IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU& KIAGE JJA)

CRIMINAL APPEAL NO. 42 OF 2013

BETWEEN

ISAAC MURIITHI WAMBUI…….....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from the conviction/sentence of the High Court of Kenya at Nakuru (Ouko, J.) Dated 31st January, 2013)

in

HCCRA. No. 45 of 2011

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JUDGMENT OF THE COURT

The appellant faced two counts under the **Sexual Offences Act**. Count 1 was defilement. Particulars of the charge were that on the 15th day of August 2010 at [Particulars withheld] village in Naivasha District of the Rift Valley Province he did cause his genital organ namely penis to penetrate the genital organ namely vagina of C. N. M., a girl child aged seven (7) years old in violation of **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. Count II of the charge was the offence of indecent assault contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge, in count II was to the effect that on the same date, year and place he did intentionally and unlawfully cause his genital organ namely penis to come into contact with the genital organ namely vagina of C.N.M. a girl child aged 7 years.

The appellant denied both charges prompting a trial in which the prosecution called seven (7) witnesses to support the charge namely C.N. PW1, the complainant, **M K M (M)** PW2**, Kevin Simogiriri Mwaura (Kevin)** PW3, **Margaret Nyaguthii Juma (Margaret**) PW4, **Dr. Terer Eric (Dr Eric)** PW5, **P.C. Jared Mose (PC Jared**) PW6, and **P.C. James Ouma Makobi (PC James)** PW7.The sum total of their testimonies is that on the material date of the appellant who was an employee of a neighbour of PW2 and PW4 found **C.N.M**. playing outside their house with a minor sibling D. He lured them to his house where **C.N.M**. was defiled. PW4 who was in the vicinity saw the appellant lead the two minors away to his

house. When **Kevin** came out looking for them, PW4 directed him to the appellant's house. On his way to the said house, **Kevin** met **D** returning to their house. On reaching the appellant's house he heard **C.N.M.** crying inside. He touched the door and found it locked from inside. He called out to **C.N.M**. and she responded from the inside. The appellant then opened the door and came out fully dressed. **C.N.M**. also came out fully dressed. She did not mention anything of what had transpired in the house to Kevin. It is after she had been called aside by PW4 and another lady that she disclosed to them that she had been defiled by the appellant. PW4, in the company of members of the public arrested the appellant, informed PW2 the mother of **C.N.M**. of the incident and escorted both the appellant and **C.N.M**. to the Police Station where they were received by **P.C. Jared Mose** PW6 who booked the report in the O.B. and then referred both of them to hospital as the appellant too had been injured by members of the public.

At the hospital **C.N.M**. was received by **Dr. Eric PW5** who upon examining her noted scratches on the nose and mouth, bruises on the genitalia and the hymen was broken. There was a whitish blood stained discharge from the vagina. He concluded that **C.N.M**. had been sexually penetrated. He filled the P3 form which he tendered in evidence as an exhibit. **Dr. Eric** also examined the appellant but found nothing significant in connection with the offence charged.

When put to his defence the appellant gave an unsworn statement that the charge had been fabricated against him by PW2 for his fellow appellants to give her 500/- and also because she wanted him out of his job to pave the way for her son.

In a judgment dated 7th February 2011 the learned trial magistrate **P.M. Mulwa** found the prosecution's case proved beyond reasonable doubt on count 1, dismissed the appellant's defence, found him guilty as charged, convicted him and sentenced him to twenty years imprisonment.

The appellant was aggrieved and he appealed to the High Court raising various grounds. In a judgment dated the 18th day of January 2013 **W. Ouko J**, (as he then was) dismissed the appeal and enhanced the sentence to one of life imprisonment.

The appellant is now before us on a second appeal. He had initially raised nine (9) homemade mitigating factors against sentence. These were subsequently substituted with three other grounds, in a homemade memorandum of appeal which basically seeks this Court's intervention to reverse the enhanced sentence imposed by the High Court which, to the appellant, was irregular.

The appellant who appeared in person handed in written submissions. In them, the appellant has urged us to reverse the enhanced sentence on the grounds that the learned Judge misunderstood his plea to the High Court as he did not challenge both the conviction and sentence but simply pleaded for leniency for the High Court to substitute the custodial sentence with a non-custodial sentence for the reasons given. It was therefore wrong and unprocedural for the learned Judge to enhance the sentence in the absence of any warning or caution to him that if he pursued his appeal then he stood the risk of having the sentence altered to his disadvantage should cause. Or that the State could to cross appeal or file a notice of the intention to seek enhancement of the sentence should the appeal proceed. On that account he urged us to interfere, and restore the sentence that had been meted out against him by the trial court.

In response to the appellant's submissions, **Miss Rugut Dorcas**,Senior Prosecution Counsel (SPC) opposed the appeal on the grounds that since the complainant was aged seven (7) years, the offence ought to have been laid under **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act (Supra). It was therefore an error that the offence was laid under **Section 8(1)** as read with **Section 8(3)** of the Act which led to the learned trial magistrate handing out an illegal sentence which the High Court had a duty to correct as it did. She conceded that indeed no caution or warning was administered to the appellant before the said enhancement was effected. The concession notwithstanding, it was her view that no prejudice was suffered by the appellant as a warning or caution is not anchored on any statutory provision but in practice.

In reply to the respondent's submissions, the appellant urged us to reverse the enhanced sentence to the one that had been meted out on him by the trial court.

This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code Chapter 75**, Laws of Kenya, this Court's jurisdiction is limited to matters of law only. In **Chamagong versus Republic** [1984] KLR 213 at Page 219 this Court held:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 judgments from the two courts below, the grounds of appeal, submissions of both sides and the law. In our view only one issue falls for our determination that is whether the enhancement of the appellant's sentence by the High Court was legal.

The approach we take in resolving the above issue is one of caution as put by the Court in **Macharia versus Republic** [2008] IKLR (92 F) 117;

> ***"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"***

Although**,** no provision of law has been cited to us questioning the approach taken by the learned Judge in enhancing the sentence *suomoto,* the State concedes that it is a practice of this Court that has now gained notoriety that it is prudent to warn and or caution the appellant.

In **Josea Kibet Koech versus Republic** [2010] eKLR the Court in reversing the High Court in similar circumstances stated;

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

See also in **JJW versus Republic** [2013] eKLR;

> ***"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 not issued, 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 not 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."***

In short, the warning to an appellant is simply to enable him 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 hearing of his appeal.

In the instant appeal, the grounds of appeal the appellant presented to the High Court and which are on record were not an appeal against sentence as such but a plea for leniency to convert imprisonment years to a non-custodial sentence. Although the learned Judge had good cause for enhancement in view of the age of the victim, nonetheless as observed by the Court in the above cited cases, the adverse change in the resulting sentence called for a warning to be given to the appellant to make an election. There has been no suggestion to us that this notorious practice of fore warning is not good practice and in the interests of justice to both sides. It should have been adopted by the learned Judge.

The question we now have to pose is which is the appropriate order that commends itself to us in the circumstances of this appeal.

In **Johana Ndungu versus Republic** [1996] eKLR the Court observed that under **Section 361(2)** of the **Criminal Procedure Code** (supra) on such an appeal if the court thinks fit that a 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, may 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 find this to be a proper matter for remitting to the High Court for its necessary action as we may direct. We allow the appeal in this regard, set aside the order enhancing the appellant's sentence from one of twenty years to one of life imprisonment. We order that the matter be remitted to the High Court for the re-hearing of the appellant's appeal to that court on priority basis with directions that such a re-hearing be undertaken after the necessary warning or caution of a possible enhancement of the sentence should the appellant elect to proceed with his appeal. The appeal shall be given priority on such rehearing.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. 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