REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. E006 OF 2021

TONY MAMBOLEO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. M. Munyekenye, SPM, delivered

on 4th February 2021 in the Senior Resident Magistrate's Court at Sirisia

in Criminal Case No. E010 OF 2021 **Republic v Tony Mamboleo)**

JUDGMENT

The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised eight (8) grounds of appeal in his petition of appeal which are as follows:

1. That he is a first offender.

2. That he did not plead guilty to the charge.

3. That he was not warned of the dangers of pleading guilty to such a serious offence.

4. That the trial magistrate erred in law and fact by convicting him notwithstanding the conditions being that it was the first time he was arrested and charged in court and that he did not understand the language used in court.

5. That the trial magistrate erred in law and fact by convicting the appellant without proper evaluation of whether the appellant was under the influence of arresters or not.

6. That the learned magistrate erred in law and fact by failing to consider the age bracket of the accused.

7. That the learned magistrate acted inhumanly for awarding a harsh and excessive sentence notwithstanding the appellant hails from a poor background and or is a school going child who needs to continue with his education to fulfil his dream.

8. That the learned trial magistrate did not warn himself by convicting the appellant on his own plea of guilty.

The submissions of the appellant.

In his written submissions, the appellant has submitted that the trial court errered in invoking sections 8 (7) of the Sexual offences Act and section 26 (2) of the Penal Code and should have meted out the least severe sentence pursuant to Articles 24, 50 (2) (p), 29 (e) and (f) and 53 (f) (i) of the 2010 Constitution of Kenya. He further submitted that the sentence of life imprisonment is manifestly excessive, cruel, and harsh since he was a minor offender in terms of age. He has also argued that he is still a minor despite the fact that the age assessment placed him at the boundary of age 18. Furthermore, he has submitted that the formula used for assessing his age was an estimation formula which dependent on genetic development; which various from one person to another.

The appellant has further submitted that section 8 (7) of the Sexual offences Act requires such minors to be treated under borstal law and section 26(2) of the Penal Code which enjoins the court to consider the lesser sentences. Furthermore, article 53 (f) of the 2010 Constitution of Kenya provides for the rights of children not to be detained and if detained it should be as a measure of last resort. And when detained the child may only be held for the shortest time. The appellant has argued that he is remorseful, apologetic and being a first offender, the least severe sentence would only be rehabilitation.

The submissions of the respondent.

Mr. Shabola Ahindukha, counsel for the respondent submitted that the appellant was convicted on his own plea of guilty and was sentenced to life imprisonment. That the facts were read out to him and the appellant confirmed the facts to be true. He submitted that the plea of guilty was unequivocal and proper in law as was held in the case of Imbena vs Republic [1981] e-KLR.

On whether the sentence meted out was proper, counsel submitted that the sentence is prescribed by statute; since the victim was 5 years old.

Counsel therefore urged the court to dismiss the appeal.

Issues for determination

1. Whether the plea of guilty was unequivocal

2. Whether the sentence imposed was manifestly excessive.

Issue 1

The appellant argued that although he pleaded guilty to the charge, the plea was not unequivocal, because it was not in a language that he understood and the consequences of his plea were not explained to him. Counsel for the respondent submitted that the plea was unequivocal.

I have perused the record of the trial court. The charge was read to the appellant to which he answered 'nimekubali' and 'ni ukweli' (I have accepted and it is true). The statement of facts was also read to him. He confirmed that the facts were correct. The record further shows that the language used in court was English which was interpreted to Kiswahili being the language the appellant understood.

Furthermore, from the record, there is no indication that the appellant was informed of the consequences of his own plea of guilty. Whether or not he was aware of this fact is not clear. In Kennedy Ndiwa Boit vs. Republic [2002] e-KLR, the Court of Appeal held that:

> *"Stopping there for the moment, it is abundantly clear to us that at no stage did the Magistrate warn the appellant of the consequences of his pleading guilty to the charge. Indeed, the appellant's plea in mitigation that "I am asking for pardon" clearly shows that the appellant was wholly unaware that he ran the risk of being sentenced to death… Mr. Mbeche who argued the appellant's appeal before us told us that the appellant's plea was unequivocal. If that was all the complaint we had to deal with, we doubt, on the face of the record, whether it would have succeeded. The High Court rejected that complaint on first appeal to that court (Etyang & Omondi-Tunya, JJ) but in rejecting the appeal, the learned Judges of the High Court said absolutely nothing about the failure by the trial Magistrate to warn the appellant of the consequences of his pleading guilty. The High Court's failure to address that issue is a question of law which entitles us to interfere with their finding and that of the Magistrate."*

Whereas one may argue that the said warning only applies to capital offences, in Bernard Injendi vs. Republic [2017] e-KLR, Sitati, J stated that:

> *"Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs- Republic [2002] I KLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty."*

Since the charge which the appellant was charged with carried a sentence of life imprisonment; the court was under an obligation to ensure not only that the appellant understood the ingredients of the offence with which he was charged at all the stages of the plea taking but that he also had to be informed that the sentence he was faced with when he opted to plead guilty. I find that this is what is contemplated under article 50 (2) of the Constitution of the Kenya which provides for the right to a fair trial. I therefore find that the manner in which the proceedings were conducted violated the appellant's right to fair trial and that the plea of guilty was in those circumstances not unequivocal.

It therefore follows that the trial of the appellant was fatally defective. In other words, it was a mistrial.

In the premises, I find that the appeal of the appellant has succeeded. I therefore quash his conviction and sentence.

The only issue for consideration is whether I should order a re-trial. In this regard, one of the main considerations is whether the potentially admissible evidence if believed might result in a conviction. See Braganza v R (1957) EA 152. The issue is whether the court should order a re-trial. The Court of Appeal in the case of Ahmed Sumar vs. R (1964) EA 483 offered the following guidance:

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."*

The other consideration is the period the appellant has been in custody namely both pre-trial and post judgement custody.

Additionally, the appellant has been in post judgement custody for about a period of one year and two months having been convicted on 4 th February, 2021.

After taking into account all of the foregoing matters, I hereby order a re-trial of the appellant before another magistrate of competent jurisdiction other than the one who convicted him, pursuant to this court's powers under section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

In the premises, the appellant is hereby remanded in custody to be produced in the Principal Magistrate's court at Sirisia as soon as practicable for re-trial purposes.

Judgement signed, dated and delivered through video conference at Nairobi this 27th day of April 2022.

J M BWONWONG'A

JUDGE

In the presence of :-

Kinyua: Court Assistant

The appellant – present in person

Mr. Oyiembo for the Respondent