In my view the evidence was not only overwhelming but manifestly reliable."***

[17] It is evident that the learned judge revisited the evidence of the main witnesses and addressed the key elements of the offence of defilement. Further, the learned judge considered the defence of the appellant, and finally came to the conclusion that:

> ***"the defence did not rebut the serious allegations made in support of the charges against the appellant".***

[18] That conclusion was an unfortunate misdirection, as the learned judge appeared to imply that the appellant was under a duty to rebut the prosecution evidence. In other words, the learned judge implied that the weakness of the defence lent credence to the prosecution case. The correct position is that, the appellant was not under a duty to prefer any defence. Under Article 50(2)(1), the appellant had a right to remain silent and not to prefer any defence. The burden still remained on the prosecution to prove its case beyond any reasonable doubt notwithstanding the defence preferred or not preferred by the appellant.

[19] Notwithstanding the slip by the learned judge, we are satisfied that the misdirection did not prejudice the appellant. This is because our re-examination of the evidence reveals that there was ample evidence against the appellant. Luka saw him running and the complainant immediately appeared screaming and reported to Luka that the appellant had defiled her. The evidence of the complainant was consistent with the evidence of her mother and the doctor who confirmed that there was partial penetration of the complainant's genital organs. Although the appellant attempted to run away, he was subsequently arrested as PW3 had given his identity and the Chief and village elders had been alerted.

[20] The particulars of the charge against the appellant stated, *inter alia*, that: he

> **"Intentionally and unlawfully committed an act which caused penetration by use of his genital organs namely penis into the genital organs namely vagina of CK a child aged twelve (12) years".**

[21] This means that in order to establish the charge against the appellant, there was need for proof that the appellant penetrated the genital organs of CK and that she was a minor aged twelve (12) years. As is apparent from the extract of the judgment already quoted (Paragraph 16 above), the learned judge addressed the issue of penetration, and came to the same conclusion as the trial magistrate that there was penetration.

[22] As regards the issue of age the learned judge properly directed himself by referring to the case of **Kaingu Alias Kasomo vs Republic Cr Appeal No 504 of 2010,** where it was held that the age of the of the victim of a sexual assault under the Sexual Offences Act has to be proved as an essential ingredient of the charge.

[23] Both CK and her mother testified that CK was 12 years old at the time the offence was committed. This evidence was consistent with the P3 wherein CK's age was estimated as 12 years, as well as the CK's immunization card that showed that she was born on 10th October 1998 and was therefore 12 years old. Therefore, we are satisfied that CK's age was established as 12 years.

[24] Similarly, the learned Judge addressed the issue of identification and like the trial magistrate arrived at the conclusion that PW3 who

knew the appellant before, saw him running away from the scene of the crime; and that CK also identified the appellant. We come to the conclusion that the learned judge properly re-evaluated the evidence and arrived at the same conclusions as the trial court. In our view, there was sufficient evidence to sustain the appellant's conviction.

[25] As regards the sentence, the trial magistrate having convicted the appellant and heard his mitigation stated as follows:

> ***"I have considered offence and mitigation of accused. The offence is serious and need to be discouraged especially when done to children like minor herein who are defenseless. I do sentence the accused to thirty years in jail."***

[26] The appellant was charged under section 8(3) of the Sexual Offences Act that provides that:

> ***"A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction for a term of not less than 20 years."***

[27] Therefore, a minimum sentence of twenty (20) years has been provided by the legislature taking into account that the victim of the offence is a child of between the ages of twelve and fifteen years. Although in sentencing a magistrate would have discretion to impose a sentence beyond the minimum of twenty years that discretion would need to be exercised judicially. In this case, the reasons that were given by the trial magistrate for imposing the sentence of thirty years was precisely the same reasons for the legislature setting the minimum sentence for the offence as twenty years imprisonment. In the absence of any other aggravating circumstances, the trial magistrate was not justified in exercising his discretion to sentence the appellant to a term of imprisonment that was way beyond the minimum of twenty years provided in the statute.

[28] The upshot of the above is that we find no substance in the appeal against conviction and dismiss the same; we allow the appeal against sentence to the extent of setting aside the sentence of thirty years and substituting thereto a sentence of twenty years.

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