IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE JJA)

CRIMINAL APPEAL NO. 436 OF 2012

BETWEEN

GUSHASHI LELESIT……..…….....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from the conviction/sentence of the High Court of Kenya at Nakuru (Wendoh, J.) Dated 22nd November 2012)

in

H.C.CRA. No. 45 of 2011

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JUDGMENT OF THE COURT

The appellant Gushashi Lelesit was arraigned before the Senior Resident Magistrate's court at Maralal on a charge of unnatural offence contrary to **Section 162(a)** of the **Penal Code**. The particulars were that on the 14th day of March 2011 at around 0900 hours in Samburu District the appellant had carnal knowledge of **S L** against the order of nature. The appellant denied the charge prompting a trial in which the prosecution tendered evidence through five (5) witnesses to prove the charge against him. In summary, the prosecution's case was that on the material date of 14th March 2011, PW3, **T L (T**) who was the father of the complainant minor dispatched him as usual in the company of the appellant who was a well-known neighbour to both T and the minor into the fields to graze the family goats. This was a routine exercise for the minor who was then aged seven (7) years. The minor came back home at around 4.00 p.m. looking sick. When T inquired from him what the matter was with him, he pointed to his, buttocks and told the father that the appellant had sodomised him.T examined the minor's anal area and noticed that it was bleeding, swollen and there was also presence of semen. He alerted other elders among them, PW4, Mpikiyo Lesibia (Mpikiyo) who also examined the minor and made the same observations as those made by T. The elders then arrested the appellant. The next day of 15th March 2011 PW3 and 4 in the company of other elders took both the minor and the appellant to Mararal Police Station. On arrival they were received by P.C. Charles Muturi (PC Charles) who booked the report in the O.B., placed the appellant in the cells, issued PW3 with a P3 form and referred them to Maralal District Hospital for

treatment. At the District Hospital they were received by PW1, Peter Lekalte (Peter) a Clinical Officer. He examined the minor and his observations were that there were tears at the anal entrance which was also swollen and tender. There was blood on the anus. Rectal swab investigation revealed presence of infection. The minor was placed on treatment. PW1 filled the P3 on the same 15th day of March 2011 handed it to police and later produced it in evidence as an exhibit.

In response to the appellant's cross-examination Peter said that no medical examination was carried out on the appellant notwithstanding that he was brought to the police station within 24 hours of the alleged commission of the offence. The minor on the other hand responded that he did not run away after he had been sodomised and went home with the appellant. He also gave police the appellant's name as the person who had sodomised him. PW3 and PW4, reiterated their testimonies that it was at 4.00 p.m. when they observed injuries on the boy that the child named the appellant as the assailant and that is why they arrested him on the same date of the incident but took him to the police station on the next day.

When put to his defence the appellant gave unsworn evidence and called no witness. He denied the offence and said that police never told him why he had been arrested. It was only later when he came to learn of the offence he then faced. He denied committing the same and maintained that he knew nothing about it.

At the close of the trial, the learned magistrate (A.K. Ithuku SRM) in a judgment delivered on the 5th day of July 2011 found the prosecution's case proved beyond reasonable doubt, dismissed the appellant's defence, found him guilty as charged, convicted him accordingly and sentenced him to serve fifteen years' imprisonment.

The appellant was aggrieved and he appealed to the High Court raising various grounds. In a judgment dated the 22nd day of November 2012, R.P.V. Wendoh dismissed the appellant's appeal against conviction and enhanced the sentence to twenty one (21) years.

The appellant was aggrieved. He is now before us on a second appeal. He has raised five (5) grounds of appeal in a homemade memorandum of appeal. In summary the appellant contends that the learned Judge failed to note:-

> **(i) that the trial court failed to keep a record of the name of the interpreter the nature of the interpretation and the language used during the plea taking thereby rendering the conviction unsafe as it contravened Article 49(1) (a) and 50(2) (m) of the Constitution;**
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> **(ii) that medical evidence was inconclusive and could not therefore be used to sustain a conviction;**
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> **(iii) that the prosecution's evidence had contradictions; and**
>
> **(iv) that the burden of proof was shifted on to him contrary to law.**

On the hearing date the appellant handed in written submissions and urged us to adopt them as his submissions in supporting his appeal. It is his argument that had the learned Judge exercised her mandate properly she would not have affirmed the conviction and enhanced the sentence. In his view, the learned Judge fell into error when she moved to enhance the sentence in the absence of either a written or verbal invitation to her to do so and also with no warning to the appellant or the State's intention to do so. Such a move would have given the appellant ample opportunity to make an election of risking consequences of enhancement should his appeal not succeed or to elect either to abandon and or withdraw the appeal. The appellant therefore suffered not only a disadvantage but an injustice in this regard, the submissions stated.

With regard to medical evidence, it is the appellant's argument that the same was shoddy as the prosecution failed to carry out a DNA test on him in compliance within **Section 26** of the Sexual Offences Act in order to prove his involvement in the commission of the alleged offence. It was also

incompetent as PW1 Peter Lekaite was not competent in law both to carry out the assessment and tender the P3 in evidence. The medical treatment chits or notes were not also availed in evidence to show what disease had been detected and treated on the complainant; also no spermatozoa were revealed by the anal swab analyses meaning that the offence charged had not in fact been committed. Lastly, no birth certificate was either called for or tendered in evidence to prove the exact age of the victim to be seven (7) years as at the time of the commission of the offence.

In response to the appellant's submissions Miss Rugut Dorcas, the learned Senior Prosecutions Counsel (SPC) urged us to dismiss the appeal on the grounds that the trial before the High Court were fair as the appellant already had the record that is why he handed in already prepared written submissions: She conceded that the sentence was enhanced without any warning or caution to the appellant but no prejudice was occasioned as the need for such warning is not statutorily anchored the enhanced sentence was legal; the appellant faced the offence of unnatural offence under the Penal Code hence the provision of the Sexual Offences Act do not apply; medical evidence adduced by the prosecution was proper as PW1 Peter was competent both in assessing, filling the P3 form and tendering it in evidence; the age of the complainant was properly determined as the father's testimony that the victim was seven (7) years was confirmed by evidence of medical assessment. In her view the father was the best placed person to know the age of his child and there was nothing to show that he was lying in any way. The medical evidence was therefore not forged as claimed by the appellant.

Turning to the discrepancy in the date of arrest and the commission of the offence, it was Miss Rugut's assertion that there was no contradiction in the said dates because evidence tendered was that the appellant was arrested by civilians on the 14th March 2011, the very date the offence was committed and handed over to police on the next day of the 15th day of March 2011 when he was rearrested by police hence the indication in the records of the date of the arrest as 15th March 2011.

As for the discrepancy in the date when the P3 form was filled as alleged to be 8th March, 2011, Miss Rugut urged that this was a minor error as the P3 itself was obtained on the 15th day of March 2011, the very date the victim was taken to hospital. The P3 was filled thereafter, which date could not be a date before the P3 was issued.

In his reply to the Respondent's submissions the appellant reiterated his earlier stand that the enhancement of his sentence by the learned Judge was irregular in the absence of a cross appeal from the State against his sentence; maintained that the trial at the 1st appellate stage were unfair as he had no record; and also that he was also disadvantaged at the trial stage as he did not understand proceedings due to language barriers.

This being a second appeal and by dint of **Section 361** of the Criminal Procedure Code, this Court is restricted to address itself on matters of law only. This Court has stated many times before that it will normally interfere with concurrent findings of facts by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence or the courts below are shown demonstratiably to have acted on wrong principles on making the findings.

In **Karingo versus Republic [1982] KLR 213** at Page 219 the court had this to say:-

> ***"A second appeal must confine 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"***

We have considered the record in the light of the rival arguments set out above. In our view the issues of law that fall for our consideration are the very Ones raised by the appellant in his grounds of appeal and as reiterated by him in his submissions.

With regard to the language of the court at the time of plea taking, **Section 198 (1) and 4** of the

Criminal Procedure Code provide as follows:

> ***"198(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***
>
> ***(2) . . . .***
>
> ***(3) . . . .***
>
> ***(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili."***

Section 198(1) of the **Criminal Procedure Code** has been reinforced by **Article 50(2) (m)** which guarantees an accused person the right to ***"have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

The record indicates that the appellant first appeared in court on the 17th day of March 2011 when plea was taken and he pleaded guilty to the charge as then read to him. The record indicates a clerk by the name of Edwin was present but the language of interpretation was not given. The prosecution was not ready with facts. The matter was then deferred to 21st March, 2011 for facts. On this day the appellant is indicated to have sought leave of court to change his plea. A clerk by the name Kishep was in attendance but the language used was not indicated. When the charge was read to the appellant a second time, he is indicated to have changed his plea to one of not guilty. Thereafter the trial commenced and proceeded to its logical conclusion with the participation of the appellant who also cross-examined witnesses. Throughout the trial there was always a court clerk on hand whose role no doubt had something to do with interpretation. Nowhere in the entire record have we found any complaint raised by the appellant with regard to lack of comprehension of the ongoing at the trial. We also note that this was not one of the grounds of appeal raised before the High Court. The appellant had an opportunity to do so. With utmost respect to him we believe this belated complaint is an afterthought without much substance and it is accordingly rejected.

With regard to the proceedings before the High Court, the record indicates that the appellant appeared in the High Court for the hearing of his appeal on the 28th day of June 2012. He is recorded as having informed the court that he was not ready to proceed with his appeal as he had just been handed the record. The hearing was then adjourned to the 23rd day of July 2012, a period of three (3) weeks and five (5) days. Come the said date of 23rd July, 2012 the appellant is indicated to have stated to the court that he was not ready to proceed with his appeal because he did not have a copy of the record. The court declined to yield to his request for adjournment because it noted that he had a copy of the record with him and also must have taken note of the entries made in the record of the proceedings of the 28th day of June, 2012 and confirmed that appellant had the proceedings as at that date. We find no fault in the learned Judge's stand in proceeding with the hearing of the appeal.

With regard to Peter's competence to both assess and tender in evidence the P3 form, **Section 7(1)** of the **Clinical Officers** (Training Registration and Licensing) **Act** Chapter 260 Revised 2009 (1990) makes provision for the registration of clinical officers while **section 7(4)** on the other hand makes provision for their power in relation to the filling and production of medical documents. It provides:

> **"**(4) **A person who has been registered by the Council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by notice in the Gazette."**

In **Raphael Kavoi Kiilu versus Republic [2010] eKLR** the Court had this to say:-

> "**Under *section 2* of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means**:-
>
> ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ……"***
>
> ***Section 7(4)*** of the Act states:-
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> The Act goes further to provide that such officers may engage in private practice ***"in the practice of medicine, dentistry or health work for a fee."*** It follows that the clinical officer did testify in this case on his area of competence."

The law is therefore clear. Peter had the competence to both fill and tender the P3 in evidence as he did.

As for the failure to carry out a DNA to link the appellant to the commission of the offence through the alleged infection detected on the minor it is true that no such DNA examination was carried out on the appellant. As

submitted by Miss. Rugut the offence the appellant faced was laid under the Penal Code and not the SOA. Peter PW1 said that he examined the appellant but found nothing in connection with the offence charged. The details of these were not disclosed. However, the key consideration in the proof of the offence against the appellant was whether there was evidence of sexual violation of the minor through his anus which was proved by the evidence of PW3 and 4 who examined the minor physically. This observation was confirmed by medical evidence. In our view proof of infection detected in the minor from the appellant was not the only way of proving violation of the minor. It was sufficient that both courts below believed the minor, PW1 and PW3 and 4 as truthful witnesses. We find nothing to discredit that evidence. Appellant was sufficiently placed at the scene of the crime as the perpetrator.

As for medical notes it is correct as contended by the appellant that these were not tendered in evidence. Peter was categorical that he used these to fill the P3. There is nothing to show that there is any legal requirement that these be tendered in evidence alongside the P3 form. In any case as submitted by Miss Rugut the appellant had every opportunity to call for them if he felt they were crucial to his defence. He never did so. We find the failure either to produce or call for them was not fatal to the prosecution case.

As for lack of presence of spermatozoa Peter said that none were detected. As explained by Miss. Rugut it was due to time lapse. We believe this is the most plausible explanation. There is no other explanation. It is therefore our view that the absence of spermatozoa did not in any way negate the sexual violation of the minor evidenced by physical injuries observed on the minor by PW3 and 4 as confirmed by medical evidence through Peter.

Turning to lack of production of birth certificate, it is correct that none was produced. As submitted by Miss. Rugut there was nothing to suggest that the age given by the father was not correct. As a father he was in a better position to know the age of his child. As submitted by Miss Rugut there is nothing to suggest that the age given by PW3 and confirmed by medical evidence was a fabrication. We affirm the finding of the two courts below that the victim was aged seven (7) years as at the time he was sexually violated.

Regarding to alleged existence of discrepancies in both the P3 and the date of arrest, the approach we take in resolving this is as was set out by the Court in **Joseph Maina versus Republic Criminal Appeal**

No. 73 of 1993 when the court held inter alia thus:

> **"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 Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"**

With regard to those in relation to the date of the P3 form it is not in dispute that the offence was committed on the 14th March, 2011. The minor was taken to the police station on the 15th when the P3 form was issued. The victim was taken to PW1 the same date of 15th March, 2011 for treatment. The P3 was filled thereafter. It is therefore not possible for the P3 to have been filled on the 8th of March 2011. The P3 form is on the record. The dates appearing in it is the 15th March, 2011. The date of 8th March, 2011 must be a typographical error in the typing of the proceedings. We therefore agree with the submissions of Miss Rugut that it was an error which is not fatal to the prosecution's case.

As for the date of the arrest the explanation given by Miss Rugut is the plausible one as the uncontested evidence is that the offence was on the 14th appellant was thereafter detained by the elders on the same date and then handed to police the next day of 15th hence the indication in the charge sheet and evidence that the appellant was arrested on the 15th in reference to his arrest by the police which is not in dispute.

As for enhancement of the sentence, it is common ground that the same was effected before administering any warning or caution to the appellant of any possible negative consequences.The appellant has asked us to intervene. The approach we take in resolving the above issue is one of caution as put by the court in **Macharia versus Republic [2008] 1KLR (92 F) 117** where the Court held *inter alia* that:-

> ***"The appellate Court does not alter a sentence on the mere ground that if a member of the Court had been judging the appellant they might have passed a somewhat different sentence"***

As submitted by learned counsel **Miss Rugut,** no provision of law has been cited to us negating the approach taken by the learned Judge in enhancing the sentence *suo moto.* Learned counsel has however conceded that it is a practice of this Court that has now gained notoriety that it is prudent to warn and or caution the appellant of the consequences.

In **Josea Kibet Koech versus Republic [2010] eKLR** the Court in reversing the High Court in similar circumstances had this to say before moving to enhance a sentence:-

> ***"The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submissions that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction".***

In **JJW versus Republic [2013] eKLR** the Court further added the following observations:-

> ***"In this appeal the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any notwithstanding, yet all of a sudden, in the judgment, the learned Judge enhances the sentence from seven years to ten (10) years. 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 this case, the enhancement of the appellant's sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the memorandum of appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically***

appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence."

From the observations of the court in both the **Josea Kibet Koech** case (supra) and **JJW case** (supra) and as correctly submitted by **Miss Rugut** (SPC) the obligation on an appellate court to forewarn or caution an appellants before enhancing a sentence imposed against him by a trial court is not anchored on any legal provision but in practice that has now gained such notoriety that it is proper that an appellant be warned of the consequences of proceeding with his appeal in circumstances where such proceeding may likely result in the sentence being enhanced to his disadvantage. It is simply to enable him to weigh the options available and then make a decision that suits his best interests, especially in circumstances where like in the instant appeal an appellant is disadvantaged for not being schooled both in the law and legal procedures he may be confronted with during the course of the trial of his appeal.

In the instant appeal it is not disputed that the grounds of appeal the appellant presented to the High Court and which are on record included a complaint against sentence. Although the learned Judge had good cause for intervening to the appellant's disadvantage in view of the age of the victim, nonetheless as observed by the Court in the above cited cases, due to the change in the nature of the resulting sentence, the proper approach to such enhancement should have been set out in the above cited cases.

In **Johana Ndungu versus Republic [1996] eKLR** the Court made the observation that under **Section 361(2)** of the **Criminal Procedure Code** (supra) on such an appeal the court may if it thinks fit that judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made or may remit the case together with its judgment or order thereon to the first appellate court or to the subordinate court for determination whether or not by way of re-hearing with such directions as the Court of Appeal may think necessary.

We have no quarrel with the stand taken by the court in the above decision. We however find that this is not a proper matter for remitting to the High Court for its necessary action. We find it prudent to finally determine it since from the reasoning above we are of the view that the appellant's conviction was based on sound evidence. We therefore dismiss the appeal against conviction. We allow the appeal against enhancement of sentence from one of fifteen (15) to one of twenty (20) years. We set aside the order on enhancement of sentence. We restore then fifteen (15) year sentence that had been meted out against the appellant by the trial court which he shall continue to serve as we have confirmed the appellant's conviction.

Dated and Delivered at Nakuru this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. MWILU

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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