**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, KOOME & SICHALE, JJ.A)**

**CRIMINAL APPEAL NO 8 OF 2015**

**BETWEEN**

**DAVID KAHURA WANGARI…….....……APPELLANT**

**VERSUS**

**REPUBLIC…….....…….RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nairobi High Court Criminal Appeal No. 254 of 2011 by (Mbogoli J.) dated 3rd October, 2013*

*in*

*HC. CR. A. No. 254 of 2011)*

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**JUDGMENT OF THE COURT**

**[1]** This is a second appeal by David Kahura Wangara (appellant) against the judgment of the High Court Nairobi (Mbogholi J) dated 3rd October, 2013. The appellant was charged with the offence of defilement of a child contrary to

**Section 8 (1) (2)** of the Sexual Offences Act. The particulars of the charge stated that on the 29th day of July, 2010, at [particulars withheld] area of Ruiru District within Central Province, intentionally and unlawfully committed an act which caused penetration to the genital organs of D. M. (name withheld) a boy child aged ten years. The appellant was also charged with an alternative count of indecent assault but that is now inconsequential as he was convicted of the main charge and sentenced to imprisonment for a term of 15 years.

**[2]** The appellant appealed before the High Court against the conviction and sentence. His appeal was not only dismissed; but the 15 year sentence imposed by the trial court was set aside and substituted with life imprisonment. The appellant has filed this second appeal against both the conviction and sentence. By dint of the provisions of **Section 361 (1) (a)** of the *Criminal Procedure Code*, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered, or looking at the entire case, their decisions on such matters of facts were plainly wrong in which case this Court will consider such omission(s) as matters of law.

**[3]** Both courts below clearly set out the facts of the matter but in order to put this judgment in perspective, we briefly set out the facts that were before the trial court. After a *voire dire* examination, D.M., the complainant, a boy child aged 10 years at the time he gave evidence, was found suitable to give sworn evidence by the learned Senior Resident Magistrate who conducted the trial. D.M. testified that on 29th June 2016, at around 9 p.m., he was in the house alone. He used to live with his father, since his mother died, but at the material time, his father was not at home. D.M. told the trial court that he heard a knock on the door; thinking it was his father he opened the door; he however found it was Dave, (appellant) who was his neighbour. The appellant had apparently promised to make a toy car for D.M. using some wires and plastic materials. The appellant asked D.M. to accompany him to his house to see the toy car.

**[4**] D.M. accompanied the appellant to his house, the appellant's wife was not in the house; the appellant proceeded to show D.M. the toy car he had made for him. After a short while, the appellant held D.M. blocking his mouth to prevent him from screaming and pushed him on the bed. The appellant ordered D.M to lie on his stomach and not to scream. The appellant partially removed his trouser, undressed D.M and had anal sex with him. Thereafter the appellant gave D.M some food, after eating, the appellant ordered him to go away and warned him against telling anyone or else the appellant would beat him. D.M said he knew the appellant well, they lived in the same plot and the appellant used to visit them prior to this incident to watch TV with D.M. and his father.

5. After the ordeal, D.M went back to his house and his father A.N.M who testified as PW2 returned at about 10.pm. PW2 found DM crying while holding a toy car; PW2 demanded to know from D.M why he was crying; D.M. told his father that he had been sodomized by Dave. PW2 became furious; he stormed in the house of the appellant with the toy car and brought the appellant to his house. When PW2 questioned the appellant, the appellant denied and rudely accused PW2 of being insane. A commotion almost ensued as PW2 wanted to beat the appellant but neighbours intervened and recommended the matter be reported to the police.

6. The matter was reported at Ruiru police station; the complaint was recorded and D.M. was issued with a P3 (medical form). He was treated at Ruiru Sub-district Hospital. The medical form was completed and produced in evidence by Joan Munene (PW4). We think it is important to reproduce a pertinent portion of what PW4 told the learned trial magistrate;-

> **"…l filled P3 form in respect of D.M. He came with history of sodomy. His shorts were stained in semen. On 29th June (must be July) 2010, the incident is said to have occurred and thereafter various repeated incidents. The victim was 10 years. No injury was noted on the genitalia. Anal region had (sic) bruised and (sic) sphuncten tone was absent. Approximate age of injury was 36 hours at the time of treatment and 40 hours at the time of filing the P3. Degree of injury was harm. I produce P3 as Exh 3. I also have the card for treatment which I produce as Exh2."**

7. The matter was investigated by PC Mohamed Rono (PW3) who was in charge of the gender desk. PW3 told the court that when he reported on duty on 2nd July 2010, he perused the Occurrence Book and found a report had been entered therein of an alleged offence of sodomy and the witness statements had been recorded by Corporal Nyadiga. This is what PW3 was recorded as having told the court in his evidence in chief;

> **"I received the P3 and medical notes. The victim is "DK" I went through the statement and talked to the victim. He said that on 29th June 2010, the child was at home. The accused who was a neighbour went and took the child to his house and sodomised him. He then gave him food and released him after threatening to kill him if he disclosed. The boy went home. The father went home at 10.pm and saw a toy vehicle. It had been given to the child earlier. The child disclosed what happened. The child had been treated and he had a problem with bowels. He could not control himself. I interrogated the accused but he denied. I charged him with the offence in court."**

8. On hearing the above evidence, the learned trial magistrate was convinced the appellant had a case to answer. The appellant was placed on his defence; he gave unsworn evidence; he did not call any witness. He denied having committed the offence and went on to give an account of the events that occurred the day he was arrested. The defence evidence was considered by the trial court, but the learned trial magistrate found it lacking in substance in view of the prosecution's evidence that was not at all shaken by the defence. The appellant was convicted of the main count of defilement, and was sentenced to 15 years imprisonment. The appellant's appeal before the High Court was not only unsuccessful, but the sentence of 15 years was found to be an illegal sentence and was substituted with a life imprisonment. This is what has provoked this second appeal.

9. The appellant who was acting in person relied on his homemade grounds of appeal filled on 6th November 2013 and a further supplementary memorandum of appeal which he submitted in Court at the hearing of this appeal. The grounds raised in both can be summarized as thus;-

**The evidence relied on by both courts below was insufficient to support a conviction.**

**The appellant's defence was not considered.**

**The appellant faulted the High Court for ignoring his request for services of legal counsel before enhancing the sentence to life imprisonment which was a violation of his fundamental rights to a fair trial protected under Article 25(1) of the Constitution.**

**The charge sheet was defective as the charge was one of rape as per sections 3 (1) (a) of the Sexual Offences Act and the particulars did not support the charge as per the provisions of section 214 (1) of the CPC.**

10. During the hearing of this appeal, the appellant amplified the fact that the investigation officer failed to avail crucial witnesses who were present at the scene of crime; medical report was not conclusive as he was not taken for medical examination; he was held in custody for a period of 2 months before being produced in court which contravened his right to a fair trial; he was not properly advised about the implications of his appeal regarding sentence because he had no legal advice; the enhancement of sentence from 15 years to life imprisonment was prejudicial. The appellant urged us to revisit the issue of sentence and allow the appeal by at least reverting to the 15 year sentence imposed by the trial court.

11. On the part of the State, Mr. O'Mirera, learned prosecuting counsel opposed the appeal. He submitted that the prosecution proved its case against the appellant to the required standard. The evidence of the complainant was clear and consistent as to how the appellant lured the complainant to his house with a promise of a toy car and thereafter sodomised him. The complainant knew the appellant prior to the incident, as a neighbour, who used to visit him and his father to watch TV together; there was no possibility of a mistaken identity. Counsel for the State was categorical that the two courts below properly evaluated the evidence of the complainant and his father which was consistent and correctly rejected the appellant's defence.

12. On the issue of the appellant's right to legal counsel, Mr. O'Mirera was of the view that legal representation is only offered to persons who are charged with murder, the rest of the applicants who cannot afford legal counsel can apply now under the Legal Aid Act which was enacted sometimes in 2016; moreover the appellant did not make any application at all to be provided with legal counsel. Lastly, counsel for the state submitted that the appellant was given notice of the possibility of the sentence being enhanced. The sentence provided under **Section 8 (1)** of the Sexual Offences Act was life imprisonment, thus the learned Judge was obliged to correct an illegal sentence meted on the appellant by the trial court. Counsel urged us to dismiss the appeal.

13. We have considered the record, submissions by the appellant, the prosecuting counsel and the law. As aforesaid, we are restricted to only consider matters of law in a second appeal. See **Chemagong -vs- 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. (Reuben Karari s/o Karanja- vs- Republic 17 EACA 146)."***

14. Arising from the above summary, the issues that we discern as falling for our determination are threefold; whether there was sufficient evidence to support the conviction; whether the appellant was given notice before the sentence was enhanced from 15 years to life imprisonment and lastly whether he was not accorded a fair trial in the absence of a legal counsel. On the first issue, the appellant was charged with the offence of defilement under **Section 8**

**(1) (2)** of the Sexual offences Act provides:-

***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(2) A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."***

From the foregoing provision, it was imperative for the prosecution to prove that there was actual penetration on D.M. and the identity of the perpetrator. Both courts below made concurrent findings that the complainant identified the appellant who was well known to him as a neighbour; the appellant lured the complainant to his house where he sodomized him through the anus. We concur with the two courts below that this was identification through recognition. In **Anjononi & others -vs- Republic** (1976-80) 1 KLR 1566, this Court held at page 1568,

**"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."**

15. Was the offence of defilement proved? According to the complainant and this was supported by PW2 and medical evidence, there was penetration of the anus. Under the Sexual Offences Act, the definition of a genital organ includes the anus. The complainant's evidence was supported by the medical report that noted there were bruises on the anal region of the complainant. Although the only evidence in respect of what actually happened was that of the complainant; both courts below were cognizant of the proviso to **Section 124** of the Evidence Act which provides:-

***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

16. The father of the complainant came after the event and found him crying, on asking him what happened, the complainant narrated the incident; that is how PW2 confronted the appellant, by then some neighbours had gathered, and a scuffle ensued as the appellant retorted rudely when he was asked why he sodomized the complainant. The matter was reported to the police but the said neighbours were not called to testify in court. The appellant also challenged the fact that the neighbours, who were present when PW2 confronted him, were not called as witness. For this argument we make reference to the provisions of

**Section 143** of the Evidence Act, Chapter 80, which provides;-

***"No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact."***

17. As per the Sexual Offences Act, the trial court can convict on the basis of a complainant's sole evidence, if the court is satisfied that the complainant is truthful. However in this case, the conviction was supported by medical evidence and the evidence of PW2 who arrived a short while later and found the complainant in distress. The injuries suffered by the complainant were confirmed at the hospital and the complainant was put under treatment. There is no requirement for the appellant to be taken for treatment to establish an act of defilement. DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court. The trial court found that the complainant was a truthful witness and his evidence was corroborated by the medical evidence and by his father. In **Nelson Julius Irungu –vs-Republic-** Criminal Appeal No. 24 of 2008, this Court held;-

> **"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."**

18. Was the appellant denied a fair trial when his sentence was enhanced from 15 years to life imprisonment? under **Section 354 (3) (a) (11)** of the Criminal Procedure Code, the High Court is given powers on an appeal, to alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence. The record of proceedings before the High Court on 19th February, 2013 indicates that the appellant was served with a notice of enhancement of sentence. He nonetheless said he wanted to proceed with the appeal and further indicated in his own words as follows;

> "**I am also ready, l understand the consequences of the notice served upon me, that if my appeal does not succeed, l shall be jailed for life."**

In ***Stanely Nkunja -vs- Republic- Criminal Appeal No. 280 of 2012***, this Court held;-

> **"While it is prudent, and fair, to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347(2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law. Illegality of a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment."**

As aforesaid, the complainant was aged 10 years, and this age was not at all challenged. The minimum sentence provided for an offence of defilement of a child of 11 years and below is life imprisonment. Thus the learned Judge cannot be faulted for correcting an illegal sentence on appeal and imposing the correct sentence.

19. The last issue was whether the appellant was entitled to legal advice before the sentence was enhanced. In ***David Njoroge Macharia –vs- Republic (supra)***

this Court held:

> "**Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense."**

20. Under the ***Constitution*** an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the ***David Njoroge Macharia –vs- Republic (supra)*** the ***Constitution*** does not set out what constitutes substantial injustice. Chapter 18 (transitional & consequential provisions) of the current ***Constitution*** places an obligation on Parliament to enact legislation which would ensure realization of an accused

person's right to a fair trial under ***Article 50*** within four years of the promulgation of the ***Constitution***.

21. The Legal Aid Act, of 2016 has eventually been enacted with a commencement date of May 2016, long after the appellant's appeal was concluded in the High Court. Prior thereto, it was only persons charged with murder before the High Court and those serving death sentence appealing before the Court of Appeal were entitled to automatic legal representation; their financial standing notwithstanding. However, what is of significance to note regarding the appellant's appeal, is the fact that he never made any application to be provided with state funded representation before the High Court. The issue of legal representation was not raised before the two courts below, the appellant was not charged with a capital offence to qualify for automatic state funded legal representation. This ground of appeal is therefore an afterthought and it lacks substance.

The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed.

**Dated and delivered at Nairobi 2nd day of December, 2016.**

**W. KARANJA**

**JUDGE OF APPEAL**

**M.K. KOOME**

**JUDGE OF APPEAL**

**F. SICHALE**

**JUDGE OF APPEAL**

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

***DEPUTY REGISTRAR***