



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), SICHALE & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 33 OF 2016

BETWEEN

NEWTON MWANIKI GATAMBA .....APPELLANT

AND

REPUBLIC..... RESPONDENT

*(An appeal from the judgment and decree of the High Court at Kerugoya( R.K. Limo, J.) dated on 29<sup>th</sup> April, 2015*

in

H.C.CR.A NO. 9 OF 2014)

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JUDGMENT OF THE COURT

This is a second appeal from the original conviction and sentence by the acting Senior Resident Magistrate (M. Onkoba) made on 4<sup>th</sup> February, 2014. Our mandate in such an appeal as provided by **section 361(1) (a)** of the **Criminal Procedure Code** is to consider only issues of law but not matters of fact that have been tried by the trial court and evaluated on first appeal. Our jurisdiction does not extend to looking at matters of fact and we shall only look at those facts in this appeal for purposes of satisfying ourselves whether the trial court and the first appellate court carried out their mandate as required by law. For a judicial enunciation of the duty of this Court on a second appeal like this one, see the recent case of **Patrick Kimanthivs Republic [2018] eKLR** which cited with approval, the earlier case of **Dzombo Mataza vs. R [2014] eKLR** where the confines of our jurisdiction were stated to be:

***“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. 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”.***

The appellant, **Newton Mwaniki Gatamba** was charged before the Magistrate’s court at Gichugu with the offence of defilement contrary to **section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on 17<sup>th</sup> day of February, 2012 between 8 and 9 pm at [Particulars Withheld] Academy in Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of **F.W**, a child aged 13 years. In the second count he was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the said Act, particulars being that on the said date and at the same place, he intentionally touched the buttocks, breasts and vagina of the said child aged 13 years with his penis.

The concurrent facts reached by the two courts below were that the appellant was a teacher in that school. On the material day which was a Friday, he was the teacher on duty and after pupils had had their supper there was a worship prayer service that took place at the dining hall from about 6.30 p.m. There was a blackout as lights had gone off and the service was conducted by a priest who used artificial light. When the service ended at about 8.00 p.m. the complainant, (F.W) who was accompanied by other pupils, decided to visit her classroom to return a bible which she had carried to the service. On the way she encountered the appellant who spoke to her and instructed her to go to Class Three. The complainant complied and was joined at the said classroom which was in darkness by the appellant. The appellant used a phone light to illuminate the room. He ordered the complainant to stand by the wall near the door and proceeded to remove her pants, undressed himself and proceeded to defile her. She screamed for help but he stopped her, warning her of dire consequences. The ordeal went on for

about an hour after which the appellant left, warning the complainant not to tell anybody about what had happened. The complainant carried her blood stained under pant and went back to the dormitory where she slept. When she woke up the next morning, she noticed blood oozing from her private parts. She informed **PW 2 CNO**, a pupil aged 13 years. CNO advised the complainant to report the matter to the school authorities but it was not possible to do so immediately as there were visitors at the school. The complainant reported the matter the next day, Sunday to **PW 4, Cyrus Nahashon Njage** who was the director of the academy. He in turn instructed **PW 3 Isabel Muthoni Gachu** who was the matron of the school to establish facts from the complainant. This later witness escorted the complainant to Kerugoya District Hospital where she was examined and admitted for further treatment. She spoke to the complainant's mother and informed her of the incident which led to the complainant being transferred from the school to another school.

The complainant testified that she recognized the appellant through his voice because he was her teacher and also because he switched on his phone which had a light. **PW 2 CNO** confirmed that the complainant had reported to her of the ordeal she had gone through. **PW 5 Mercy Wamuyu Gichuki** was the Clinical Officer attached to Kirinyaga Sub District Hospital. He received and examined the appellant and did not find any injuries on his penis.

**PW 6 Hezron Macharia Maina** was a Clinical Officer at Kerugoya District Hospital. He was requested by the Officer Commanding Station, Kirinyaga Police Station, to examine the complainant whose age he gave as 13 ½ years. On receiving the complainant, she told him that she had been defiled by a person well known to her who was her teacher. On examination he found small tears on both the labia majora and the labia minora. The hymen was stretched and broken on the upper part which he called the 11 o'clock position. The complainant had a whitish vaginal discharge and the witness confirmed that the complainant had been defiled. He produced P3 form as part of the evidence.

The report on the incident was received by **PW 7, No. 88586 Martin Mwalavu** attached to CID office Kirinyaga East District. He visited the school where he carried out investigations and arrested the appellant.

**PW 8, Corporal Eunice Mutiso** was the investigations officer who after satisfying herself of the validity of the complaint made charged the appellant with the offence.

That was the material that was placed before the trial court on which it was found that the appellant had a case to answer: he was accordingly put on his defence. In a sworn defence, the appellant stated that although he was a teacher at the school, he was in poor health as he was HIV positive. He further stated that he had secured a teaching job at the same school a few months before the date of the alleged offence. According to him, the complainant was heavier than him due to his medical condition and she was also taller than him and it was not possible for the offence to have occurred as was stated by the prosecution. According to him, on the evening in question, he did not go to the dining hall where the prayers were taking place but remained outside where he chatted with the school watchman and finally went home at about 9 pm where he joined his wife **DW 2 Lilian Njeri Njagi**. He further stated that the following Sunday, he was summoned by PW 4 where the allegation about defilement was made and that he was shocked as he had not committed the offence. He was later arrested and charged with the offences. In further evidence, he told the trial court that because of his medical condition, he had been counseled and advised not to engage in sex as engaging in sexual activity may lead to deterioration of his health status. His wife **Lilian Njeri Njagi** was in the house on the material day, she confirmed that the appellant was on duty in the evening at the school and that he had come to the house at 8.45 p.m. in the company of the school's watchman. She later heard word going around the school that her husband had defiled a pupil and stated that at that time, she was not engaging in sexual activity with her husband due to his medical condition.

**DW 3, Dr. Muthee Muriithi**, was a medical officer in private practice who had worked in the public service for over sixteen years. Shown discharge summary documents from Kerugoya District Hospital he confirmed that there were small tears on the labia minora and an indicator of a small one centimeter tear at 11 o'clock position on the hymen. According to him, if the injuries had been caused by penile penetration, bruises or signs of inflammation were likely to be seen on the penis. His evidence seemed to confirm that sexual activity had taken place although he would again contradict this by claiming that no sexual activity had taken place.

The trial magistrate analyzed the totality of the evidence and found that the prosecution had not proved count 1 on defilement and the appellant was acquitted of that offence. The magistrate however found that the prosecution had proved to the required standard that the appellant had committed an indecent act with a child which was the substance of Count 2. He was accordingly convicted and sentenced to serve 10 years imprisonment. He was dissatisfied with those findings and filed an appeal at the High Court of Kenya at Kerugoya. The appeal was heard by R. Limo J., who in a judgment delivered on 29<sup>th</sup> of April, 2015 found no merit in the appeal and dismissed it. The learned Judge found that the trial magistrate had erred in dismissing Count 1 and found that the trial magistrate should have convicted the appellant on that Count 1. He exercised his discretion under **section 354 (1) (ii)** of the **Criminal Procedure Code** and altered the findings of the trial magistrate and substituted thereof a finding of guilt against the appellant on Count 1 under **Section 8(1) (3)** of the **Sexual Offences Act**. The Judge reversed the earlier sentence and imposed a term of imprisonment of 20 years.

Those are the findings that have provoked this second appeal which is premised on some home grown grounds of appeal drawn by the appellant. In the first ground, the learned Judge is faulted for reversing the sentence imposed by the magistrate. The Judge is also faulted for what the appellant says is dismissal of the defence without giving cogent reasons for doing so. It is also said that the Judge erred in law in arriving at findings which were contrary to the evidence on record. There is also a complaint about identification of the appellant which is said to have been made in error. It is therefore prayed that we allow the appeal.

When the appeal came up for hearing before us on 23<sup>rd</sup> July, 2018, **Mr. Davidson Warutere**, learned counsel appeared for the appellant while learned Senior Assistant Director of Public Prosecutions **Mr. Peter Mailanyi** appeared for the respondent. Counsel for the appellant had filed a memorandum of appeal on 28<sup>th</sup> July, 2016 but, at the hearing, he abandoned the same and wished to rely on the home grown grounds which we have already set out in summary in this judgment. Counsel submitted that it was wrong for the High Court to enhance the sentence from 10 years to 20 years as, according to him, a retrial should have been ordered. In further submissions, it was Mr. Warutere's view that the High Court had not analysed the evidence and that findings were at variance with the evidence. According to counsel, identification of the appellant was in doubt because the light was insufficient and it was not clear how long the incident had taken.

In opposing the appeal Mr. Mailanyi submitted that although *voire dire* had not been conducted, the complainant was 15 years old when she testified and there was no need for the same. On enhancement of sentence, counsel submitted that the offence of defilement depended on the age of the complainant which in the case before the trial court, the complainant was 13 years old and the sentence prescribed was 20 years. Counsel supported the High Court for exercising its power under **section 354** of the **Criminal Procedure Code** by reversing the sentence imposed by the trial magistrate and substituting thereof a sentence of 20 years imprisonment. According to Mr. Mailanyi, this was a correction which the law allowed. On identification it was his view that the appellant had been properly identified by the complainant through his voice and that they had been together for one hour in the classroom. Further that the evidence of PW 2 placed the appellant at the scene of the offence. If there were any contradiction in the prosecution case, submitted counsel, they were minor and did not go to the substance of the case.

In a brief rejoinder Mr. Warutere submitted that since the appellant had been acquitted of the charge on count 1, it was illegal for the High Court to enhance sentence.

We have considered the record of appeal, the submissions made and the law.

The first complaint in the home made grounds of appeal concerns enhancement of sentence and we would prefer to deal with it as the last issue in this judgment. The other complaints raised by the appellant in this appeal are that his defence was dismissed without being considered; that the Judge reached his findings which were not backed by the evidence and that identification of the appellant could have been made in error.

Looking at the record of appeal the prosecution case was straight forward. It was common ground that the appellant was a teacher at the said school and he was the teacher on duty on the material night. The complainant testified that as she left the dining hall where a prayer worship service had just taken place, she met the appellant who she knew very well as he was her teacher; and that he instructed her to go to class 3. She obeyed the instruction because it was given to her by her teacher. Although the lights had gone off she recognized the appellant's voice and it was her further testimony that she saw him clearly because he used a phone light to illuminate the classroom. She described in detail how he forcefully undressed her, undressed himself and preceded to defile her, warning her of dire consequences if she cried out or if reported the matter to anyone. When the ordeal was over, the complainant went to the dormitory where the other pupils were already asleep but she informed PW2 about it. She informed the director of the school on Sunday, 2 days after the incident because it was the first opportunity she had to report to him, visitors having been present at the school on Saturday and she was unable to approach the director of the school before.

There was medical evidence to show that the complainant had been defiled. The complainant was defiled by a person well known to her and there cannot be any merit in the submission by learned counsel for the appellant that identification could have been mistaken. The complainant knew her attacker who was her teacher. She knew his voice and she saw his face as they were together in the classroom for a whole hour during the incident. There is no room at all for mistaken identity. The trial magistrate and the High Court, on first appeal reached the correct conclusion that the appellant is the person who defiled the complainant. The two courts were correct in dismissing the defence which was in any event far-fetched where the appellant was only claiming that because of a medical condition he could not have committed the offence. It is unfortunate that although he knew that he suffered a condition that could ruin the life of a young person who was his pupil, he misused his position and took undue advantage to defile the complainant. Like the two courts below, we dismiss the defence as lacking in merit.

We now come back to the complaint by the appellant that the learned Judge was wrong to alter the sentence.

The record shows that on 12<sup>th</sup> of March, 2015, the appeal in the High Court came up for hearing. Counsel for the appellant stated that he had filed submissions and that he relied on the same. The State Counsel opposed the appeal and addressed the court at length. He summarized the facts of the case as had been enumerated before the trial court. In the course of the submissions, the learned State Counsel stated:

***“On sentence handed to the appellant was 10 years (sic) the sentence is very lenient. The law provides for 20 years. I ask the court to enhance it under section 354 Criminal Procedure Code”***

Counsel for the appellant did not respond to this but it is recorded:

***“COURT: the appellant is warned on the implications of the Director of Public Prosecution submissions and application for enhancement of sentence. The counsel responds as follows”***

Counsel for the appellant is then recorded as stating that the appellant denied committing the offence, that the appellant should not be asked to prove existence of a grudge and that the trial court had failed to specify what count it was placing the appellant on defence and that it amounted to a mistrial that prejudiced the appellant immensely.

As we have stated in this judgment, the learned Judge exercised his discretion under **section 354** of the **Criminal Procedure Code** and altered sentence from the original sentence of 10 years imposed by the magistrate to a sentence of 20 years imprisonment.

Looking at the record, part of which we have reproduced herein, there is no clear warning at the beginning of the hearing of the first appeal notifying the appellant of the consequences of proceeding with the appeal where sentence could be changed to his disadvantage. The State Counsel as part of his submissions asked that sentence be enhanced.

In a recent case by this Court ***EGK Vs. Republic [2018] eKLR*** a judgment delivered on 6<sup>th</sup> June, 2018, the first appellate court enhanced a sentence from 40 years imprisonment to life imprisonment citing provisions of the said **section 354** of the **Criminal Procedure Code**. We

found on appeal that the first appellate court had no jurisdiction to enhance the sentence without any cross appeal by the State and without giving a warning to the appellant. We considered what had been held earlier in the case of *JJW Vs. Republic* [2013] eKLR where sentence was enhanced without a cross appeal and without a warning to the appellant thus:

*“We now consider the sentence and here we have difficulties in appreciating what the learned Judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned Judge enhanced the sentence. 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 action 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 matter before the Judge on first appeal, the State did not file a cross appeal and there was no clear warning served on the appellant to tell him that the sentence imposed by the trial magistrate could be enhanced. It was wrong, with respect, for the Judge to deal with the issue of enhancement of sentence in the casual manner that we discern from the record. In the absence of a cross appeal by the State and without a proper or any warning given to the appellant, it was wrong for the Judge to enhance sentence. In the premises, we do hereby allow the appeal on sentence to the extent that we reinstate the sentence of 10 years imprisonment imposed by the trial magistrate to be served from the date that that sentence was imposed. We dismiss the appeal on conviction. These then, are our orders.

*Dated and delivered at Nyeri this 11<sup>th</sup> day of October, 2018*

**W.OUKO (P)**

**JUDGE OF APPEAL**

**F. SICHALE**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**