IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, BOSIRE & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 416 OF 2010

BETWEEN

JOSEPH KIPLIMO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Mwilu, J.) dated 29th April, 2010

in

H.C.CR.A. NO. 39 OF 2009)

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JUDGMENT OF THE COURT

The appellant, ***Joseph Kiplimo Absolom***, was charged in the Chief Magistrates Court at Eldoret with the offence of defilement of a girl contrary to ***section 8 (1)*** as read with ***section 8 (2)*** of the Sexual Offences Act No.3 of 2006. The particulars were that:-

"On the 26th day of February 2009, in Keiyo District of the Rift Valley Province unlawfully defiled M. K. M a girl aged 5 years."

In the alternative, he faced a charge of indecent act with a girl contrary to ***section 11 (1)*** of the Sexual Offences Act No. 3 of 2006. For reasons that will be clear in this judgment, we need not reproduce the particulars of that alternative charge save to say he denied it. He pleaded guilty to the main charge of defilement of a girl and after the facts were narrated to the court, the appellant, on being asked whether those facts were true or not, confirmed that the facts as stated were true, and the learned Resident Magistrate convicted him. The prosecution stated that the appellant could be treated as a first offender. In mitigation, the appellant prayed for forgiveness saying he had a family which relied on him. The learned Magistrate, thereafter in sentencing the appellant stated:-

"I have noted the mitigation by the accused person. However, he committed a beastly act that requires a deterrent sentence. The accused is sentenced to serve 50 years imprisonment in respect of the principal count."

The appellant was not satisfied with that sentence and it would appear that he also had second thoughts on his conviction although he appeared to have plainly pleaded guilty to the charge. He appealed to the superior court against both conviction and sentence. In his petition of appeal to that court he stated as follows:-

"1. That I innocently pleaded guilty to this serious offence without surely knowing the

consequences since it was my first encounter to (sic) the court environment.

2. That Your Lord, the police officers and the entire court failed to inform me the seriousness of the offence I was faced with as I was in confusion by that time. Secondly the court should have informed me of the changes (sic) and the seriousness of the offence.

3. That my Lord I humbly pray this Honourable court to hear my crisis and order for a retrial so as to give me an opportunity to defend myself. I am now well and fit to stand before a court of law and defend myself.

4. That the sentence I am now serving is totally harsh and will completely ruin my life."

That appeal was heard by the superior court (Mwilu J.) who, after full hearing, dismissed it saying:-

"1. This appeal has not an iota of merit, and it must fail in its totality. It is accordingly dismissed."

That is what has prompted the appeal before us in which the appellant, who conducted his appeal in person, raised six grounds in his home-made amended grounds of appeal. These are:-

"1. That my Lordships I pleaded guilty at trial.

2. That the sentence of 50 years imprisonment is extremely harsh and uncalled for in the circumstances since I am a first offender.

3. That my Lordships I pray to the Honourable Court to consider reducing the sentence to a minimum level since I was the (sic) first offender in the case.

4. That my Lordships I pray that you mercifully order the sentence be reduced in order for the basic objective which reform be achieved.

5. That my Lordships I humbly pray this Honourable Court to hear my crisis and act upon it to my benefit.

6. That I wish to be present during the hearing of the appeal."

Thus this appeal before us is a second appeal and is an appeal on sentence only. ***Section 361 (1) (a)*** of the Criminal Procedure Code is clear, and it makes it certain that this Court has no jurisdiction to entertain a second appeal based on severity of the sentence. Based on that provision, we would have downed our tools and said to the appellant – too bad but we cannot help in any way as the law forbids our intervention. Although the appellant was sentenced to 50 years imprisonment, the only sentence provided under the relevant provision is life imprisonment. We will revert to this issue later on in this judgment. However, there is one aspect that gives us anxiety in the appeal, and that is the legal interpretation of *"life sentence"* and how the courts in this country should approach the issue when the only sentence spelt out in respect of an offence is life sentence.

In this appeal, as we have stated, the appellant was convicted of the offence of defilement of a girl contrary to ***section 8 (1)*** as read with ***section 8 (2)*** of the Sexual Offences Act No. 3 of 2006. The sentence provided for that offence is spelt out in ***section 8 (2)*** of the same Act which states:-

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

This provision apparently provides only one sentence for a person who commits an offence of defilement with a child aged below eleven years and further that that sentence of life imprisonment is

mandatory. ***Section 8 (3)*** states that a person who commits the same offence but with a child between the ages of twelve and fifteen years is liable, upon conviction to imprisonment for a term not less than twenty years whereas ***section 8 (4)*** sets out a sentence not less than 15 years for one convicted of the same offence where the victim is between the ages of sixteen and eighteen. In short, for the offender where the victim is above eleven years, the court has discretion to decide on the sentence albeit the sentence cannot be below either fifteen years or twenty years. But for the same offence with children below eleven years, that discretion is not specifically spelt out by Parliament. A sentence of imprisonment for life is not defined in Kenya so far as our research goes. In several other jurisdictions, life sentence is defined, particularly in regard to substitution of a number of year's imprisonment for life as the trial court did in the matter before us. In the case of ***Fred Michael Bwayo vs. Republic, Criminal Appeal No. 130 of 2007,*** this Court differently constituted stated as follows:-

"The challenge is the substitution of a number of year's imprisonment for life imprisonment where, as in this case, the law allows for discretion. As far as our research goes, there are variations in approach in different countries of the world. A few examples will suffice: in Uganda life imprisonment is taken to mean 20 years maximum, although the debate continues after a recent constitutional court decision that it should mean "the whole of a person's life." In Australia it would be between 10 to 20 years followed by parole depending on the degree of the offence. In Argentina it is between 13 to 25 years while in Belgium it is 10 to 16 years pending parole. In England and Wales, the term is indeterminate but until the year 2002, the Home Secretary reserved the right to set the minimum length before that power was reposed on the courts; while in Congo (DRC) the maximum penalty is 30 years imprisonment. Generally in many countries there will be a number of years followed by parole."

These references above were made in a defilement case which was dealt with by the Court under the old ***section 145 (1)*** of the Penal Code which provided that a person convicted of defilement of a girl under the age of 16 years was liable to life imprisonment and thus gave the courts discretion to mete out sentences of imprisonment of upto life imprisonment. In the case before us, the appellant, was charged under the Sexual Offences Act which provides life imprisonment as a mandatory sentence. The first question that comes to mind is, was the trial court right in sentencing the appellant to 50 years imprisonment instead of to life imprisonment? The second is can we, on a second appeal interfere in such a sentence i.e. is the substitute of a definite period of imprisonment for life imprisonment a matter of severity of sentence or is it a matter of law and the third question is, if the trial court had sentenced the appellant to life imprisonment, would this Court on second appeal still in law interfere with that sentence?

In our view, the answer to the first question must be negative. While we appreciate that the issue as to whether a mandatory life sentence as provided for in ***section 8 (2)*** of the Sexual Offences Act is a matter that may very well require further research and possibly a different approach, we think that may await a different forum. As the law stands, ***section 8 (2)*** (supra) does not allow for substitution of a definite period of imprisonment. It provides for life imprisonment and no more, no less. If the legislature had intended to allow for any discretionary term, it would have proceeded the way it did in ***section 8 (3)*** and ***8 (4)*** of the same Act. Thus the answer to the second question as to whether the action of the learned trial magistrate in substituting a definite term of imprisonment namely 50 years imprisonment in place of life imprisonment provided in ***section 8 (2)*** (supra) is a matter of law or of fact, is in our view not in dispute. It is a matter of law, as the sentence that was awarded is not the lawful sentence provided.

The superior court (Mwilu J.) apparently did not deal with the issue of sentence as a separate issue. All the learned Judge said on sentence was:-

"And the offence with which the appellant was charged and was convicted of does not fall for punishment by way of a non-custodial sentence. The sentence for defiling a five year old girl is imprisonment for life. The appellant was only escaped (sic) with a term of imprisonment of 50 years."

The learned Judge did not for example consider as to whether a definite term of imprisonment was available and if so, whether 50 years was appropriate in the circumstances of the case. The issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was

awarded. We have jurisdiction to interfere.

As we have stated above, the law as it stands is that life imprisonment is the only sentence provided for the offence that the appellant was charged with and is a mandatory sentence. The sentence of 50 years awarded by the trial court was unlawful and was not interfered with by the first appellate court as it should have done. We have no alternative but to put right the position.

The appeal is dismissed. Sentence of 50 years imprisonment is set aside and in its place, the appellant will serve life imprisonment.

Dated and delivered at Eldoret this 25th day of March, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR