REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 178 OF 2019

KEVIN MAKOKHA WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the original conviction and sentence by Hon D.O. Onyango (S.P.M)

in Kimilili S.P.M Sexual Offence Case No. 32/2015 delivered on 29/5/2015)

JUDGMENT

1. The Appellant was charged in the subordinate Court with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The facts were that on the 25th day of May, 2015 at [Particulars Withheld] Village in Bungoma North District within Bungoma County he intentionally caused his penis to penetrate the vagina of ANM (*name reducted*) a child aged 13 years.

2. He equally faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The facts being that on the 25th day of May, 2015 at [Particulars Withheld] Village in Bungoma North District within Bungoma County he intentionally touched the vagina of ANM a child aged 13 years with his penis.

3. The Appellant pleaded guilty to the charges and was subsequently convicted on his own plea of guilty and sentenced to serve 20 years' imprisonment.

4. Being dissatisfied, the Appellant lodged the instant appeal which is premised on the grounds that:

i. The trial magistrate erred in law and fact by:

a. convicting the appellant on his own plea of guilty that was not unequivocal.

b. by failing to comply with the provisions of Article 50(2)(p)(q) of the Constitution hence the sentence handed down is harsh and excessive.

ii. the mandatory sentence of 20 years meted out by the trial magistrate as provided under section 8(3) of the Sexual Offences Act is unconstitutional.

The appeal has been disposed of by way of written submissions both parties having filed their respective submissions.

5. The Appellant submits that he was harassed, threatened and intimidated by police officers and therefore pleaded guilty under duress. That he was a stranger to courts and a layman who was not informed of the context of plea bargaining and or informed of the right to legal representation.

6. He urges this court to consider that he was a first time offender and was remorseful. That he was an academic enthusiast whose dreams have been shattered by long incarceration and that the mandatory minimum sentence is unconstitutional as declared in **Christopher Ochieng vs. R [2018] eKLR**. He finally urges the court to consider the mitigating factors that his family is ready to facilitate his resettlement.

7. On its part, the Respondent submits that since the challenge is only on the sentence meted, the court ought to be guided by decisions in the

cases of **S vs. Maglas 2001(1) SACR 469 (SCA); Mokela vs. State (135)11) (2011) ZASCA 166; Ogolla S/O Owuor vs. R (1954) EACA 270; Shadrack Kipkoech Kogo vs. Republic Criminal Appeal No. 253/2003-Eldoret** and **Benard Kimani Gacheru vs. Republic [2002] eKLR**.

8. On the mandatory minimum sentence, the Respondent submits that taking into consideration the age of the victim and the circumstances under which the offence was committed, the sentence was proper. The cases of **Simon Kipkurui Kimori vs. R [2019] eKLR** and **Dahir Hussein vs. R [2015] eKLR** have been cited in support.

9. The record indicates that the Appellant pleaded guilty to the charge. As such, the appeal is governed by the provisions of **section 348** of the **Criminal Procedure Code** which states:

> ***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.***

10. The locus classicus case as regards the recording of a plea of guilty is **Adan vs. Republic [1973] 1 EA 445** which set it out as follows:

> ***i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
>
> ***ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***
>
> ***iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
>
> ***iv. if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;***
>
> ***v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.***

Therefore, the duty of the court in this appeal is to confirm whether the trial court complied with the above procedure before convicting and subsequently sentencing the Appellant.

11. It is apparent from the record that the charges were read out to the Appellant with Kiswahili/English interpretation a language he was said to understand well. He answered; ***"it is true, she slept in my house".*** The facts were explained to the Appellant the following day whereupon he answered that the facts were true. He was sentenced as stated above.

12. The manner in which a plea should be taken has been addressed by superior courts on numerous occasions. In the case of **Obedi Kilonzo Kevevo vs. Republic [2015] eKLR**, the Court of Appeal stated as follows in relation to plea taking:

> ***The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.***

In this case, the facts were read to the Appellant in Kiswahili language and he answered that the facts were true. This denotes that he understood the offence he was facing.

13. On the sentence imposed upon the appellant, **section 8(3)** of the **Sexual Offences Act** provides that:

> ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

The Section is clear on the sentence that ought to be imposed upon an offender upon conviction. In the instant case, the Appellant in his mitigation prayed for leniency.

14. I have considered the fact that the Appellant was a young man of 20 years and the Complainant was a school going child of 13 years. I have also considered the fact that the Appellant waylaid the minor and kept her locked up in his house until the following day as her parents and other people searched for her. I have equally taken into account the sentencing policy guidelines particularly that a sentence ought to rehabilitate the offender.

15. The upshot of the above is that the plea of guilty was properly entered. The sentence imposed by the trial court was the minimum sentence as provided by law. The sentence is therefore affirmed. The appeal is hereby dismissed for lacking in merit.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.