IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO, J. MOHAMMED & KANTAI JJ.A)

CRIMINAL APPEAL NO. 441 OF 2010

BETWEEN

JACKSON KIBIWOT LANGAT.................................APPELLANT

AND

REPUBLIC ....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Eldoret (Mwilu, J.) dated 14th October, 2010

in

H.C.CR. REVISION NO. 5 OF 2009)

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JUDGMENT OF THE COURT

On the 8th day of November, 2002 in **Nandi South District** within Rift Valley Province, the appellant in this appeal **Jackson Kibiwot Langat** is alleged to have had carnal knowledge of **M C** a girl aged five years. Alternatively, it was alleged that he, on the same day and at the same place unlawfully and indecently assaulted the same girl by touching her vagina with his penis. As **Edwin Kipkoech (PW2)** almost found him in the act, he ran away and was never seen within the vicinity until sometimes in the year 2007- according to **P K R** (PW4) the father of the victim but for some unclear reasons, was arrested by police but released till 2nd April, 2009 when according to the charge sheet he was arrested again and arraigned in court on 3rd April, 2009. As a result of the inordinate time lapse between the date the offence was committed and the date he was taken to court, the Penal Code under which he was to be charged had undergone one serious amendment and repeal particularly affecting the provisions of **Section 145** of the Penal Code. In the year 2003 that section, together with several others were amended vide Act No. 5 of 2003 which substituted the original sentence for Defilement of a girl under fourteen years which was maximum imprisonment with hard labour for fourteen years together with corporal punishment with that of imprisonment with hard labour for life.

Thereafter, in the year 2006, the entire Section and others were repealed and replaced with the **Sexual Offences Act.** The effect of all these in this case is that although the appellant committed the offence in 2002 before any amendments were made to the provisions of **Section 145** of the Penal Code and before the provisions were eventually repealed, by the time he was arrested and charged in the court the drafters

of the charge sheet apparently found it difficult stating specifically under what provision of law he was charged and hence they settled for *"Defilement of a girl contrary to Section 145(1) of the Penal Code (Now repealed) as read with Section 48 of the sexual Offences Act No. 3 of 2006."* This was not proper. The offence took place in the year 2002, and the law is clear that under the then retired Constitution, he could only have been charged with the offence under the law that was in existence at the time he committed the offence.

However, we note that despite this confusion, both the trial court and the High Court were aware that the offence did not fall under the Sexual Offences Act though cited and although the High Court fell into another error as we will point out in this judgment hereafter, none the less the two courts were alive to the legal position that the offence was only punishable under the provisions then existing at the time the offence was committed which was 8th November, 2002 and not otherwise. We thus will not discuss the defects apparent in the charge sheet for in any event the entire case before the trial court proceeded and witnesses gave evidence such that the appellant cannot be said to have been prejudiced by that defect. We also feel the defect was cured by the provisions of **Section 382** of the Criminal Procedure Code.

After the full trial in which five (5) prosecution witnesses gave evidence and the appellant gave unsworn statement in defence in which he claimed that *"the case was fixed on him"* as the complainant's mother was his lover and her father had a grudge against him, the learned Principal Magistrate found the appellant guilty of the main charge, convicted him and after receiving and considering mitigating factors, sentenced him to imprisonment with hard labour for ten (10) years. That was on 6th August, 2009. He did not appeal against either the conviction or sentence.

Later, vide a letter dated 30th October, 2009 received in the Court Registry on 2nd November, 2009, addressed to the learned Judge of the High Court at Eldoret, P R who had been a witness as stated above sought revision of the sentence. His letter cited **Section 364(1) (a)** of the Criminal Procedure Code. His reason for seeking the same were put by him:

"I am not satisfied since the complainant is discharging urine uncontrollable (sic) since the incident. I have used over Ksh.700,000/= for the treatment and she is still undergoing the same."

On that letter being placed before the learned Judge (P.M. Mwilu, J. as she then was), she called for the Principal Magistrate's court file and having received and perused the same file she fixed the matter for hearing on revision. At the hearing, the State was represented and the appellant was also produced in court and conducted his case in person. For some unexplained reason, R was heard as if he was the complainant. He stated in court:

"I seek enhancement of sentence. The child was completely ruined and treatment of over 8 years. She has not recovered."

Mr. Kabaka, who appeared for the State also sought enhancement of the sentence as he felt the sentence awarded by the lower court was too lenient yet the injuries were extremely severe. On his part, the appellant opposed enhancement saying ten years was enough and he would serve it out though he did not commit the offence and the charge resulted from vendetta.

After the learned Judge of the High Court had considered the case, she enhanced the sentence to that of fifty (50) years imprisonment with hard labour. In doing so, the learned Judge addressed herself thus:-

"The accused was liable to imprisonment for life with hard labour for that offence. A sentence of 10 years appears as if he was being rewarded for what he had done. That sentence was inappropriately low in the circumstances of this case. It is however not a situation too late to correct. The law gives me power to so correct it by way of enhancing it. A young girl's life was forever changed for the worse by a grown (sic) man with a totally misplaced self gratification,

…………………………His not appealing notwithstanding the law has given this court power under revision to enhance that low sentence. Accordingly I hereby enhance the term of imprisonment meted

out to the accused by the Principal Magistrate at Kapsabet of ten (10) to fifty (50) years imprisonment with hard labour. That started running on his conviction and sentence on 6th August, 2009."

Earlier, in that judgment, the learned Judge had made findings on points of law as follows:-

"This court has power to proceed and enhance sentence under section 364 in the same manner the court would if it was hearing an appeal under section 354 of the same code only that the court may not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

I am alive to the fact that the accused must be sentenced under the law that was in force at the time of the commission of the offence. This offence was committed on 8th November, 2002 and the punishment for defiling a child under the age of sixteen years was imprisonment with hard labour for life as per the provisions of Section 145(1) of the Penal Code."

(underlining supplied).

The appellant felt dissatisfied with that decision and hence this appeal premised on nine grounds of appeal filed on his behalf by his advocates. A summary of the same grounds is that the learned Judge erred in considering extraneous and unsupported allegations by P R; that the learned Judge in enhancing the sentence failed to take into account the appellant's age; that the learned Judge failed to consider the evidence tendered by the defence; that the learned Judge failed to take into account relevant factors and took into account irrelevant factors hence her erroneous decisions; that she failed to consider the totality of the evidence that was in the record; and that the trial was unconstitutional.

At the hearing of the appeal, Mr. Chepkwony, the learned counsel of the appellant canvassed the above points raised in the memorandum of appeal but added with our permission one point which strictly was not raised in the memorandum of appeal and that was that the learned Judge applied the sentence that was introduced vide the amendment to the provisions of the then ***Section 145 (1)*** of the Penal Code which amendment was introduced vide Act No.5 of 2003 whereas the offence was committed in the year 2002 before that amendment came into being. He submitted that that was in law an error. He also referred to ***Section 77 (4)*** of the retired Constitution and submitted that the offence could only attract a punishment that was in the law obtaining at the time it was committed and not the law at the time the punishment was being meted out.

On his side, Mr. Omwega, the learned Assistant Director of Public Prosecutions conceded the appeal, submitting that the learned Judge of the High Court though rightly called up the file for revision, nonetheless erred in law in that she applied the wrong provision of the law - a sentence that did not exist at the time the offence was committed namely a sentence in the amended ***Section 145 (1)*** which was amended in the year 2003 after the offence had been committed. He contended that the maximum sentence obtaining as at the time the offence was committed was imprisonment with hard labour for fourteen years and strokes of the cane. He further submitted that although the provisions of ***Section 329C*** of the Criminal Procedure Code allows for the calling of and considering a victim impact statement at any time after the court convicts an accused person but before it sentences the offender, that should be confined to the trial court and not on revision or on appeal. He asked the court to allow the appeal.

The learned Judge of the High Court on being informed by R, in a letter that there was a reason to call up the file in respect of Criminal Case No. 1171 of 2009, rightly called up the file as she had the powers to carry out revision of the sentence which power is clearly donated by ***Section 364 (1)*** of the Criminal Procedure Code. In our view, however, we find it difficult to appreciate any reasons why she allowed R to address the court on revision. No reasons were set out in the record in support of his being allowed to address the court. The record shows that he was a witness at the trial of the appellant and was PW4. The record also shows that he complained in writing to the learned Judge as we have stated, but we do not find these aspects good reasons for allowing him to address the court particularly when a state counsel also addressed the court. Further, and even more intriguing, the record does not state in what capacity he addressed the court. Was he a witness? Was he a representative of the child? If witness then why was the

appellant not allowed to cross-examine him and if a witness, then under what provision was he called as a witness on revision which is an exercise close to hearing a matter on appeal? Where was the application for additional evidence? If a representative of the child, then under what provisions of law, it being noted that as on 11th March, 2010 when he addressed the court; the victim was about thirteen (13) years old? We have agonised and considered whether he was allowed to address the court under the provisions of Part IXA of the Criminal Procedure Code which deals with

VICTIM IMPACT STATEMENTS. ***Section 329C (1)*** states:-

"(1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts; but before it sentences an offender. "

This provision clearly suggests that the court which should receive and consider victim impact statement is the court which has convicted the offender but has not sentenced him. That can only be the trial court. Hence we think Mr. Omwega is plainly right in saying that the appellate court or the court dealing with the matter under revision does not seem to have jurisdiction to receive and consider victim impact report.

If there are reasons to warrant the same such as where such a statement was availed to the trial court but was not considered, then all the appellate court can do is to refer the matter back to the trial court with directions that it considers it and that would be after setting the sentence aside. That may be in very rare cases. Otherwise, we are of the view that the court to consider victim impact statement is the trial court and it receives and considers it after convicting the accused but before sentencing the accused, just as it would receive and consider mitigating factors or Probation officer's report. Further and in any event under ***Section 329E (1):***

"A victim impact statement shall be in writing and shall comply with such other requirements as are prescribed by rules of court."

R in his address to the court stated:

"I seek enhancement of sentence. The child was completely ruined and treatment of over 8 years. She has not recovered."

He did not submit any statement in writing and there is nothing in the entire record. The letter he wrote to the court dated 30th October, 2009 and received at the registry on 2nd November, 2009 we have mentioned hereinbefore, was a letter of complaint and was seeking revision of the sentence. It was not and could not in our minds be a Victim Impact Statement referred to in Part IXA of the Criminal Procedure Code. In any case, one would have expected such a statement to annex medical evidence of the allegations of injuries and the allegations of prolonged and future medical treatment requirements and not mere allegations unsupported by any cogent evidence. The learned Judge of the High Court, not only received R statement which was clearly not evidence and not a written victim impact statement, and which in any case was not subjected to any cross-examination, but also acted on it to enhance the sentence to fifty (50) years. In our view, the learned Judge misdirected herself in doing so and that misdirection was to the effect that the learned Judge acted on extraneous matters she should not have acted upon in the exercise of her discretion. That in law would entitle this Court to intervene.

The second point is equally important if not more important and that is that the learned High Court Judge having rightly stated she that was alive to the fact that the accused must be sentenced under the law that was in force at the time of the commission of the offence, and having rightly stated that the offence was committed on 8th November, 2002, erred in her assertion that the punishment for defiling a child under the age of sixteen years was imprisonment with hard labour for life as per the provisions of ***Section 145 (1)*** of the Penal Code. This last part was a misapprehension of the law obtaining in the year 2002. In the year 2002, ***Section 145 (1)*** of the Penal Code provided as follows:

"145 (1) Any person who unlawfully and carnally knows any girl under the age of fourteen

years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together with corporal punishment."

That was the law in the year 2002. Vide Act No. 5 of 2003, that section was amended and the amended ***Section 145 (1)*** now provided as follows:-

"145 (1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."

The amendment was introduced in the year 2003 vide Act No. 5 of 2003 which came into effect on 25th July, 2003. Unfortunately it was the provision invoked by the learned Judge in her decision. That was an error as it was a misapprehension of the law in existence at the time of the commission of the offence.

A similar case that of **Daniel Makhanu Wekesa vs. Republic** – *Criminal Appeal No. 129 of 2007* was dealt with by this Court. Briefly Daniel Makhanu Wekesa was found guilty of defilement of a young girl pursuant to ***Section 145 (1)*** of the Penal Code. The offence took place on 18th December, 2002 at ***Kaptien Farm*** in ***Transzoia*** District. He was convicted of the offence on 5th May, 2006 by the Principal Magistrate at Kitale and sentenced to serve imprisonment term for 50 years together with hard labour. He appealed against both conviction and sentence. The High Court dismissed the appeal against conviction but reduced the sentence to that of thirty (30) years imprisonment. On appeal to this Court, the court considered the purport of ***Section 77 (4)*** of the retired Constitution which stated as the learned Judge did state here that the punishment to be awarded in such a case must be the punishment that existed as at the time the offence was committed and having done so stated:

"Under Section 77 (4) of the Constitution, the Magistrate had no jurisdiction to do so. She could only impose upon the appellant the penalty that was in place as at 18th December, 2002 when the offence was committed. Ochieng, J. purported to reduce the sentence to one of thirty (30) years imprisonment He too, had no jurisdiction to do so and in doing so, he was violating the provisions of Section 77 (4) of the Constitution. Both the trial Magistrate and the learned Judge were only authorised to sentence the appellant to a maximum of fourteen years imprisonment with hard labour. Thus the sentence of thirty years imprisonment imposed on the appellant by Ochieng, J was and still is unlawful."

That case was in respect of an offence committed on 18th December, 2002. This case is in respect of an offence committed on 8th day of November, 2002. In both cases, the fact that ***Section 145 (1)*** was amended in the year 2003 after the commission of the offence was misapprehended, - in that case by both the trial court and the first appellant court and in this case by the High Court. In this case the trial court clearly got it right though the sentence was not commensurate with the offence committed even at that time as the child defiled was only five years, but the High Court though aware of the legal position, got it all wrong and sentenced the appellant under a provision that came into effect long after the offence had been committed. The Criminal (Amendment) Act No. 5 of 2003 came into effect on 25th July, 2003.

We have no alternative but to interfere with the sentence that was meted out against the appellant by the learned Judge of the High Court in her revisionary power; for that sentence was unlawful.

However, in doing so, we are also conscious that the sentence that was awarded by the learned Principal Magistrate was, as we have stated, on the lower side though we also observe that at the relevant time the punishment prescribed by the law also incorporated hard labour and corporal punishment whereas the sentence of fourteen years imprisonment was maximum imprisonment term at the time the offence took place and though the appellant was a first offender and should not have been sentenced to maximum punishment- see *Daniel Makhanu Wekesa vs Republic (supra)*, we note that in Wekesa's case the victim was fourteen (14) years old as opposed to this case where the victim was five (5) years old. We therefore think that the offence here deserved the maximum that was then provided by law in respect of imprisonment term.

In respect of the corporal punishment and hard labour, we note that the present Constitution would not

allow the Prison's department to administer the same. Article 50 (2) (p) states as follows:

"Every accused person has the right to a fair trial, which includes:-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

Perhaps this was meant to take care of provisions of ***Section 77 (4)*** of the retired Constitution. We think the provision allows us to drop the corporal punishment and the hard labour part of the sentence that was part of the provisions of ***Section 145 (1)*** before it was amended. We say so because the current Act - Sexual Offences Act does not provide for those terms of punishment.

In conclusion, the appeal is allowed to the extent that the sentence of fifty (50) years imprisonment with hard labour is set aside. In its place, the appellant is sentenced to serve imprisonment for a term of fourteen (14) years. In doing this, we are aware that the appeal is against enhanced sentence by the High Court and is therefore an appeal before us pursuant to ***Section 361 (1) (b)***. The sentence to run from 6th August, 2009 when he was convicted and sentenced by the Principal Magistrate.

Dated and Delivered at Eldoret this 23rd day of May, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR