REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. E 008 OF 2020

WILFRED ONDIEKI KIBETI alias BABA CHUCKY.....APPELLANT

VERSUS

REPUPLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case NO. 42 of 2019 of the Principal

Magistrate's Court at Oyugis by Hon. C.A. Okore–Senior Resident Magistrate)

JUDGMENT

1. Wilfred Ondieki Kibeti Baba Chucky, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 0f 2006.

2. The particulars of the offence are that on 19th & 20th October, 2019 at [Particulars Withheld] South location, Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of JA a child aged 10 years.

3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised grounds of appeal as follows:

a) That he was not conversant with the language of the court when he pleaded guilty.

b) That the investigating officer misdirected him to plead guilty to the offence.

c) That he was not aware of the consequences of pleading guilty.

5. The appeal was opposed by the state though no submissions or grounds were filed.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Article 50 (2) m of the Constitution provides as follows:

Every accused person has the right to a fair trial, which includes the right—

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

I have perused the record and though the appellant was not asked to state the language he understood, it is clear from his response after the facts were read to him he understood Kiswahili. He not only gave a response to the facts, but also tried to explain why he committed the offence while pleading for leniency. His submissions indicate that he indeed committed the act which he describes as beastly. He is estopped from contending that he did not understand the language of the court.

8. Though the appellant contends that he was misdirected by the investigating officer to plead guilty, he did not complain to the court. The court did not take note of any injuries or anything to suggest that he was not pleading freely. I therefore dismiss this ground.

9. Section 348 of the Criminal Procedure Code provides as follows:

> **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.**

I will therefore endeavour to establish the legality of sentence bearing in mind that an appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **Nillson vs. Republic [1970] E.A. 599,** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.**

10. Section 8 (2) of the Sexual Offences Act provides as follows:

> **A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

11. In the instant case the minor was aged 10 years. The prescribed sentence is mandatory and any other sentence would be illegal. I therefore have no basis to interfere with the sentence. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE