IN THE COURT OF APPEAL

AT BUSIA

(CORAM: ONYANGO OTIENO.AZANGALALA & KANTAI, JJA)

CRIMINAL APPEAL NO. 326 OF 2010

BETWEEN

H O W..... APPELLANT

AND

REPUBLIC .....REPUBLIC

(An Appeal from a Judgment of the High Court of Kenya at Kakamega

(Lenaola, J.) dated 27th July, 2010

in

H.C.CR.A.NO. 50 OF 2009)

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JUDGMENT OF THE COURT

The record before us shows that the victim in the entire saga which has ended in this appeal whom we refer to as **J.S,** (PWl) was sister to **J K** (PW2) who was in turn, the wife of the appellant **HOW**. At the relevant period before 11th November, 2007, she was living with her sister and her brother-in law the appellant. In her evidence to the court, she said after *voire dire* was administered to her, and after she was found not to know the duty of telling the truth and allowed to give unsworn statement, that on 11th November, 2007, the appellant whom she referred to as **O** went with her to get kerosene. As they proceeded through the thickets, the appellant got hold of her, bit her shoulder, removed his clothes, removed her inner pant, put her down facing up and slept on her stomach and had carnal knowledge of her. He warned her not to cry or else he would cut her. He also told her not to tell J. After that, they returned back home without the kerosene they had gone to get. She did not tell J what had happened to her that night, but when her mother visited them, she told her what had happened. J.S. put her age at ten years but she did not rely on any documentary evidence for that assertion. This evidence of J.S. was not subjected to cross-examination. We will revisit that aspect later in this judgment. J, as we have stated, was the wife of the appellant, she heard the appellant calling J.S. and telling her that they were going to fetch paraffin at a neighbour's place which was 100 metres away. They went and when J.S. came back, J.S. appeared as if she had been crying, but she did not tell her what had happened to

her despite her enquiries. The next day in the morning she told J what had happened. J examined her and-found- her sexual organ had blood and mucous things. The underpants also had blood and fluid. The blood in the vagina was clotted but she could not confirm if she had any injuries. She reported the matter to the Assistant Chief **Cale Okoti** (PW6) but this was after her brother-in law one **M** ordered her to go and report the incident to the Assistant Chief. She took J.S. to Butere District Hospital, her treatment note recorded and was then referred to Butere Police Station where a report was made to **P.C. Inviolata Lumatsi (PW4).** The Police took her to Butere hospital where **Robert Wanyonyi,** (PW3) a clinical officer examined her on 16th November, 2007, and confirmed from his examination that there was evidence of penetration. Meanwhile the Assistant Chief Caleb Okoti (PW6) to whom the report had been made by J accompanied with J.S. and who had also interrogated J.S. made arrangements and arrested the appellant on 12th November, 2007, and took him to Shiatsala Administration Police Camp and handed him over to **APC Thomas** (PWS). APC Thomas rearrested the appellant, kept him in custody at the camp till the next day when he was taken to Butere Police Station where PC Inviolata Lumatsi had him charged with the offence of defilement contrary to **Section 8 (1)** and **(2)** of the Sexual Offences Act and with the alternative charge of Indecent Act with a child contrary to **Section 11 (i)** of the Sexual Offences Act. The particulars of the main count were that:

"*On the 11th day of November in Butere District within Western Province, unlawfully had carnal knowledge of J S a girl aged 10 years."*

He denied the charge and its alternative charge of Indecent Act with a child.

In his defence in court, he gave unsworn statement and said:

"*I am H O W from Masaba. My village is Masaba. I recall on 11th 11.07 (sic) I was at home. There was a decision to sell land. The Assistant Chief wanted to bring (sic) the land for extraction (sic) of church. I refused. In the morning I went to work when (sic) I came back in the evening I found my wife, children and sister in law (the complainant) well. At 7.30 pm I was arrested. I do not know why I was arrested."*

The above is the evidence upon which the trial court convicted the appellant and after considering mitigating circumstances, sentenced him to serve 20 years imprisonment having acknowledged that in law the sentence should have been life imprisonment but reducing it to that period on account that there were elements which prohibited her from pronouncing that *"maximum"* sentence.

The appellant was not satisfied with the conviction and he appealed to the High Court. We have perused the Petition of Appeal filed in that court and we note as Mr. Otanga, the appellant's learned counsel submitted, that it does not raise any complaint against the sentence that was pronounced by the trial court. The High court (Lenaola, J.) heard that appeal and the following is the entire record of the proceedings on that appeal.

"15.06.2010

Before I. Lenaola, J.

CC Odongo Moses

Limo for State

Appellant Present.

Appellant: I seek leniency on sentence.

COURT: Appellant warned that the sentence can be enhanced.

Mr. Limo. I leave it to court.

Court: Judgment on 271712010.

I. Lenaola J.

15.6.2010."

On 27th July, 2010, the learned Judge delivered a Judgment in which he dismissed the appeal and enhanced the sentence to that of Life Imprisonment.

That is what has prompted this appeal before us premised upon three grounds set out in what the appellant's advocates erroneously headed Petition of Appeal but which we have accepted as a Memorandum of Appeal as pursuant to Rule 64 (1) of this Court's Rules, the appellant is required after filing a Notice of Appeal to file Memorandum of Appeal and not Petition of Appeal as is the case in the High Court. The three grounds were in a summary that the learned Judge erred in holding that the appellant had not challenged his conviction when the petition filed by the appellant challenged mainly his conviction; that the learned Judge failed to revisit, analyse and evaluate the evidence afresh and arrive at his own independent conclusion; and that he erred in failing to find that the prosecution had not discharged the burden of proving particulars of the charge beyond reasonable doubt.

Mr. Otanga, the learned counsel for the appellant addressed us at length on the above grounds maintaining in his submissions that the learned Judge failed to observe that the Petition of Appeal before him was only challenging the conviction and there was no complaint against sentence. He failed to note that the appellant had not abandoned the grounds of appeal and thus they were still to be considered by the learned Judge, but he did not consider them. That being the case, he maintained, the learned Judge erred in considering a matter that was not before him and in particular in enhancing the sentence when the appellant did not raise any issue on sentence and the prosecution also did not seek enhancement of the sentence. He further submitted that the age of the victim was not proved beyond reasonable doubt. Mr. Abele, the learned Assistant Director of Public Prosecutions, on his part felt that the trial court erred in law when it did not allow the appellant to cross-examine the complainant who was the main witness in the entire case. He submitted that as her evidence was not subjected to cross-examination, it should be expunged from the record. Mr. Abele submitted further that the first appellate court did not analyse evidence as regards age of the victim particularly on the face of conflicting evidence by three prosecution's set of witnesses namely the complainant, who said she was 10 years old, J Kwho also said the victim was 10 years old, the clinical officer who said victim was 10 years old but none of who produced evidence, documentary or otherwise to prove the same and Inviolata who said the victim was 11 years old, and-the Assistant Chief Okoti who said the victim was 12 years old but again the two also had no evidence to support their allegations. In Mr. Abele's view, there was need for the first appellate court to analyse the same evidence and evaluate it as is required by law, a duty the learned Judge avoided. He submitted that in view of the failure of the first appellate court to analyse the evidence afresh, evaluate it and reach its own conclusion, the appellant was prejudiced and thus, in his mind the conviction and sentence were not safe. He felt that on the issue of age, the mother should have testified as the doctor merely adopted the age inserted by the police in the P3 form but did not himself examine the victim as to her age and so no reliance can be attached to the age the doctor mentioned in his evidence.

We have considered the record before us, the grounds of appeal including issues raised by the two learned counsel in the course of canvasing the appeal, the authorities to which we were referred by the learned counsel and the law.

In our view, a number of issues are causing us concern in the way the entire case was handled both by the trial court and by the first appellate court.

The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J.S. who was a minor was taken through *voire dire* examination and this was proper in law for whatever evidence was given on age, she was not above twelfe (12) years in age. The learned trial Magistrate found as a result of *voire dire* examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross- examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. **Section 208** of the Criminal Procedure Code is clear on this aspect. It states:

"208 (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the dose of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."

(underlining supplied)

This provision is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross-examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought as we have stated that as J.S. gave usworn evidence she would not be subjected to cross-examination. With respect he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.

In the case of **Sula v Uganda (2001)2 EA 557**The Supreme Court Uganda stated as follows:

"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."

In Kenya, that position was taken by this court in the case **of Nicholas Mutula Wambua v Republic** - Criminal Appeal No. 373 of 2006 heard at Mombasa where this Court stated:

"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined..... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him." Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission."

This is the law. We only need to add for emphasis that the proviso to ***Section 19*** of the Oaths and Statutory Declarations Act, the section that gives guidance on the evidence of children of tender years states:

"If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of adult with imprisonment."

In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that ***Section 208*** of the Criminal Procedure Code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well. Thus the learned court erred in law in failing to ask the appellant to cross-examine J.S. if he wished to do so, and the High Court erred in failing to direct its mind to that serious legal lapse. We say serious legal lapse because the conviction was based on that evidence on the main.

The second matter we need to discuss is the complaint that the learned Judge failed to consider the petition that was before him and concentrated his judgment on the sentence only saying - that:

"The evidence against the appellant was overwhelming and he has not challenged his conviction in any event."

With respect the learned Judge misapprehended what was before him. The entire Petition of Appeal which had six grounds never touched on sentence. It was all challenging conviction. The appellant, indeed said that he sought leniency on sentence and that was all he said before the High Court when the appeal came up for hearing, but he did not abandon any of the six grounds of appeal and they remained for the learned Judge to consider them. The learned Judge did not ask the appellant whether by seeking leniency on sentence he was abandoning the grounds in his Petition of Appeal and seeking to amend the petition by substituting them with appeal against sentence only. In our minds, the grounds in Petition of Appeal filed in the High Court on 15th April, 2009 remained intact and it was the learned Judge's duty to consider them against the record even if the appellant did not argue them for they were not abandoned. On that aspect Mr. Otanga, the learned counsel for the appellant was plainly right.

The last point of concern to us is the way the learned Judge enhanced the sentence from 20 years imprisonment to that of life imprisonment. The learned Judge observed that the sentence of 20 years imprisonment was not lawful. This was based on the evidence that the victim was 10 years old. That age was given in evidence by the child, whose evidence as Mr. Abele rightly submitted must be expunged from the record as it was not subjected to cross-examination, and also by K and the clinical officer. None of the three as we have stated produced anything to prove that age. Inviolata stated she was 11 years old but again that was according to her assessment, and she is not an expert on that field. She is a police constable. The Assistant Chief put the age at 12, again without any cogent evidence to support it. The learned Judge in enhancing the punishment did not analyse these contradictions on the evidence as to age. We cannot tell what decision he would have come to had he done so. It was his duty to do so see case of **Okeno v R (1972) EA 32.**

Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning.

All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice.

We think we have said enough to indicate that this appeal must succeed. The appeal is allowed. Conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Busia this 9th day of May, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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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