



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 213 OF 2019

MOSES WANJALA MWEMBER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the conviction and sentence by Hon. C.A.S. Mutai (S.P.M)

in original Bungoma CMCC Sexual Offence Case No. 125/2019

delivered on 17/12/2019)

JUDGMENT

1. The Appellant was arraigned in the subordinate Court to answer charges 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 9th December, 2019 at [Particulars Withheld] location within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the anus of JSS a child aged 13 years.

2. He 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 were that on 9th December, 2019 at around 2200 hrs at [Particulars Withheld] Village, Kanyoli Sub Location in Bukembe Location within Bungoma County he intentionally and unlawfully caused his penis to come into contact with the anus of JSS a child aged 13 years.

3. When the charges were read out to the Appellant, he pleaded guilty. A plea of guilty was accordingly entered and he was sentenced to serve 24 years in prison. Being aggrieved with the sentence, the Appellant now appeals to this court vide his petition of appeal filed in court on 27th December, 2017. The grounds are that:

- i. The appellant is a first offender.*
- ii. He is remorseful for the offence he committed.*
- iii. The appellant pleaded guilty being a layman on the law of the land.*
- iv. The appellant was intimidated by the prosecution side for the decision he made.*
- v. The sentence meted out was harsh and excessive being in the mid of the ladder of secondary education.*
- vi. The appellant pleads to this court to re-evaluate and make appropriate determination of the offence committed.*
- vii. There was no sufficient proof or evidence for the learned trial magistrate to warrant a conviction.*

4. The appeal was disposed of by way of written submissions.

5. The Appellant relying on the provisions of **sections 216 and 329** of the **Criminal Procedure Code** as well as the Supreme Court decision in **Francis Karioko Muruatetu & Anor Vs R & Anor (2017) eKLR** submits that he is remorseful for the offence. That **Article 27** of the **Constitution** protects him from discrimination. He states that he has suffered for the one (1) year he has been behind bars leading to the

suffering of his octogenarian parents.

6. The State in opposing the appeal submits that **section 348** of the **Criminal Procedure Code** precludes the Appellant from appealing against conviction. That **section 8(3)** of the **Sexual Offences Act** prescribes a minimum sentence of 20 years without a maximum and therefore urges the court to uphold the sentence.

7. The record indicates that the Appellant pleaded guilty to the offence charged. It is therefore my duty to re-evaluate the record to satisfy myself that the plea was taken and the sentence meted in accordance with the law.

8. **Section 348** of the **Criminal Procedure Code** only allows an appeal on legality of a sentence where one pleaded guilty to a charge in the subordinate court. The section enacts:

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.

9. In the celebrated case of **Adan vs. Republic [1973] 1 EA 445** the East Africa Court of Appeal (Sir William Duffus P, Spry VP and Mustafa JJ.A) set out what a proper plea should entail 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 with 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.*

10. This position was restated by Ngugi, J. in **Simon Gitau Kinene v Republic (2016) eKLR** where the learned Judge held:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded.”

The court is therefore duty bound to ascertain whether the trial court complied with the above procedure before convicting and subsequently sentencing the Appellant.

11. The record indicates that the charges were read out to the Appellant “in a language he/she understands”, and he answered; **“it is true”**. The facts were then read out to him whereupon he answered that the facts were admitted. He later proceeded to tender his mitigation to the effect that he was sorry and that six (6) of his brothers were dead.

12. It is trite law that the plea ought to be unequivocal. Ngugi J. in the above mentioned case citing **Ombena vs. Republic [1981] KLR 450** held:

...whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

Having perused the record, I am satisfied that the plea of guilty was unequivocal and therefore properly entered.

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

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 offence therefore carries a minimum sentence.

14. The sentence imposed on an accused person must be commensurate to the blameworthiness of the offender. The court looks at the facts and the circumstances of the case in its entirety when imposing sentence. The sentencing regime in Kenya is guided by the Constitution, statutes, policy guidelines and case law.

15. I have considered the circumstances of the case and the Appellant's mitigation and remorse vis-à-vis the impact the ordeal had on the minor. The Appellant abused the trust bestowed on him by the complainant's mother as well as the victim who had held the light for hours for the Appellant to cook his mandazi.

16. Taking all the foregoing into consideration, I am satisfied that the sentence meted out on the Appellant is commensurate with the gravity of the offence for which he was convicted. This appeal is therefore 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.