REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO. 72 OF 2018

PETER MWANGI MURIUKI.....APPELLANT

VERSES

REPUBLIC.....PROSECUTOR

(Being an appeal arising from the original conviction and sentence in SO Case No. 149 of 2017 at Chief Magistrates Court Kibera Law Courts by Hon. Juma) – SPM on 14/6/2017)

JUDGMENT

1. **Peter Mwangi Muriuki**, the Appellant, was charged with two counts of defilement contrary to **Section 8(1**) as read together with **Section 8(2**) of the Sexual Offences Act. It was stated that he defiled children aged 5½ and 7 years respectively. In the alternative, the appellant faced charges of committing Indecent Act with the minors contrary to **Section 11(1)** of the Sexual Offences Act.

2. The Appellant admitted having defiled the minors and was convicted on his own plea of guilty. Facts of the case were presented and having admitted the facts as presented, the trial court found him guilty, convicted and sentenced him to life imprisonment.

3. Aggrieved, he appeals on grounds that: the trial court relied on contradictory evidence; the case was not proved to the required standard; essential witnesses were not summoned; the burden of proof was shifted; the Investigation Officer did not conduct any investigations and if he did, they were shoddy; and that the defence put up was not given any consideration.

4. This being a first appellate court it has an obligation to analyse what transpired at trial and come up with its own conclusion.

5. The appeal was canvassed by way of oral submissions. The Appellant sought to be released or at least have the sentence meted out reduced.

6. The State through learned State Counsel, Ms. Kimaru opposed the appeal. She urged that the Appellant pleaded guilty to both counts of defilement and was sentenced to life imprisonment. That evidence of both complainants was overwhelming; post rape forms adduced in evidence indicated their years as 5 ½ and 7 years respectively; an identification parade was conducted at the police station where the 2nd Complainant identified the Appellant; and that the Appellant was a serial offender serving another sentence.

7. **Section 348** of the Criminal Procedure Code provides thus:

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."***

8. However, the fact that a party pleaded guilty does not necessarily prevent him from bringing an appeal. In the case of ***Wandete David Munyoki Vs. Republic [2015] eKLR*** it was stated that:

> ***" It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. In deed in Ndede Vs. Republic [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed."***

9. I must emphasize what was stated in the case of ***Adan Vs. Republic (1973) EA. 445*** regarding the procedure for taking a plea. The court stated as follows:-

> ***"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed"***

10. Upon arraignment the charges were read out to the Appellant who responded thus:

> ***"It is true."***

The matter was adjourned until the afternoon to enable the prosecution avail the facts. When the file was brought up at 12.00 noon, the charges were read out afresh whereby the Appellant communicated in Kiswahili language. He responded in Kiswahili as follows:

> ***"Count 1- it is true.***
>
> **Count 2- It is true "**

This was followed by presentation of facts thus:

> ***"…The facts are that the accused on 7/5/17 a young girl S aged 5½ years was playing (sic) outside their house at Kawangware Muslim area when the accused called her and asked her to accompany him. On the way the accused took her to under a bridge where the accused defiled her then left her there. (sic)***
>
> ***People passing by found the child bleeding, her mother was called and she took the child for treatment.***
>
> ***When the complainant was at the hospital undergoing treatment. The accused on the 20/5/17, went back to the same main road bridge and duped another girl named SA and the accused took her to Muslim bridge where he defiled her and left her there. (sic)***
>
> ***People passing by found called the mother who took the complainant to Nairobi Women hospital where she was treated. (Sic)***
>
> ***After treatment the complainant went to Muthangari police station and reported the matter and recorded statement. (sic)***
>
> ***Police officers interrogated members of the two suspects the accused and another who is before the court.***
>
> ***The accused was subjected to Police identification parade and when SA and another few people identified accused. (Sic) SA was still traumatized and crying as such she was unable to identify him. I have copies of Post Rape Care form dated 7/5/17 which I wish to produce as PExhibit.1. I have the discharge summary for SA dated No.A20756 for discharge summary for a date between 7/5/517 to 12/5/17 which I produce as Exhibit 2.SA was examined by Doctor Shako who filed her P3 dated 7/6/2017 which I wish to produce as Exhibit 3. The Post Rape Care form for S identified. is dated 20/5/17 which I wish to produce as P Exhibit 4. Discharge summary for S for a date between 21/5/2017 to 23/5/17.***
>
> ***I wish to produce the discharge forms as P Exhibit 5. S was examined by Dr. Kizzi Shako.***
>
> ***I wish to produce the discharge forms as P Exhibit 6.***
>
> ***That is all."***

11. The Appellant's response was as follows:

> **"Facts are true and correct"**

A response that elicited a conviction on his own plea of guilty. It was indicated that the Appellant was not a first offender, having been convicted and sentenced in **Sexual Offence Case No. 43/2017,** a fact that he admitted.

12. The Appellant was given the opportunity to address the court in mitigation. He pleaded for pardon and mercy from the court, he stated that he was 28 years old, single and homeless. That he helps Kamau who resides everywhere with work .That he committed the offence by the road side where he stays and he was aware that he had been convicted to serve a life imprisonment in another case.

13. The trial court noted that the accused was not a first offender and the fact of having pleaded guilty to similar charges in a different case.

In the result it sentenced the Appellant to life imprisonment.

14. This court did confirm that the appellant was mentally fit to proceed with the appeal. A mental assessment report to that effect was filed. Looking at the grounds of appeal filed in this case, they do not call for consideration for appeal purposes. In the case of ***Ndede*** *(Supra*), the court stated that the list of unusual circumstances is not exhaustive and that other reasons may exist, but, in this case the appellant's grounds of appeal question the evidence presented and the burden of proof, yet, he admitted the charge at the outset and in the course of mitigation he seized the opportunity to explain how he committed the offence. In the c ments without any challenge from the appellant. The appellant could only challenge the evidential burden of proof if he denied the charges and/or the facts during plea taking. The grounds of appeal relied upon by the Appellant are not adequate to challenge the conviction.

16. It is opined that if the court finds that the plea was not taken in accordance with the laid down procedure, the court has discretion to set aside the conviction and allow a retrial to mitigate the injustice caused to the appellant. The trial court had to ensure that the accused understands the charges. This duty similarly extends to this court on first appeal as it analyses the record and arrives at its own conclusion to determine whether to set aside or uphold the trial court's findings. Typed proceedings indicate that the charges were read out in a language that the appellant understood. The language was indicated as English and Kiswahili. The appellant pleaded guilty using the words: ***"it is true".*** The charges were read out the second time in the afternoon. The record indicates that the appellant responded in Kiswahili. A court interpreter was present who did the necessary interpretation. The court explained the ingredients of the offence to the Appellant that he pleaded to as held in the case of ***Mose -Vs- R (2002 1 EA,163, where the Court of Appeal*** stated that the procedure for calling upon an accused to plead required that the accused admits to all the ingredients of the offence charged.

17. The Appellant does not contest the manner in which the plea was recorded, and as argued, the plea must be clear, unambiguous and unequivocal. The Appellant having not demonstrated any grounds to set aside the proceedings of the trial court when the plea was taken, I find and hold that the plea was unequivocal. As a result, the grounds of appeal as framed are rendered irrelevant. As stated above, the Appellant did not address the court on his grounds of appeal, as his prayer was solely on being released and/or his sentence to be reduced.

18. The principles of interfering with sentence by an appellate court have been articulated in many cases. In the case of ***Dismas –Vs- Republic [1984] KLR 634,*** the court held that an Appellate Court should not interfere with the discretion by a trial Court as to sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

19. **Section 8 (2)** of the Sexual Offences Act provides for a mandatory life sentence where the victim is aged 11 years or less. The minors' age was not in issue and the P3 form was clear on their age. Therefore, the sentence imposed was lawful.

20. The upshot of the above is that the appeal lacks merit. Accordingly, it is dismissed in its entirety.

21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JULY 2021

L. N. MUTENDE

JUDGE.