REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 5 OF 2019

TABU KITSAO MWAYELE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal from the Judgment delivered by the Learned trial Magistrate,

Hon. V. Asiyo (SRM) in Lamu Criminal Case Number 8 Of 2019

at Lamu on 17.5.2019)

Coram: Hon. Justice Nyakundi

Appellant in person

Mr. Mwangi for the State

JUDGMENT

The appeal is against the Judgment of trial Court at Lamu delivered on 17.5.2019 which convicted and sentenced to fifteen (15) years after the appellant pleaded guilty for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act.

The appellant aggrieved with both conviction and sentence filed an appeal to this Court based on the following grounds:

> ***(1) That the Learned trial Magistrate grossly erred in Law and facts by failing to consider the P3 Form was not produced by the maker but by a police officer, in breach of Section 77 of the Evidence Act.***
>
> ***(2) That the Learned trial Magistrate erred in both Law and facts by failing to consider that the certified copy of a birth certificate was marked for identification but not produced and admitted as an exhibit.***
>
> ***(3) That the Learned trial Magistrate erred in both Law and facts by failing to consider that the legal provision on minimum sentence under Section 8 contradicts with Section 216 and 329 of the Criminal Procedure Code thereby violating Article 27 (1) (2) (4) of the Constitution.***

Background

The facts of the case which the appellant admitted were that on diverse dates between 1st February 2019 and 10th May 2019 in Lamu West Sub-County, he intentionally and unlawfully caused his penis to penetrate the vagina of **ZKC**, a child aged sixteen (16) years old.

Grounds 1 and 2 are distilled in the appellants brief submissions where he argues that all the elements of the offence were never proved therefore rendering the plea of guilty equivocal to sustain any conviction as founded by the Learned trial Magistrate.

The appellant attacks the holding by the trial Court that penetration and age of the victim were proved beyond reasonable doubt. He contended that Section 64 and 66 of the Evidence Act which provides for certification of documentary evidence was never complied with by the prosecution, that omission therefore rendered the P3 Form and birth certificate inadmissible.

The appellant cited the principles in the cases of **Mwachongo v R {2016} eklr, Daniel Maina v r {2018} eKLR, Alfayo Okello v R {2009} eKLR, Eliud Wambui v R {2016} eKLR** to buttress his arguments that the issues dealt with by the Learned trial Magistrate failed to prove the offence of defilement as required by the Law.

As regards sentence, appellant's argument and contention was in regard to the application of mandatory minimum sentence of 15 years which in congruent with the principles in **Muruatetu v R {2017} eKLR and Article 25 (c) and 50 (2) of the Constitution**. Relying on the dictum in **Amedi Omurunga v R, Rophus Ngombo v R {2018} eKLR, Wanjala Wanyonyi v R {2019} eKLR, Raphael Mutinda v R {2019} eKLR** to that extent he prayed that his sentence of 15 years be interfered with and substituted with a lesser sentence.

Learned respondent counsel submits that the respondent discharged the burden of proof the Law places on it to prove the charge of defilement on the facts so admitted by the applicant. He find no merit on the issues touching on conviction of the appellant to call upon the Court to set aside the verdict of guilty and subsequent conviction.

Determination

This appeal shall be guided by the settled principles in **Okeno v R {1972} EA 32 and Ruwalla v R {1957} EA.** It is certainly the Law that a plea of guilty can only be challenged by an appellant if the charge as read and interpreted to the appellant was in contradiction of the safeguards laid down in **Adan v R {1973} EA 45 and Kariuki v R {1987} KLR 98.**

From the record, the appellant entered a plea of guilty to the offence as charged upon the Court explaining the ingredients of the offence in Swahili language. The trial Court was satisfied that he intended to admit to the truthfulness of the facts of that offence as framed by the state in the charge sheet.

Learned trial Magistrate was therefore free to adopt the facts of the case and subsequent answer to the ingredients which then forms basis of the conviction followed by the prescribed sentence.

It is apt to say that in that instant trial, the respondent produced P3 Form as **exhibit 2** and the age assessment report as **exhibit 1.** In addition to the medical age assessment report, a birth certificate ascertaining the age of the victim was also admitted in evidence as **exhibit 3**. This is in tandem with the well settled principles of Law that facts admitted need no further proof from witnesses lined up for the respondent's case once there exist unequivocal plea of guilty albeit that the appellant was not represented can never be a ground to impact that plea of guilty.

There is no burden on the part of the state to proof the elements of the offence beyond reasonable doubt. All what the trial Court is expected to accomplish is the duty under Article 50 (1) of the Constitution and to the facts adduced do confirm the elements of the charge as statutory defined and provided for in that specific indictment. Here, in that trial, the prosecution tendered and admitted all the necessary documentary exhibits being challenged by the appellant pursuant to Section 77, 64 and 66 of the Evidence Act.

In my considered view, the applicant never objected to their production during or after a plea of guilty. There was therefore no irregularity or illegality of procedural that the exhibits were admitted and adopted by the trial Court to form part of the evidence in support of the charge.

With, this authentic record, I am satisfied that the appellant intended and did execute that intention by admitting the charge. There is nothing on record to show that the plea of guilty and not comply with principles in **Adan v R (supra)**. There are no discrepancies or contradictions in the documentary exhibits which would substantially or fundamentally affect the main issues at the trial during the summary hearing of the appellant.

To put it in other words, even the errors or omissions complained of by the appellant on production of documentary exhibits are curable under Section 382 of the Criminal Procedure Code. On all these evidence the Learned trial Magistrate was perfectly entitled to find as he did on the guilty and conviction of the appellant.

When it comes to sentence, the appellant vigorously attempted to develop the trajectory on the severity of sentence of fifteen (15) years imposed by the Learned trial Magistrate.

Here it's the contention of the appellant. That since the dicta by the Supreme Court in **Muruatetu (supra)** the pendulum on mandatory minimum sentences has siding back and so the Courts have mainstreamed their discretion to readily interfere with such sentences.

Considering the scenario and antecedents of this case in which the appellant pleaded guilty on being arraigned in Court its to me a sense of a positive score towards sentencing. The purpose of sentencing is well articulated in **D.M.W.R. {2015} eKLR.** In **Dalmas Ongaro v R {2016} eKLR** the Court held interalia:

> ***"That the antecedents of an accused person also came into play when the Court is considering the appropriate sentence. If an accused person is a first offender, the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivision."***

Considering the outlined facts by the Learned trial Magistrate on sentencing, he held himself hostage that he lacks jurisdiction to exercise discretion to pass any other proportionate sentence except the statutory fifteen (15) years imprisonment.

In **Muruatetu case**, its apparent that the criterion discussed by the Supreme Court ought to mirror in all cases when it comes to sentencing a convicted offender. It is therefore no longer permissible to presume that trial Courts lack the power to exercise discretion in performing this task on sentencing. What the statute provides has been redefined in subsequent cases after **'Muruatetu'** and significance proportion of mandatory minimum sentences which run the risk of violating Section 333 (2) of the Criminal Procedure Code.

Section 216 and 329 of the same code have been interfered going by the current jurisprudential trends. A further issue arises with regard to the credit for a guilty plea and the fact that the convict is a first offender.

Having regard to the facts on record, I find it difficult to agree with the Learned trial Magistrate that the appellant was only entitled to a mandatory minimum sentence. As much as I find the sentence to be legal, I do not think in accordance with the principles in **Muruatetu (supra)** the course open to the trial Magistrate to enquire into all those parameters and objectivity in sentencing was closed.

In the instant case and having found that the plea was unequivocal, I find no merit in the conviction of the appellant.

However, the sentence of fifteen (15) years be and is hereby set aside and substituted with seven (7) years imprisonment with effect from the date of conviction.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the State

2. The appellant