REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 40 OF 2019

JOHN WAMBAYA ISIAYO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at ELDAMA RAVINE Criminal Case No. 40 of 2018 delivered on the 19th day of November 2018 by Hon. J. Nthuku, SRM]

JUDGMENT

Introduction

[1] The appellant who was charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act, was on 19th November 2018 convicted on his own plea of guilty and sentenced to imprisonment for 15 years appeals to the High Court seeking an order ***"for my appeal/mitigation to be allowed, sentence set aside and other necessary orders."***

[2] The particulars of the offences were that the appellant had –

> *"On diverse dates between 1st May 2018 and 10th May 2018 at in Koibatek sub-County within Baringo County wilfully and unlawfully committed an act which caused the penetration of his penis into the vagina of [BS] a child of 17 years."*

Judgment of the trial court

[3] The full text of the proceedings for the plea taking in the trial court and resultant conviction on plea of guilty were set out in the record as follows:

> *"REPUBLIC OF KENYA*
>
> *IN THE PRINCIPAL MAGISTRATE'S COURT AT ELDAMA RAVINE*
>
> *SEXUAL OFFENCE NO. 40 OF 2018*
>
> *REPUBLIC ……PROSECUTION*
>
> *Versus*
>
> *JOHN WAMBAYA ISIAYO……ACCUSED*
>
> ***19.11.2018***
>
> *Coram: Before Hon. J. Nthuku - SRM*

SC: Kelwon

CC. Malakwen

Accused Present

The charges and elements therein are read over and explained to the accused in a language that he/she understands ie. Kiswahili/English who replies

Accused: ***Ni kweli***

Facts by Court Prosecutor

In the month of February, 2018 the accused person started visiting the home of the complainant on Sundays when her parents were in Church. According to the complainant's mother the accused could touch and suck the complainant's breasts. In May, 2018 at 6pm the complainant took her small brother home from the nearby shopping Centre. The accused came and sent the complainant's brother to go look for charcoal with the intent to be left alone with the complainant. When the young boy left the accused told the complainant to have sex with him. ***Since she is a minor, she said she is afraid of getting pregnant. She is aged 17 years. He told her he will know what to do.*** *She told him she was still a child in form two at [Particulars withheld] Secondary School.* ***He told her he will know what to do.*** *He then defiled her sexually. According to her they had sexual intercourse on several days between 1st May. 2018 – 20th May. 2018. She didn't disclose this until 11th November. 2018 when she went for a youth Seminar then disclosed the incident to her mother. The matter was reported at Makutano Police Station on 16th November 2018 and a P3 Form issued to the complainant. She was taken to hospital at Eldama Ravine Sub-County Hospital for treatment. Statements were recorded and P3 form issued. The complainant was found to be 27 weeks pregnant. The accused was arrested on 16th November and charged with this offence. I produce the treatment notes as an exhibit - exhibit 1. I produce her birth certificate as exh.2.*

Accused*: Ni ukweli but I have spoken with her parents so that I take care of the child once born. We are close neighbours at home.*

COURT*:* ***Plea of guilty entered. Accused is convicted on his own plea of guilty.***

Due to the gravity of the offence, I hereby read the provisions of section 8 (1) and 8(4) of the Sexual Offences Act to the accused so that he knows the consequences of a plea of guilty.

Accused*: It's true I had sexual intercourse with the girl. but I pray for a lighter sentence because I have a pregnant wife.*

COURT*: The accused admits to having sexual intercourse with the child even after I told him the minimum sentence. He knew he was having sex with a child who was also in school. Now she is pregnant and her academic life has been messed up.*

There's need to discourage sex predators from robbing children of not only their innocence, but also their future. I hereby sentence the accused person to 15 (fifteen)years imprisonment. *Right of Appeal 14 days.*

J. Nthuku

SRM

19.11.2018"

The Appeal

[4] The appellant filed an appeal based on general grounds of appeal set out in the Petition of Appeal dated 12th April 2019 presented on the obviously ***incorrect*** basis that ***"I pleaded not guilty at trial"***:

"GROUNDS OF APPEAL

1. THAT the learned trial magistrate erred in law and in fact by convicting the appellant based on speculative assumptions

2. THAT, the learned trial magistrate erred in law and fact by failing to consider that the age of the victim was not conclusively proved.

3. THAT, the learned trial magistrate erred in law and fact by failing to consider the appellant defense

4. THAT, the learned trial magistrate erred in law and fact by failing to find that the prosecution evidence was marred with inconsistencies and contradictions.

5. THAT the learned trial magistrate erred in law and in fact by failing to consider crucial witnesses were not called to testify.

6. THAT I pray to be supplied with a certified copy of the trial proceedings and the judgment

REASONS THEREFORE; I pray for total success of this appeal, conviction be quashed, sentence set aside and I the appellant be set at liberty. NAK/3069/018/LS JOHN WAMBAYA ISIAYO APPELLANT"

[5] Subsequently, at the Directions for the hearing of the appeal on 20th November 2019, the appellant filed a fresh petition of appeal with amended grounds as follows:

*"**PETITION OF APPEAL***

I JOHN WAMBAYA ISIAYO currently serving a sentence of 15 years imprisonment for the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act No.3 of 2006 passed upon me by Hon. J. NTHUKU (SRM) at Eldama Ravine law courts on 9/11/2018, humbly beg leave of the Honorable court to appeal against the said sentence on the following grounds:

1) THAT, I pleaded guilty to the charges

2) THAT, I adduced the evidence/mitigation of taking the responsibility.

3) THAT, may the Honorable court take into considerations the right of the innocent child to be.

4) THAT, may the Hon court consider the equal parental rights of the father and mother to be.

5) THAT, may the Honourable court count my conduct prior to the trial and during trial pertaining to the allegations (demonstrated commitment).

REASON WHEREFORE: I humbly pray for my appeal/mitigation to be allowed, sentence set aside and other necessary orders be made my lordship.

JOHN WAMBAYA ISIAYO APPELLANT"

Appellant's submissions

[6] In urging his appeal, the appellant filed written submissions principally seeking his release in spite of, indeed because of, his plea of guilty so that he may take his parental responsibility for the child the product of his defilement of the minor complainant subject of his trial as follows:

"APPELLANT'S WRITTEN SUBMISSIONS

MY WRITTEN SUBMISSIONS My lordship, I was charged with defilement of a girl contrary to section 8(1) as read with 8(4) of the sexual offences Act No.3 of 2006.The particulars of the offence were that, on diverse dates between 1st May 2018 and 10th May 2018 within Baringo county wilfully and unlawfully committed an act which caused the penetration of my penis into the vagina of BS, a girl aged 17 years. Alternative count was that, on diverse dates between 1st May 2018 and 10th May 2018 within Baringo county wilfully and unlawfully committed an act which caused my penis to come into contact with the vagina of BS, a girl aged 17 years.

My lordship, I pleaded guilty to the charges and once again when the charges were read to me I pleaded guilty and the court proceeded to convict and sentence me to serve 15 years imprisonment. ***I humbly now beg leave to appeal in mitigation, the sentence before this Honorable court.***

My lordship, it's true that I had sexual intercourse with the complainant as my friend. I humbly wish to draw the attention of the Honorable court to the fact that the maturity conduct portrayed by the complainant during all the time we dealt with the allegation left me with no doubt that she was physically and psychologically mature to make sound decisions. She behaved maturely hence even my plea of "NI UKWELI" since deep inside me, I was dealing with a fully grown up female.

My lordship, it is with great regrets that I came to learn during my judgment that the complainant was an underage. I did it and I could not lie before a court of law hence my plea of "NI UKWELI"

My lordship, it was quite clear that during our conversation with the complainant before having sex, we looked into the issue of her becoming pregnant and I promised to take care of her (be responsible) in case it happens. I have not denied having impregnated her or abscond from taking care of her during and after pregnancy. I agreed I will be responsible now

that it happened, I beg this Honorable court to see into it that I owe the girl that promise.

My lordship, to prove my commitment to that responsibility, I took further step ahead to consulting with her parents on the issue only to be suppressed by the law.

My lordship, since one of the cores of justice is to restore harmony and peaceful co-existence among people, I beg this Honorable court to see to it that dialogue is given a chance to resolve issues and amicable resolutions reached.

My lordship, I submit my mitigation here that it may not be the right decision to imprison me since the mother and the child will bear the bitter pains of bringing up the child in my absence yet claiming to serve justice to the complainant. My lord, let the Honorable court consider that by the appellant taking responsibility, justice is also seen to be served to the complainant. Let it not be denied by imprisoning the appellant. In my quest to take responsibility, I pleaded guilty and went ahead not to deny the charges.

My lordship, no one is talking about the rights of the child to be. I submit that it is in our constitution that rights of a child are enshrined, the prime one being that of life which encompasses others like protection and provision of basic needs such as food, shelter and clothing. These rights are not privileges because constitutionally they are to be provided.

May this Honorable court consider that the child to be born needs to be taken care of. When the mother (complainant) is left alone by the law to take that responsibility by imprisoning the father (appellant),the child is left at the losing end. It will be unfair for the child whose mother is termed as underage by the law and the father put behind bars, this amounts to psychological torture to the child.

My lord, I believe it is not the intention of the courts of law to have street children and the vulnerable created by negligence and poverty. It is my submission here that when fathers are imprisoned and the responsibility is left to these young mothers, then these families (street children, HIV infected and others) will continue to increase. This will economically and socially affect the nation. May the Honorable court consider alternative mechanisms of resolving sexual offences other than imprisonment which is causing hardships and destroying other families. Alternative Conflict Resolutions means are available my lord. Rights of young children are fatally infringed upon when a father is imprisoned. What would be the way forward if or when an underage male is defiled by a woman and the woman gets pregnant? Will it be justice to imprison the expectant mother and the child to be born?

My lord, I humbly beg to draw the attention of this honorable court to the point that life starts at conception hence we are relating to a young human being who is voiceless to his/her rights. It is my submission that may the Honorable court declare these children rights and order them to be provided by the father thereby setting aside my sentence and setting me at liberty to enable me provide for the innocent child.

My lordship, allow me once again to kindly refer the Honorable court to the right of equal parentage. I have mitigated my lord that the mother and I have the equal rights to parenting. It will be an abuse to the constitution that being the father of the child I serve 15 years imprisonment at the expense of the child and in extension abdicating my responsibilities to the mother alone.

My lordship, my absence will actually instigate hatred and jealousy in the family. I submit that with the trend of jailing parents this way, future harmony and peace will not prevail. Parents who do not provide for their families are charged with negligence in courts. Why not see/view the same perspective pertaining to imprisonment of young and women. It is wrong to deny them that constitutional requirement to provide since the young mother is left alone. My lordship it is wrong to punish the father, the mother and the child in the name of serving justice to them. I beg this Honorable court to allow my mitigation in the interest of justice to the mother and the child. My lord, one can be judged through his conduct before and during trial. The way one conducts her/himself speaks volumes about his/her character. It is evident that I agreed to take responsibility to what will happen to the complainant (pregnancy).! Pleaded guilty to the charge and adduced evidence that I will take responsibility. I did not deny to the court that we had a sexual intercourse which up to now I confess. All this my lord demonstrates a committed person to his responsibility. My lordship, I mitigate humbly praying that may the court consider me honest, truthful and remorseful. My plea of yes guilty is a total proof that I was and will be responsible to all the parental requirements. I beg that may the Honorable court give me back my liberty so that I can help my child who is now surviving courtesy of well-wishers since the mother alone is unable to provide everything. My lordship, it's my humble and sincere prayer that my honesty and general conduct before court and prior to being charged not be left to be the cause of my suffering and the psychological torture extended to the mother and the innocent child. I pray that may the court find my mitigation meritious and other necessary orders of the court be made. May the Honorable court find it better to consider handing me anon-custodial sentence. The innocent child, the mother and myself are all suffering, which now begs the question, is justice being served?

JOHN WAMBAYA ISIAYO APPELLANT"

DPP's submissions

[7] The DPP opposed the appeal in submissions dated 10th July 2020 as follows:

"*REPUBLIC'S WRITTEN SUBMISSIONS*

This appeal is opposed.

The appellant herein was convicted of defilement contrary to section 8(1) as read with section 8(4) of the sexual offences Act no. 3 of 2006. He pleaded guilty and was sentenced to serve life imprisonment on the 19th of November 2018. The appellant herein pleaded guilty to the offence of defilement even after the charge and the gravity of the sentence was explained to him. ***The appellant has raised 6 grounds of appeal which the prosecution cannot respond to as the case was not heard.*** *The appellant cannot allege that evidence was inconsistent and that witnesses were not called when he denied the prosecution a chance to produce the evidence. I am of the view that the appellant herein did not understand the nature of the offence that was facing him during plea and even at the time of filing this appeal. The learned trial magistrate having known the gravity of this offence and the consequences of a plea of guilty ought to have given the appellant reasonable time to contemplate on the charge. The appellant upon pleading guilty was convicted and sentenced the same day.*

In the circumstances, and for justice to be done, I request the honourable court to order for a re-trial in this case.

DATED at KABARNET this 10th day of July 2020.

ESTHER MACHARIA

ASSISTANT DIRECTOR OF PUBLIC PROSECUTIONS FOR: DIRECTOR OF PUBLIC PROSECUTIONS"

Issue for determination

[8] If plea of guilty is unequivocal, the appellant would only be entitled to appeal on the severity of sentence by virtue of section 348 of the Criminal Procedure Code, which provides as follows:

> ***"348. No appeal on plea of guilty, nor in petty cases***
>
> *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.*
>
> [Act No. 17 of 1967, s. 31.]**"**

[9] In the context of procedure for plea taking, and as a first appellate court (see ***Okeno v. R*** (1972) EA 32), this court has a duty to re-evaluate the evidence before the trial court to satisfy itself that the facts disclosed an offence; that the plea was properly taken; and that the plea of guilty was unequivocal.

[10] The *locus classicus* on plea taking procedure is ***Adan v. R*** (1973) EA 445, 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 the facts or raises any questions 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."***

DETERMINATION

Request for retrial by DPP

[11] At the outset, the Court observes a disconnect between the DPP's submissions and the position taken by the appellant. It would appear that the DPP submissions responded to the grounds of appeal set in the original Petition of Appeal before amendment and without the benefit of the submissions filed by the appellant and set out herein above, in which the appellant reiterates his plea of guilty to the charge of defilement but seeks in mitigation an order for noncustodial sentence to allow him to take responsibility for the mother and child. The Court of Appeal for East Africa in ***Fatehali Manji v. The Republic*** [1966] EA343 laid down the law on retrial as follows:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective;*** *it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;* ***each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it."***

[12] See also ***Opicho v. R*** [2009] KLR 369, 375 where the factors to be considered in ordering a retrial were set out as follows:

> *"In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result from a retrial;* ***at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it.*** *See* ***Muiruri v. Republic*** *[2003] KLR 552,* ***Mwangi v. Republic*** *[1983] KLR 522 and* ***Bernard Lolimo Ekimat v. Republic****, Criminal Appeal No. 151 of 20014 UR."*

[13] In the view of this court, the circumstances of this case where the plea taking was taken regularly in scrupulous compliance with procedure therefor and where the appellant has reiterated his plea of guilty before this appellate court and only seeks a suitable sentence, no lawful object in the interest of justice is to be served by an order for retrial. Consequently, I am unable to agree with the DPP's call for a retrial because as demonstrated by the proceedings the trial was regular and without defect in any way as would on well-known principles support an order for retrial.

Conviction

[14] The appellant's response to the charge and submissions in this court clearly demonstrate that understood the offence and he accepted the charge and hoped the court would allow him to take responsibility – not the criminal responsibility for his action but parental responsibility for the child product of his defilement of the minor child as he urges the court to think of the child of the illicit sexual encounter.

[15] The sexual intercourse with the complainant was admitted in the facts accepted by the appellant. Medical evidence PEx 1 showed the examination of the complainant revealed a 27-week pregnancy. The complainant by the certificate of birth PEx 2 dated 14/11/2014 was 17 years at the time of the offence on the diverse dates between **1-10 May 2018**, her date of birth being **5/7/2001.**

Defence of Deception

[16] For completeness, it is noted that the appellant at plea taking did not raise and prove a defence as to having been misled by the complainant that she was above 18 years of age as he could have within the provisions of section 8(5) and (6) of the Sexual Offences Act as follows:

> *"5. It is a defence to a charge under this section if—*
>
> *(a) it is proved that* ***such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence;*** *and*
>
> *(b) the accused* ***reasonably believed that the child was over the age of eighteen years.***
>
> *6. The belief referred to in subsection (5)(b) is to be determined* ***having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."***

[17] In his written submissions, however, the appellant suggests that he was deceived by the complainant that she was over the age of 18, or in his words that –

> *"****the maturity conduct portrayed by the complainant*** *during all the time we dealt with the allegation* ***left me with no doubt that she was physically and psychologically mature to make sound decisions.*** *She behaved maturely hence even my plea of "NI UKWELI" since deep inside me, I was dealing with a fully grown up female. My lordship, it is with great regrets that I came to learn during my judgment that the complainant was an underage."*

[18] Having regard to the circumstances of the case, there is no basis for finding that the appellant took any steps to ascertain the age of the complainant despite having been put on notice by the complainant when she told him that she was a minor and in school. The suggestion of deception as to age of the complainant by her mature mien, as obliquely as it is made, in the written submissions of the appellant is clearly a vain afterthought which must be rejected. The defence was not raised at plea which would have taken the case to full trial on a plea of not guilty, and the appellant does not claim or show, in accordance with section 8(5) (a) of the Sexual Offences Act, that the "*child deceived the accused person into believing that he or she was over the age of eighteen years at the time*". Indeed, she told him she was a minor and she feared she would get pregnant and that she was in school. There could not have been any basis for the appellant in accordance with section 8(5) (b) and (6) of the Sexual Offences Act to have "*reasonably believed that the child was over the age of eighteen years.*"

[19] The appellant clearly knew the girl was a minor and he is, indeed, the one who deceived the minor that all would be well in spite of her fears about the act as disclosed in the Facts of the case. Twice in the Facts related by the Prosecution the child reminded the appellant of her status as minor and being in school, he told her "***he will know what to do***". The plea and Facts of the case were taken in ***Kiswahili*** a language that the accused is shown to have understood and, as required in ***Adan***, his responses were recorded in ***Kiswahili*** language to indicate his acceptance of both the charge and the facts.

[20] Indeed, and most commendably, the trial court went beyond the requirements in ***Adan*** to warn the accused of the consequences of plea of guilty in view of the seriousness of the charge. This practice which has now become trite has been added to the procedure for plea taking requiring the court to warn an accused who is pleading guilty of the consequences of such a plea especially in serious cases. See ***The Kenya***

Judiciary Criminal Procedure Benchbook 2018 at paragraph 74 at p.41, the object being that the court be *"convinced beyond doubt of the intention of the accused the plead guilty."*

[21] In this case, the appellant's plea of guilty was wholly unequivocal, and his conviction cannot be faulted in any way. Consequently, the court finds that the defilement by the appellant of a minor girl aged 17 years is proved and the offence under section 8(1) and (4) has been established as charged.

Sentence

[22] The penalty for defilement in case of a child victim aged 17 years is prescribed under section 8(4) of the Sexual Offences Act as follows:

> *"(4) A person who commits an offence of* ***defilement with a child between the age of sixteen and eighteen years*** *is liable upon conviction to imprisonment for* ***a term of not less than fifteen years.****"*

[23] The sentence of imprisonment for 15 years is a minimum sentence, and the court does not find discretion in the matter. Even if it had a discretion, the same would, in the circumstances of the case, judicially be exercised in imposing a deterrent sentence as sought by the trial court.

[24] The mitigation by the appellant that he is keen to take parental responsibility for the child of the minor, the product of the defilement, is an attempt to avoid the just consequences of his unlawful act. It is a cardinal principle of law that a person shall not be allowed to benefit from his own wrongdoing. The appellant will have benefitted from his unlawful act if he were allowed to avoid imprisonment in accordance with the law on the ground that he pledges to take responsibility for the child born out of his defilement of the minor complainant, an act which he entered into intentionally and deceptively on the minor victim that he would ***know what to do***, presumably, to forestall any adverse consequences. By his defilement, the trusting minor became pregnant, dropped out of school and her future was ruined. If the court were to allow such perpetrators of defilement to avoid due criminal penalty on account of their pledge, which is unenforceable by the court anyway, to take responsibility for the children born of the illicit sexual intercourse with minors, it would open flood gates for defilement of children under an empty promise to take responsibility for the consequences, and the court would have encouraged rather than deterred sexual defilement of minors. That is not the function of a court.

[25] In sentencing the appellant, the trial court considered that a deterrent sentence was necessary in the circumstances of the case, as shown above. The sentence is not excessive in the circumstances and there is no error in principle to warrant the interference by this court with sentence of the trial court. See ***Wanjema v. R*** (1971) EA 493, 494.

Orders

[26] Accordingly, for the reasons set out above, the appellant's appeal from conviction and sentence in the Judgment of the trial court dated 19th November 2018 herein is without merit and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF AUGUST 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Macharia Ass. DPP for the Respondent.