



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 21 OF 2018

(Formerly Garissa Criminal Appeal No. 48 of 2015)

MK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident's Magistrate Court at Hola Criminal Case No. 195 of 2014 by Hon. M.D. Kiprono (SRM) dated 27th August 2014)

JUDGEMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 22nd April 2014 and 4th May 2014 in Tana North Sub-County within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of SSS a child aged 15 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. The particulars were that between 22nd April 2014 and 4th May 2014 in Tana North Sub-County within Tana River County, the Appellant intentionally touched the vagina of SSS a child aged 15 years.
3. The Appellant pleaded guilty and was convicted on his own guilty plea. He was sentenced to imprisonment for 20 years.
4. Despite being convicted on his own guilty plea, the Appellant lodged an appeal against the conviction and sentence on the 27th July 2015. Subsequently, on 30th September 2019, he filed his amended petition of appeal together with his written submissions.
5. His three grounds of appeal were that the prosecutor not being a medical doctor produced the P3 form as evidence in contravention of section 77 of the Evidence Act; that there was no court interpreter at the time of taking plea in breach of Article 50(2)(j) of the Constitution of Kenya 2010, and; that he was a minor at the time of the offence and the age assessment was unreliable and inconclusive.
6. The Appellant's submissions were to the effect that the P3 form, which was an expert report was produced by Mr. Kilambyo the prosecutor, in contravention of section 77 of the Evidence Act. That the prosecution was required to summon a medical doctor under the provisions of section 150 of the CPC to produce the P3 form and to explain how he reached the conclusion that there was penetration. It was his submission that the case was not proved and he therefore deserved an acquittal. He relied on **Stanus Opiyo vs Rep Cr. App No. 711 of 2003 (2006); Amos Karuga Karatu vs Rep (2008) eKLR**.
7. Secondly, the Appellant submitted that he was not furnished with witness statements before taking plea which contravened Article 50(2)(j) of the Constitution. In addition, he stated that there was no court interpreter during plea taking in contravention of Article 50(2)(m) of the Constitution. He quoted the case of **Njeru Kathiami & anor vs Rep (2007) eKLR** that held the court's failure of the court to indicate the name of the interpreter and nature of interpretation was a serious defect making the conviction unsafe and unsustainable.
8. Finally, the Appellant submitted that he was a minor at the time of the offence and that his trial and sentence was in breach of section 188, 189, 190 and 191 of the Children's Act and Article 53(1)(f) of the Constitution. It was his submission that when he was taken for age assessment it was determined that he was 18 years old because he had 32 teeth. He submitted that the trial magistrate erred in relying on the age assessment stating that it was unreliable and inconclusive. He relied on the case of **E.K vs Rep (2019) eKLR**.
9. The Respondent opposed the appeal in its entirety through its written submissions dated 5th November 2019. During hearing Mr. Mwangi,

learned counsel for the Respondent, highlighted the submissions that firstly, the Appellant was convicted on his own plea of guilty and there was no need to go to full trial or to call witnesses. Secondly, he submitted that since the Appellant was convicted on his own guilty plea, the trial magistrate was not under a duty to order that the Appellant be furnished with witness statements. On the issue of an interpreter, he submitted that the Appellant understood Kiswahili which was used. He drew the attention of the court to the fact that the Appellant had demonstrated his proficiency in Kiswahili in this court when conducting his appeal. Lastly, on the issue of the Appellant's age, it was Counsel's submission that the Appellant never produced any evidence to prove he was below 18 years.

10. In response to the Respondent's submission, the Appellant denied stating that he did not understand Kiswahili and insisted that the complainant was his girlfriend.

11. I have considered the grounds of appeal, the respective submissions, and the record. The issues for determination in this appeal are whether the plea was unequivocal; whether there was a court interpreter present at the plea taking; whether the Appellant was a minor at the time of commission of the offence, and; whether the sentence was lawful and just.

12. I will start with the issue of plea. This is the issue that will determine whether or not the Appellant would be entitled to appeal. Section 348 of the Criminal Procedure Code states that: -

“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.”

13. The Court of Appeal in the case of **Alexander Lukoye Malika v Republic [2015] eKLR** in interpreting the above section and held that:-

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

14. I am guided by the above authority on the instances in which an Appellant can raise an appeal notwithstanding his guilty plea. An appellate court must however, satisfy itself that the plea was taken in accordance with the law and was unequivocal.

15. In the celebrated case of **Adan versus Republic (1973) E.A.445** the Court of Appeal set out the procedure of entering a plea of guilty where it held that:-

“... 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 deny the 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, of course, be recorded.”

16. I have perused the record to satisfy myself that the plea was taken in accordance with set out procedure. It is apparent from the record that indeed it was. The Appellant has however faulted the prosecution for not calling the doctor to prove penetration and to give evidence of how his age assessment was done. This argument is misplaced. This is because, where the Appellant admits to the essential elements of the charge, the prosecution is only bound to present the facts. The prosecution is not under a duty to call any witnesses as it would be similar to conducting a trial to prove the facts already admitted.

17. On whether there was an interpreter in court, the record shows the languages used in the lower court were English and Kiswahili, which are the languages of the court. Further, I take note that the Appellant, during the hearing of this appeal admitted that he understood Kiswahili.

18. It is trite that one of the roles of a court clerk is to interpret the proceedings into the language of the court as was held by the Court of Appeal in **Mohammed Abdullahi v Republic [2019] eKLR** where it pronounced itself thus:-

“As held by this Court before, the principal duty of a court clerk is to interpret into the language of the court and also from the language of the court to the language an accused person or the witness understands. Where therefore the presence of an interpreter is not disputed, as is the case here, and the record clearly shows participation of the accused person in the proceedings, the presumption is that the proceedings were duly interpreted into a language the accused person understood.”

19. The record shows that when the matter came up for plea on the 27th August 2014, one Adongo was present in court as a court clerk. The record goes on to show that the charge was read out to the accused in Kiswahili, a language he understood. Based on the foregoing I find that a court clerk was present and therefore the Appellant's ground in this regard is without basis and must fail.

20. The Appellant has further contended that he was not issued with witness statements before plea was taken in contravention of Article 50(2)(j).

21. In **Joseph Ndungu Kagiri v Republic [2016] eKLR** Mativo J, stated that: -

“Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution’s evidence at the opportune time both in cross-examination and in his defence... This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence.”

22. It is clear that the purpose of availing an accused with witness statements and other evidentiary documents is to enable the accused person to prepare his defence and conduct the trial. In the present case, the Appellant pleaded guilty to the charge and admitted the facts as presented by the prosecutor. Since the case was not going to trial, there was no need for the prosecution to supply the witness statements or to call witnesses. The Appellant was not going to defend himself in any way. This ground therefore fails.

23. Having considered all aspects of the plea and the record, it is my finding that the plea was unequivocal and therefore the Appellant can only rightly appeal against sentence only. Indeed, the Appellant persisted even in this appeal in admitting that he had sexual intercourse with the complainant stating that she was his girlfriend.

24. The final issue in this appeal concerns the age of the Appellant and the sentence meted to him. The Appellant contends that he was a minor at the time of the offence and disputes the age assessment report which stated that he was 18 years old. I have carefully examined the record. As pointed out by the Respondent, the Appellant failed to give any evidentiary proof of his age at the time. I note that apart from the Appellant stating he was a minor, he did not even indicate his age or the date he was born. His only argument was that he was in primary school at the time.

25. Under the section 143 of the Children Act, a court is required to ascertain the age of a person brought before it where it appears that such a person is under the age of eighteen years because of the protection given to child offenders by the Constitution and the law

26. In this case, when the Appellant was presented for plea on 12th August 2014, the court deferred plea and directed that the Appellant be escorted to Hola District Hospital for age assessment. On 27th August, 2014, the prosecutor told the court that the age assessment report was in the file and that the accused had been assessed to be 18 years.

27. The record shows that the Appellant did not contest the age assessment at the trial. He only stated in his mitigation that he was still a student. In this court, he stated in his oral submissions that a police officer advised him to plead guilty and then tell the court that he was a minor. Just like in the trial court, he has not sought to table any evidence to demonstrate that he was indeed a minor. In the circumstances, and in absence of evidence contradicting the age assessment report, I hold that the Appellant was not a minor and that the trial court was therefore not in error to treat him as an adult.

28. The Appellant has urged that the 20 years’ imprisonment was harsh. However, it was and still is, the mandatory sentence under the SOA. The record shows that after hearing the Accused’s mitigation, the trial magistrate ruled ***“.....Parliament in its wisdom saw it fit to put in place stringent penalties with minimum sentences.....the discretion of this court is therefore limited.”***

29. This court is aware that the mandatory nature of sentences under the SOA has in the recent past come under close judicial scrutiny following the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**, where it declared that the mandatory nature of the death sentence under section 204 of the Penal Code was unconstitutional, when pronounced itself thus:

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

30. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where it stated thus:-

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing.”

31. In my understanding, the recent decisions of the court of appeal have not abolished the minimum sentences under the SOA. Rather, they have reclaimed the discretion of the trial court to consider mitigating factors in imposing sentence. The sentences remain lawful and ought to be imposed unless there were peculiar mitigating circumstances on a case by case basis.

32. In the present case, the Appellant stated that the complainant was his girlfriend. From the facts in the trial court, it is evident that they were partners in an amorous but unlawful adventure. In the first encounter, they were attending a ceremony on 24th April 2014. They left the venue of the ceremony, hid in a bush to engage in sex and returned to the ceremony. On 14th May, 2014, the Appellant lured the complainant to a bush again and they had sexual intercourse. Their sexual relationship only came to light because the complainant missed her period in May and her sister took her to a dispensary where she was confirmed to be pregnant.

33. Evidently, the Appellant was totally ignorant of the consequences of having a sexual relationship with a minor. This is because he not only readily pleaded guilty in the trial court, but also submitted before this court that the complainant was his girlfriend. He told the trial court in mitigation that he was remorseful and pleaded for mercy to enable him to go back to school.

34. I have taken into consideration the above circumstances. It is indeed sad that the complainant was robbed of her innocence and turned into a mother at such a young age. However, in the circumstances of this case, I find the prison sentence of 20 years meted on the Appellant manifestly harsh and excessive. The Appellant has already served 5 years' imprisonment from the date of sentence. I consider the period served as sufficient.

35. The Appellant is set at liberty forthwith unless otherwise lawfully held.

36. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 26th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Onderi for the Respondent