REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 22 OF 2018

AMM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. K. Kibelion), in Criminal Case SOA No. 14 of 2017 delivered on 22.8.2017)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

AMM.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. K. Kibelion Senior Resident Magistrate in Criminal Case SOA No. 14 of 2017 on 22.8.2017. The Appellant was on 25.7.2017 charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 22nd day of July, 2017 at within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **E.K** a child aged 5 years old.

2. When the charge was read to him, the trial court recorded the proceedings of the day material to this appeal as follows;

Pw1 – S W M – Sworn and states in Kiswahili

- I live in K

- I am a casual labourer.

3.I remember 22/7/2017, at around 4.00 p.m. I was at home with my children JW, V and E. I used to leave my children with their grandmother whom we lived with (my mother in-law).

The following day I prepared my children to go to church. When they came back they were with AM. O told me that EK had been locked inside the house by the said AM. They told me that M defiled E. O told me that they were instructed by M to go and get firewood while he locked E inside the house. The accused gave E sweets after he was done.

I asked EK who told me that the accused called her and removed her clothes and laid on the bed by her uncle and inserted his fingers on her vagina. The child was walking normally. She told me she was feeling pain on her belly. I called his father. He directed me to report to Nyumba Kumi officer. We went to the assistant Chief who directed us to the hospital. We took the child to Masii Health Centre and later to Masii Police Station. The child narrated what had happened. A P3 form was issued.

P3 form – PMFI -1

Treatment notes – PMFI-2

Immunization card – PMFI-3

The accused lives within the homestead. The accused is my husband's brother. He is in court (points at the accused). The child Elian was born on 2/2/2012.

Cross-examined by Accused:

Accused – What the witness stated is true. It is true I did that. It appears that the devil got into my mind. I realized the following day that what I had done was wrong. I pray for forgiveness. I want to change plea to admit the offence/charge.

Court – Charge read over to the accused in Kiswahili a language he states he understands and replies:

Accused – Ni Kweli

Prosecutor – Facts are that on 22/7/2017, SW the mother of the victim EK went into the neighbourhood to do casual jobs. She left the complainant/victim aged 5 years with her other two children at home (her aged mother in-law's home). She came back at 4.00 p.m and she continued with her normal duties. The following day on 23/7/2017 S was approached by one of her kid O at about 1.00 p.m and who told her that their uncle AM (Accused) had locked EK in his home the previous day and sent the other kids away to fetch firewood. At this point S became suspicious and she called the victim to enquire what had happened. This is when the victim indicated that it was true that AM had lured her to his home the previous day and directed her to lay on his bed, removed her pants and slept on her where she felt pain in her vagina. The mother reported the case to the village manager Philomena Mule who called the area Assistant Chief Mr. Shikuku who visited the victim's home and advised SW to report the matter to Masii Police Station. The victim was taken to Masii Police Station. She was also taken to hospital for treatment. Upon the conclusion of the investigation, the charges before court were entered. We wish to produce the following documents as exhibits.

- P3 form from Masii Health Centre – PEXH 1

- Treatment notes from Masii Health Centre – PEXH 2

- Copy of Immunization Card – PEXH 3

Accused – Maelezo Ni ya ukweli.

Court – Plea of Guilty Entered. Accused is hereby convicted accordingly on his own plea of guilt.

Prosecutor – No previous record respecting the accused. He be treated as first offender.

Accused Mitigation – I committed the offence. I did not know that I would be caught up by the law. I pray that I be forgiven. I will not repeat such an offence again. I understand that if I am found to have committed a similar offence in the future then I be punished accordingly. This is the first time I have committed an offence. I regret my actions and I plead for leniency.

Court – Sentencing on 22/8/2017 at 9.00 a.m.

Kibelion – Senior Resident Magistrate

21/8/2017

22/8/2017

Before Hon. Kibelion – Senior Resident Magistrate

Court Assistant – Susan

Court – I have considered the nature of the charge together with the accused's mitigation. I wish to point out the following salient facts. The victim herein was born on 2/2/2012 hence the victim was aged 5 years, 5 months and 20 days as at the time of commission of the offence hence falls within the realm of Section 8(2) of the Sexual Offences Act. The section provides for a mandatory sentence. I in the circumstance sentence the accused herein to life imprisonment as provided for under the herein section. The accused has a Right of Appeal within 14 days.

Kibelion – Senior Resident Magistrate

22/8/2017

22/8/2017

Before Hon. Kibelion – Senior Resident Magistrate

Court prosecutor – Kimani

Court assistant – Susan/Catherine

Accused – present

Interpretation – English/Kiswahili

Court – Sentence Read out to the accused in open court.

3. The appellant is dissatisfied with those proceedings and on 29.11.2017 his request to lodge appeal out of time was allowed. The appellant challenged the conviction on the grounds that the plea was unequivocal. He challenged the trial court for failing to provide him with a translator and for failing to consider his mitigation.

4. Submitting in support of the appeal, the appellant in placing reliance on the case of **Evans Wanjala Wanyonyi v R (2019) eKLR** that the mandatory sentence that was meted on him ought to be set aside. He also sought to invoke the provisions of Section 333(2) of the Criminal Procedure Code and urged the court to take into account the period that he spent in custody. He cited the provisions of Article 50(2)(m) of the Constitution and Section 198(1) of the Criminal Procedure Code and submitted that the witness who testified did so in a language that he did not understand.

5. In response, the learned counsel for the state opposed the appeal and argued that the plea that was recorded was in line with the procedure in the case of **Adan v R (1973) EA 446**. Reliance was also placed on section 348 of the Criminal Procedure code as well as the case of **Olel v R (1989) KLR 444**.

6. The issues to be determined herein are on the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

7. Having been convicted on his own plea of guilty, the appellant by challenging inter alia the manner in which the plea was recorded, is in essence appealing against the legality of the said plea.

8. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

> **"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 guilt, 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 of course be recorded."**

9. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

10.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. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or 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. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

11. For a charge under sections 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, it is necessary that the facts of the offence should specify; - the existence of a victim who is a child, unlawful penetration of the sexual organs of a victim and the identity of the perpetrator. In the instant case, the evidence that was tendered by Pw1 in Kiswahili that informed the appellant's decision to admit the offence and change plea disclose that the victim was aged 5 years; that the appellant penetrated the victim. In addition the facts as narrated by the prosecutor do disclose that the appellant penetrated the victim. With all due respect the facts as read out do not indicate the language that was used, however the same were similar to the evidence that was given by Pw1 so it can be said that the appellant understood the details of the charges that were facing him. In the result, it cannot be said that the plea was equivocal since the appellant was aware of the charges facing him, the plea can be said to have been unequivocal and as a result the same can sustain the conviction. It is noted that the proceedings kicked off in Kiswahili language and that the accused addressed the court in the same language and in his responses both to the charge and the facts.

12. It should also be observed that in this appeal the appellant is raising objections to the same plea that he took after considering the evidence that was against him and was in a language that he understood and which the learned trial magistrate relied upon in making the order he did. As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as a machinery to help him do so.

13. The doctrine of 'approbation and reprobation' has been elucidated in Halsbury's Laws of England, 4th Edn, Volume 16, at page 1012, paragraph 1507 thus:

> "*The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent*."

14. Further, such action also amounts to abuse of the court process and this court has every power to cull actions that it deems amount to abuse of the court process as well as to preserve the integrity of the judicial system.

15. Justice Mativo in the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** expressed himself in the following terms;

> "*23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-*
>
> *(a)Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> *(b)Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> *(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
>
> *(d)Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> *(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]*
>
> *(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> *(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> *(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]*

16. Looking at the plea entered by the appellant there is no doubt that he understood the charge and facts quite clearly and was thus convicted on his own plea of guilty. He also mitigated by indicating that he committed the offence but added that he didn't know that he will be caught up with the law and went ahead to seek for forgiveness. There is therefore evidence that the right procedure for taking plea was properly followed by the trial magistrate and which was backed by production of medical documents such as child immunization card, treatment notes and P3 form. It is also noted that the appellant himself decided of his own volition to change plea midstream and the trial court gave him the opportunity to plead to the charges. This was a clear sign that indeed he wanted to carry his cross for his transgressions. The appellant therefore was properly convicted and thus the appeal on conviction must fail.

17. Regarding the sentence it is noted that the appellant was lawfully sentenced to life imprisonment as decreed by section 8(2) of the Sexual Offences Act. However following the Supreme Court's decision in **Francis Karioko Muruatetu & Another Vs. R (2017) eKLR** several persons convicted and sentenced vide the Sexual Offences Act have moved the courts to have their minimum sentences interfered with by the courts. For instance the Court of Appeal in **Jared Koita Injiri v. R (2019) eKLR** reduced a sentence of life imprisonment for an offence of defilement under section 8(2) of the Sexual Offences Act to thirty years. The appellant's circumstances are similar to the above case and it is thus fair and just that he should benefit as well. Consequently the sentence by the trial court ought to be interfered with. The appellant is noted to have pleaded guilty to the charges and thus saved judicial time. I am inclined to interfere with the sentence and being guided by the above Court of Appeal decision i hereby order that the appellant serves a sentence of twenty (20) years imprisonment from the date of arrest namely 24/7/2017.

18. In the result the appellant's appeal on conviction is dismissed but the appeal on sentence succeeds to the extent that the sentence of life imprisonment is set aside and substituted with a sentence of twenty (20) years from the 24.7.2017.

It is so ordered

Dated and delivered at **Machako**s this **27th** day of **April, 2020.**

D. K. Kemei

Judge