



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO. 17 OF 2015

BETWEEN

DENIS KINYUA NJERU.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Appeal from the Judgment of the High Court of Kenya at Nyeri

(Wakiaga, J) Dated 28th November, 2014

in

H.C.CR. A. NO. 2 OF 2011)

JUDGMENT OF THE COURT

The appellant **Denis Kinyua** was charged, tried and convicted before the Principal Magistrate's court at Runyenjes, for the offence of defilement contrary to **section 8(1)** as read with **section 8(3)**, of the Sexual Offences Act No.3 of 2006 (SOA). The particulars were that on the 27th day of January, 2014 in Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of **DGN**, a child aged 8 years.

The brief facts were that, on the material date at about 4.00pm **DGN**, headed home from [Particulars Wthheld] Primary School alone (the school). On the way, she met the appellant, a *boda boda* operator whom she knew very well as **Njeru**. He invited her to his motor cycle, pretending to take her home. Instead, he detoured into the maize plantation of **Mumbi**, removed her pants, removed his trouser, defiled her, gave her Kshs. 500/= and threatened to kill her if she disclosed the defilement perpetrated against her. In obedience to the threat, **DGN** took the money, went home and kept quiet.

It was not until the 30th day of January, 2014 when inquiries involving PW1, **LL (L)** a teacher at the school, and PW2, **LNN (L)** her father, among others, that the minor disclosed the defilement against her, by the appellant. **L**, reported the incident to Runyenjes Police station. PW5, **PC Musa Nderitu (PC**

Musa) received and booked the report in the OB, issued a P3 Form, and then referred **L** to Karurumo Health Centre. At the Health Centre, PW3, **Jim Mugambi Njeru, (Jim)** examined the child and found lacerations on the vagina; a discharge of pus containing pus cells and red blood cells, and concluded that the child had been defiled and infected with a sexually transmitted disease. The appellant was arrested on the 5th day of February, 2014, charged, and tried by the learned trial Magistrate, **M.O. Obiero** Ag Principal Magistrate, found guilty as charged on the main count of defilement, convicted, and sentenced to serve twenty (20) years imprisonment.

The appellant appealed to the High Court against both the conviction and sentence, resulting in the impugned judgment, of **F. Muchemi, J**, in which the learned Judge found the conviction safe, and affirmed it, but found the sentence of twenty years imprisonment unlawful, set it aside, and substituted it with one of life imprisonment.

The appellant is now before us on a second appeal, raising five (5) supplementary grounds of appeal filed on his behalf by the firm of **Wabandi Gacheru Kariuki Advocates**. In these, the appellant complains that the learned appellate Judge erred in law:-

(1) in failing to uphold the seminal mandate to consider, analyze and evaluate the entire evidence on record thereby relying on insufficient evidence to uphold that the prosecution had proved the charge as against the appellant beyond reasonable doubt;

(2) in enhancing the appellant's term of imprisonment from a lesser sentence of twenty (20) years to a maximum sentence term of life imprisonment, thereby wrongly condemned the trial courts power to sentencing the appellant for a lesser term;

(3) for upholding the conviction based on a grossly defective charge sheet thereby occasioning failure of justice;

(4) for failure to take into account a relevant factor that the prosecution failed to call key witnesses which was adverse to its case; and lastly

(5) in relying on the evidence of only a single witness, PW4 without corroboration.

In a brief submission before us, learned counsel **Mr. Wabandi Gacheru** submitted that there were inconsistencies, discrepancies and contradictions in the prosecutions' case which were fatal to the prosecutions case; crucial witnesses were never tendered to court to give evidence; the trial proceeded on a defective charge, and therefore fatal; the age of the minor was not properly proved; and lastly, that the appellant's sentence was irregularly enhanced by the learned judge without any prior warning to him.

To buttress his submissions, learned counsel cited the case of **DWN versus Republic [2016] eKLR ; BMN versus Republic [2014] eKLR ;** and lastly **Frank Muia Mutua versus Republic [2014] eKLR**, all on the principles that guide the court in the exercise of its mandate when deciding whether to interfere or otherwise with a sentence affirmed by a first appellate court.

In response to the appellant's submissions; **Mr. J. Kaigai**, the learned Senior Assistant Director of Public Prosecutions (SADPP), submitted that the conviction was based on sound uncontroverted prosecution evidence as the appellant elected not to offer any evidence in his defence; the failure to produce the birth notification to prove the age of the minor was not prejudicial as the evidence of PW2, the father and PW4 the minor herself as to her age was corroborated by the estimated age in the P3; that the appellant faced the offence provided for in **section 8(1)** of the SOA as read with **section 8(2)** of the same Act and not as was erroneously stated in the charge sheet; and the learned judge was entitled to revise the unlawful sentence imposed by the trial magistrate and substitute it with the lawful sentence as provided for by law. He further submitted that the prosecution had liberty to call only necessary witnesses and that if any discrepancies, inconsistencies or contradictions were noted in the prosecution's evidence which was not the case, then these were curable under section 382 CPR and did not therefore prejudice or cause injustice to the appellant.

This being a second appeal, our mandate set out in a long line of cases including **Karingo versus Republic [1982] KLR 213** at page 219 is:

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Kariri Slo Karanja versus Republic [1956] 17EA CA 146.”

We have given due consideration to the totality of the record, in the light of the rival submissions set out above. In our view, five (5) issues fall for our determination namely:-

- (1) whether there were any contradictions, discrepancies and inconsistencies in the prosecution’s case;
- (2) whether the trial proceeded on the basis of a defective charge;
- (3) whether crucial witnesses were not called to testify.
- (4) whether the minors age was properly proved;
- (5) whether the high court substituted the appellant’s sentence of twenty years to life imprisonment without warning to him and if so whether the enhancement was lawful.

In response to issue number one (1), the guiding principle was restated in the case of **Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993**; that:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are in consequential to the conviction and sentence”

In **Njuki & 4 others versus Republic [2002] 1KLR 771** the court added *inter alia* that:-

“The main factor to be considered in such cases is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. However, where the discrepancies in the evidence do not affect an otherwise proven case against the accused, a court is entitled to overlook those discrepancies”

The duty of the court when faced with allegations of existence of discrepancies, inconsistencies and contradictions in any trial or appeal is to reconcile these and determine whether these vitiate the trial or not. See **Josiah Afuna Angulu versus Republic Nakuru Criminal Appeal No.277 of 2006** and **Charles Kiplangat Ngeno versus Republic Nakuru CRA No.77 of 2009**.

The discrepancies as to time when the offence was committed came from a child of tender years who could not be expected to be exact on her estimation of time. While those relating to the finding of Kshs. 400.00 with the minor, relate to events after the defilement and are therefore inconsequential to proof or otherwise of the defilement.

With regard to the alleged defective charge, it is not disputed that the trial proceeded on the basis of an offence of defilement contrary to **section 8(1)** of the SOA as read with **section 8(3)** of the Act, although the charge specifically stated that the victim was aged eight (8) years. **Section 8(1)** of the SOA defines the offence of defilement. **Subsection 8 (2)** prescribes the penalty of imprisonment for life, where the victim is eleven (11) years or less, while subsection 8(3) prescribes a penalty of imprisonment for a term of not less than twenty years, where the victim is between the age of twelve (12) and fifteen (15) years.

It was at the time of the drafting of the judgment that the trial magistrate noted the anomaly in the

manner the charge had been drafted despite the age of the victim having been stated to be eight (8) years, and therefore falling within the **subsection 8(2)** penalty age bracket. Despite making observations as above, the trial magistrate went on to find the appellant guilty of the offence of defilement, and sentenced him to twenty years imprisonment as charged.

The learned 1st appellate Judge had this to say about the said sentence:

“The particulars of the charge were correct since the appellant had no issue with them. They were also consistent to the evidence of the key witnesses. The offence of section 8(1) was also correctly stated. It is the section which he defined the offence of defilement while section 8(2), 8(3) and 8(4) give the age bracket of the victim and also guides the court in imposing the sentence upon conviction. In this case the complainant was aged 8 years which was clearly stated in the charge. He age bracket is eleven years and below which is covered by section 8(2). The citing of the section 8(3) instead of 8(2) was wrong. However, the charge was properly framed and all the ingredients of the offence included.”

The concurrent findings of the two courts below were that the age of the victim indicated in the charge sheet as eight (8) years was correct, that the appropriate penalty section that ought to have been indicated in the charge sheet should have been subsection 8(2) of the SOA; and that the indication of subsection 8(3) as the penalty section was therefore an error curable under section 382 of the Criminal Procedure Code. In this regard, both courts below were satisfied that the trial was therefore not vitiated. We affirm that finding as it was based on a correct construction of **sections 8(1) and 8(2)** of the SOA.

As for alleged uncalled witnesses, the general rule of evidence is as provided for in section 125 of the Evidence Act, Cap 80 Laws of Kenya, thus:

“(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them”

Section 143 of the Evidence Act on the other hand provides thus:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact”

In **Bukenya & Others versus Uganda [1972] EA 549**, the predecessor of the court had *inter alia* this to say:-

“(i)....The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent

(ii)....the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case

(iii)....where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution”

The Court went further in **Keter versus Republic [2007] 1EA 13J** to hold *inter alia* that:-

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

The witnesses the appellant complains about were the woman who interrogated the minor at the AP camp and caused her to disclose the defilement perpetrated against her by the appellant; a **Mrs. Muriithi** and the elder sister of the minor, **P**, whose roles were limited to events that related to the discovery of Kshs. 400.00 on the minor, which in our view, had no probative value to the proof or otherwise of the perpetration of the defilement. Its exclusion was not therefore prejudicial to the prosecution case.

As for proof of the age of the minor, it is not disputed that the birth notification document for the minor was simply marked for identification and not produced as an exhibit. The two courts below relied on the oral testimony of **L**, the father of the minor, the minor herself and the age estimate in the P3 form. In **Kaingu Elias Kasomo versus Republic Criminal Appeal No. 504 of 2010** the court stated inter alia that:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be depending on the age of the victim”

See also **Basilio Karoni versus Republic [2016] eKLR**, in which the court approved the holding in **Francis Omuromi versus Uganda**, Court of Appeal Criminal Appeal No.2 of 2000 for the holding *inter alia* that:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age, may also be proved by birth certificate, the victims’ parents or guardian and by observation and common sense.....”

On the totality of the evidence on the record, the two Courts below rightly concurred that the minor’s age was eight (8) years as at the time of the perpetration of the defilement against her, as the said findings were correctly based on the evidence of the minor herself and more particularly the father, **L** and the estimate given in the P3, which are modes of proof of age as affirmed by principles of case law assessed above.

Turning to the last issue of the lawfulness or otherwise of the manner in which the 1st appellate Judge revised the appellant’s sentence, the two courts below concurred that the age of the minor as at the time of the perpetration of the defilement against her was eight (8) years, which finding brought the offence the appellant ought to have been charged with within section 8(1), as read with section 8(2) of the Act. The trial court appreciated that the charge had been wrongly laid under section 8(1) as read with section 8(3), but despite making the said observation, went ahead and convicted the appellant and sentenced him as charged.

On appeal, the respondent did not formally put in a notice of Cross- Appeal, seeking to enhance the sentence, but did so informally in the course of the submission of learned counsel **M/s Matere**, when she stated thus:-

“the sentence was unlawful as provided for in the provision covering the age bracket of 8-10 years. The sentence is provided as life imprisonment though he was sentenced to 20 years. I pray that the sentence be enhanced to life imprisonment”

The appellant who was represented by an advocate before the High Court did not respond to that informal request to enhance the sentence. Neither did the learned Judge administer any informal warning to the appellant of any risk of enhancement of the sentence should the appeal fail, but went ahead to revise it in her judgment, to the detriment of the appellant.

In the case of **DWM versus Republic** (supra) and **BMN Versus Republic** (supra) both of which related to convictions founded on **section 20(1)** of the SOA, the words used in the penalty section were “shall be liable to imprisonment for life”. The court interpreted the said section and stated that the said words did

not mean that the sentence provided for under that section was mandatory and that there was an inbuilt discretion in the said provision donating power to the sentencing court to award any sentence up to the maximum of life imprisonment depending on the peculiar facts of each case.

In **Frank Muia Mutua versus Republic** (supra) the court reiterated the principle that the Court does not alter a sentence unless the trial Judge has acted upon wrong principles or over looked some material factors, or alternatively that the sentence is manifestly excessive in view of the circumstances of the case. In the case of **Shadrack Kipkoech Kogo versus Republic, Eldoret Criminal Appeal No. 253 of 2003** the court of Appeal stated *inter alia* that:-

“Sentence is essentially an exercise of discretion by the trial court and for an appellate court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and that an error in principle must be inferred”

See also **Griffin Versus Republic Criminal Appeal No. 185 of 1998 (UR)**, for the holding *inter alia* that:

“The court of Appeal cannot interfere with the sentence solely on the ground that it was heavy, unless it was also manifestly excessive”

In the light of the above principles, it is our finding that jurisdiction exists in the first appellate court to interfere with a sentence meted out by the trial.

The approach the court has been enjoined to take when determining whether to interfere with such exercise of discretion was broached in the case of **J.J.W. versus Republic [2013] eKLR** wherein, the court made observation *inter alia* that:

“.....It is correct that when the High Court is hearing an appeal in a Criminal case, it has power 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 commencing 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”

.....

The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement”

In contrast to the above, the penalties under the SOA, may be described as “**straight jacket**” penalties leaving no room for the exercise of any discretion by the sentencing court. The question is whether the court should follow the **J.J.W case** (supra) before deciding to interfere with a revision of a sentence by the 1st appellate Judge under the SOA. And whether failure to give such warning was fatal to the enhancement of the sentence.

In **Stephen Ngwili Mulili versus Republic [2014] eKLR** the court was explicit that:

“The Sexual Offences Act removed discretion in sentences particularly where the victims are minors. The sentence provided for is therefore, mandatory and not discretionary”

In **SJM versus Republic [2016] eKLR**, the court went further and made observation as follows:-

“In the present appeal, the first appellate court did not convict the appellant for a more serious offence. It sustained the conviction by the trial court for defilement but interfered with the sentence, which it found to be illegal under section 354 of the Criminal Procedure Code, the High Court has power on an appeal against conviction to increase or reduce the sentence. In Kenneth Kimani Kamunyuu versus Republic [2006] eKLR, this Court reiterated that an appellate court has jurisdiction to interfere with an illegal or unlawful sentence. While we agree that it is good practice for the court to warn an appellant before the hearing of the appeal that should the appeal fail it would be obliged to substitute an illegal or unlawful sentence with the proper sentence prescribed by law, the duty of the appellate court to impose the lawful sentence as prescribed by law is not undermined by the failure to issue such warning or conviction.”

Our view, on the above legal approaches to sentencing under the SOA, is that, since the penalty provisions under the SOA do not call for the exercise of discretion in sentencing, interference by an appellate court is limited to the determination as to the lawfulness or otherwise of the sentence under review.

As for warning, the observation in the case of **J.J.W versus Republic** (supra) that this has no statutory underpinning is correct. It has evolved as good practice on the part of the court in that it accords with the principle of justice and fairness, especially in instances where an appellant is appearing in person, and there is a likelihood of the sentence being revised to his detriment. As observed, in the **JJW versus Republic case** (supra), a cross-appeal is a formal way of warning, but in our view, this does not rule out an informal warning, either by the State or the court *suo motu*, whether at the onset of the hearing, or in the course of the hearing.

In the instant appeal, the State informally applied for enhancement of the sentence, in the course of the hearing of the appeal. It gave reasons for the request, to which neither the appellant’s counsel nor the learned Judge made any remarks. The failure to so remark notwithstanding, the learned Judge went ahead to revise sentence, set it aside because it was unlawful, and substituted it with the lawful sentence prescribed in section 8(2) of the SOA.

This is the action the appellant has termed erroneous. In our view, in instances as the one displayed herein, where the request to enhance the sentence is made informally, and an appellant or his advocate on record does not raise any objection to it or seek any further clarification on the matter, even if the judge seized of the matter does not make any remarks with regard thereto, on the record, an appellant is deemed to have been sufficiently warned of the possibility of enhancement of the sentence to his disadvantage should his appeal fail.

We therefore find that it is not correct as contended by the appellant that no warning was given to him before the sentence was revised to his disadvantage. He was duly warned informally by both the State when it applied informally to enhance the sentence, and also informally by the conduct of the court when it made no remarks for or otherwise against the informal request. His silence thereto should be deemed to be a no objection to the informal request made. Second, whether warning or no warning, in the circumstance of this appeal, the learned judge was entitled to interfere and reverse an illegal sentence, set it aside and substitute it with a lawful one. See **SJM versus Republic** (supra).

The upshot of all the above assessment is that we find no merit in this appeal. The same is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF JUNE, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR