REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 16 OF 2019

CHARLES NYAGA MWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. **CHARLES NYAGA MWITI**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charges were that on diverse dates between October 2018 and 25th December 2018 at [Particulars Withheld] Area in Tharaka South within Tharaka Nithi County he intentionally defiled (name withheld) a child aged 15 years. He also faced an alternative charge of committing an indecent act with the same child contrary to **Section 11 (1**) of **Sexual Offences Act** but he was convicted of the main charge on his own plea of guilty.

2. The Appellant despite being convicted on his own plea of guilty, was nonetheless aggrieved by both the conviction and sentence meted out against him by the trial court. His main grounds are that he was misled into pleading guilty unaware of the nature and the effect of pleading guilty because he was unrepresented. He contends that he was a 1st offender and he seeks for a retrial.

3. In his written submissions the Appellant contends that he pleaded guilty on a serious charge and that the trial court never warned him of the consequences of his plea. He relies on the decision in the case of ***Paul Matungu –vs- Republic [2006] eKLR*** where he contends that the Court of Appeal held that in offences carrying death sentence, it is essential to warn the accused of the consequences of pleading guilty. He submits that owing to the lengthy sentence that the offence for which he was convicted attracts, the trial court ought to have warned him of the consequences and that failure by the trial court to warn him of the consequences of pleading guilty exposed him to unfair trial contrary to the provisions of **Article 50 (2)** Laws of Kenya. He further contends that in those circumstances the plea taken was not unequivocal and asks this court to order for retrial. To buttress his contention he has relied on the decision of ***Ahmed Sumar –vs- Republic [1964] EALR 483***.

4. The Appellant further relies on the case of ***Alexander Lukoya Maliku –vs- Republic [2015] eKLR*** where the Court of Appeal stated that an appellate court may only interfere with a guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a guilty plea.

The other situation the Court of Appeal observed is where the accused pleads guilty as a result of misapprehension or mistake or where the charge disclosed no offence known in law

5. The Appellant submits that the investigating officer coerced him to plead guilty on promise of being set free. He also pleads to be set free in order to take care of the complainant and the child whom he alleges have severally visited him in prison.

6. The Appellant has urged this court to take cognizance of the conduct of the complainant alleging that by visiting him in his house for sex, she behaved like an adult and that he should not be unfairly punished because he was not expected to inquire from people about her age. He has relied on the decision in ***Martin Charo- vs- Republic*** where **Chitembe J** *inter alia* observed that several countries have lowered the age of consent to 15 years and others 16 years on recognition of the fact that young people are getting exposed to sex at a very early age. He prays that his conviction be set aside as his case falls within **Section 8 (5)** of the **Sexual Offences Act.**

7. The Respondent has opposed this appeal through written submissions dated 13th February 2020 and filed on 14th February 2020. The State contends that the appeal is unmerited because the Appellant pleaded guilty twice unequivocally and that going by **Section 348** of **Criminal Procedure Code** the appeal on conviction is untenable.

8. On sentence the State contends that the same was proper as sentence was arrived at after trial court considered victim assessment report from the probation officer.

9. The Respondent has faulted the Appellant for continuing to be in touch with the victim who is still a minor and that he likely to continue with the illicit relationship if conviction is set aside. The State asserts that both the conviction and sentence meted out were proper. It has

relied on the decision in ***Obedi Kilonzo Kevevo – vs- Republic [2015] eKLR*** where the Court of Appeal handling a similar case on 2nd appeal, reiterated the correct manner of recording a guilty plea and stated that it was important that both the facts as read as well as the charge should disclose an offence. The court ordered a retrial as the facts as read were found to be insufficient in information as it left out the age of the victim and thereby failed to disclose an offence. The court also stated that the decision on whether or not a retrial should be ordered is based on every particular case and is made where the interests of justice require it, considering the illegalities or defects in original trial, length of time from arrest/arraignment of the Appellant and whether the mistakes were on the part of prosecution.

10. This court has considered this appeal and the response made. The Appellant herein was charged and convicted on his own plea of guilty of the offence of defilement contrary **Section 8 (3)** of **Sexual Offences Act** which states;

> ***" (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement…"…….***
>
> ***(3) 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."***

11. There is no dispute here that the Appellant pleaded guilty to both the charge and the detailed particulars read over to him as per the proceedings of the trial court. The Appellant now says the investigating officer prompted him to plead guilty but I have gone through the proceedings and I do not find any evidence of coercion or interference by the investigating officer or any other person. The record shows that after pleading guilty to the charge, on 9th January 2019 the trial court deferred the reading of facts to the following day (10th January 2019). This therefore shows that the Appellant had every opportunity to reflect on the plea he had taken and the nature of the offence he had committed. The charge and the facts were read over to the accused in Kitharaka a language the accused said he understood. He has not stated here that he did not understand the language used in court which means he understood the charge read over to him and the particulars well. He pleaded guilty on both and charge and the facts and the plea was unequivocal in every sense.

12. This court further finds that both the charge sheet and the detailed particulars read over to the Appellant clearly disclosed the offence of defilement as defined under **Section 8** of the **Sexual Offences Act, 2006**. It disclosed that there was penetration and the victim was aged 15 years at the material time. The decision in ***Alexander Lakoye Maliku –vs- Republic (2015) eKLR*** does not therefore apply here as I do not find any basis to interfere and order for a retrial.

13. The Court of Appeal has on several occasions re-stated the law on plea taking. In ***John Muendo M. –vs- Republic [2013] eKLR,*** the court had this to say;

> **"The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of Adan vs Republic [1973] EA 445 where the Court held:-**
>
> **"(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 facts relevant to sentence together with the accused's reply should be recorded."**

14. It is true that in cases where the offence committed carries a heavy penalty like death or life sentence, courts should treat plea taking with caution especially where the accused is unrepresented. In ***Abdalla Mohammed –vs- Republic [2018] eKLR*** the **Korir J** expressed that importance by making the following observations;

> **"15. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by *Joel Ngugi, J in Simon Gitau Kinene v Republic [2016 eKLR* when he stated that:**
>
> **"19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)* this is what I said and I find it relevant here:**
>
> **In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence…..To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of**

the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea. ”

In the present matter, as observed above the Appellant was given sufficient time to reflect on the charge facing him perhaps by default because the record of proceedings shows that the prosecution applied for time to get exhibits and present the facts which was done. The Appellant was therefore not ambushed or hurried into court where the plea and sentence was done same day. In fact the record shows that after admitting the facts the court differed sentence to another date to await the social inquiry. The Appellant had opportunity to change his mind and change plea before the sentence was passed against him. I am not persuaded that in the circumstances the trial court was under obligation to caution the Appellant notwithstanding that he was unrepresented. There is no legal requirement for the trial court to caution an accused person pleading guilty unless the charge carried mandatory death or life sentence. It may be advisable in situations where the offence attracts heavy penalty like long custodial sentence such as in this instance but in my view a re-trial cannot be ordered principally on that omission. Having pleaded guilty to the charge, I agree with the prosecution that **Section 348** of **Criminal Procedure Code** precludes him from appealing on conviction.

15. On sentence, I am satisfied that the Appellant has made a strong case showing that the sentence meted out against him may have been too harsh in the face of the Supreme Court's decision in the case of ***John Francis Muruatetu and Others –vs- Repbulic [2017] eKLR.*** It is true that the statute (Sexual Offences Act, 2006) prescribes a minimum sentence of 20 years but the Supreme Court decision above meant that the trial court's hands are no longer tied with the mandatory nature of a prescribed minimum sentence. In this instance, the Appellant is aged 18 years indicative of the fact that he is barely out of his teenagehood. The girl defiled is said to have been 15 years old and that fact in my view is a mitigating fact considering that the two were said to have been in a relationship. Of course the relationship was illicit in view of the age of the victim but given the age of the Appellant at the material time I am satisfied that 20 years imprisonment was rather too harsh for the young man.

In the circumstances, I do not find merit on this appeal on conviction. The plea taken was unequivocal and **Section 348** of the **Criminal Procedure Code** bars the Appellant from appealing on conviction in such circumstances. However on sentence this court finds the sentence of 20 years imprisonment too harsh for the aforesaid reason. The conviction is therefore upheld but the sentence of **20 years** imprisonment is set aside. In its place, I will impose a custodial sentence of **5 years** imprisonment less the time he has already spent in jail custody. This appeal is only allowed to that extent.

Dated, signed and delivered via zoom this 27th day of April 2020.

R. K. LIMO

JUDGE

27/4/2020

Judgement delivered via zoom connecting both Mr. Momanyi for ODPP and accused person.

R.K. LIMO

JUDGE

27/4/2020