IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 192 OF 2013

BETWEEN

PAUL MUNYOKI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Garissa (Mutuku, J.) dated 20th May, 2013 in H.C.CR.A No. 52 of 2012)

JUDGMENT OF THE COURT

Following the conviction of the appellant for the offence of defilement contrary to **Section 8(1)** & **(3)** of the Sexual Offences Act in the Senior Resident Magistrate's Court at Mwingi, he lodged an appeal in the High Court at Garissa hoping for a different outcome. However, the High Court (Mutuku, J.) by a judgment dated 20th May, 2013 dismissed that appeal.

Though being a second appeal in which case our jurisdiction is limited by **section 361** of the Criminal Procedure Code to consideration of matters of law only, we note that there were concurrent findings of fact by the two courts below that after the April, 2011 school holiday PW1, a student at [particulars withheld] Primary School, refused to go back to school and instead expressed to her mother (PW2) her desire to get married. True to her word, PW1 ran away from her home to live with the appellant as husband and wife. It would appear PW2 was passive and did not do much to end or interfere with the said relationship which continued until the appellant was arrested for allegedly growing *cannabis sativa* on his farm. It was at that point that the relationship between the appellant and PW1, who apparently was 14 years old, came to the attention of police authorities. Consequently, the appellant was charged and convicted of the offence of defilement. He was sentenced by the trial court to 20 years imprisonment, which penalty was confirmed by the High Court.

Taking a second bite at the cherry, the appellant preferred this appeal before us challenging his conviction and sentence. In support thereof, the appellant who was unrepresented by counsel relied on his amended grounds of appeal and written submissions which he highlighted during the hearing of the appeal.

In the appellant's view, the learned Judge failed to appreciate that his right to a fair trial had been infringed at the trial. In particular, he was not furnished in advance with witness statements and documents relied on by the prosecution contrary to **Article 50 (2) (j)** of the Constitution. What's more, he was not informed by the trial court of his right to such statements and documents. As a result, he was not afforded sufficient time and resources to prepare his defence as prescribed under **Article 50 (2) (c)** of the Constitution.

He went on to state that in as much as his trial was vitiated on account of the foregoing, he urged us, in the circumstances of his case, not to order a retrial, because a retrial would give the prosecution an opportunity to correct flaws in its evidence to his detriment against the High Court's decision in **Kelvin Ochieng Tom vs. R** [2018], not to mention the fact that he would be subjected to double jeopardy.

The appellant further submitted that the learned Judge failed to appreciate that PW1 who was a minor had not been taken through *voir dire* to test her competency to give evidence. He added that there were contradictions concerning the period of time PW1 had lived with him, in that PW1 stated that she had stayed with him for seven days while PW2 stated it was for a period of one month and PW3 mentioned 2 months. As far as he was concerned, the inconsistency went to the root of the credibility of those witnesses and ought to be resolved in his favour.

It was the appellant's view that penetration, as contemplated in **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act was not established because PW1, not only consented but also encouraged the sexual relationship from the onset; that PW1 had expressed to her parents her wish to get married; and that her parents did not object even after she left to join the appellant as his wife. He argued that PW1's conduct coupled with the fact that she lived with him for a month was a clear indication that she knew what she wanted as was found by the learned Judge of the High Court in **Duncan Mwai Gichuhi vs. R** [2015] eKLR.

Whilst admitting that **Section 8(5)** of the Sexual Offences Act which is a defence to a charge of defilement if it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence, has the effect of shifting the burden of establishing that defence to him, the appellant contended that the applicable standard of discharging the burden was not beyond reasonable doubt but on a balance of probability. He maintained that he had met that standard by adducing evidence to the effect that PW1's conduct of refusing to disclose her age even upon his request coupled with PW1's own prompting to get married would lead a reasonable man to believe she was an adult as alluded to in the High Court decisions of **Martin Charo vs. R** [2016] eKLR and **Karisa Katana Gona vs. R** [2015] eKLR.

Finally, the appellant expressed his remorse over what occurred and urged us to exercise our discretion to substitute the sentence with a more lenient sentence taking into account the period he had been in prison.

On behalf of the respondent, learned counsel Mr. Njeru, argued that all the ingredients of the offence of defilement had been proved to the required standard; and that penetration was proved by the evidence of PW1 that she had sexual intercourse with the appellant, a fact he did not deny. Further, it was established that PW1 was 14 years old at the material time. On sentence, Mr. Njeru was amenable to review of the same in light of the circumstances of the case.

We reiterate that by virtue of **Section 361** aforesaid, our jurisdiction in a second appeal is restricted to consideration of matters of law only. Equally, we are not to interfere with the concurrent findings of fact arrived at by the two courts below unless they were based on no evidence. See this Court's decision in **Chemagong vs. R** [1984] KLR 213.

As appreciated by the appellant, the objective of furnishing witnesses statements and documents to be relied on by the prosecution before the commencement of a trial is to enable the accused person know in advance the nature of the case against him and also to help him or her to prepare an appropriate defence. The duty to furnish this evidence lies with the prosecution as opposed to the court. See this Court's decision in **Simon Githaka Malombe vs. R** [2015] eKLR.

We have perused the record and note that the appellant did not raise any issue before the trial court concerning access to the witness statements. In our view, looking at the record as whole, we are not satisfied that the appellant's right to a fair trial was compromised as alleged. This ground for that reason fails.

Turning to the substantive merits of the appeal, and specially the question of penetration, the appellant called into question the credibility of the evidence given by PW1, PW2 and PW3. First, that *voir dire* examination was not conducted to test PW1's understanding of the importance and solemnity of an oath in a trial. See **Samuel Warui Karimi vs. R** [2016] eKLR. It is for that reason that in certain cases failure to take a minor through *voir dire* may vitiate the trial, more so, where the conviction is based solely on the evidence of the minor.

In this case, there is nothing on record to suggest that PW1 was taken through *voir dire*? But her age, 14 years was proved. Following the judgment of the Court of Appeal for Eastern Africa in the celebrated case of **Kibageny Arap Kolil vs. R** (1959) EA 82, it is now firmly established that the phrase "a child of tender years" means a child under the age of 14 years. PW1's age removed her from the requirement of a *voir dire*. Like the two courts below we find evidence from which to uphold the conclusion that there was evidence of penetration not only from PW1 and medical the appellant's own admission that he engaged in sexual intercourse with PW1, believing she was an adult.

Having thus expressed ourselves, we equally find no substance in the complaint that there were inconsistencies regarding how long PW1 and appellant lived together, since the element of penetration had been established.

The next question is the appellant's defence based on **section 8(5)** aforesaid; that he was deceived into believing that PW1 was over the age of eighteen years at the time of the alleged commission of the offence. In its full context, **Section 8(5)** provides that-

> **"5) It is a defence to a charge under this section if—**
>
> **a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence;**
>
> **and**
>
> **b) the accused reasonably believed that the child was over the age of eighteen years."** (Emphasis ours).

We, like the two courts below, cannot find anything to suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him to believe that PW1was over the age of eighteen years. In any case, PW1 was categorical that the appellant knew she was a student attending Primary School, not to mention that the appellant and PW1 lived only 500 metres away from each other.

All in all, we find that the appellant's conviction was safe and we see no reason to interfere with the same.

On the issue of sentence, we are guided by the sentiments of the Supreme Court in **Francis Karioko Muruatetu & Another vs. R** [2017] eKLR as follows:

> **"48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating**

circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.” *(Our emphasis).*

Taking into account the circumstances of this case based on PW1 and PW2’s conduct coupled with the appellant’s mitigation, as well the ages of the appellant and PW1, we deem it appropriate to interfere with the sentence meted out against the appellant. We hereby set aside the mandatory minimum sentence of 20 years imprisonment and substitute therefor a sentence of imprisonment to the period the appellant has so far served which we believe is commensurate with his culpability.

In the end, the appeal herein is partially allowed to the extent we have set out above, with the result that the appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 5th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR