REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 143 OF 2018

JULIUS MZEE KABUCHANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence made on

12/11/2018 by Hon. C.A.S Mutai SPM in Bungoma S.O No. 102 of 2018)

J U D G M E N T

1. **Julius Mzee Kabuchanga alias Julius Ngoni** ('the appellant'), was charged with the offence of defilement contrary to ***section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.***

2. It was alleged that on the night of 6th and 7/11/2018 at [particulars withheld] village in Kuywa Sub-location in Bungoma Central sub-county within Bungoma County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of **YW** a child aged 10 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to section ***11 (1) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on the same dates, time and place, he willfully and unlawfully caused his penis to come in contact with the vagina of **YW** a child aged 10 years.

4. The appellant pleaded guilty and the facts were read to him which he also agreed with. He was convicted on the main charge and was sentenced to life imprisonment.

5. Aggrieved by the said decision, the appellant filed this appeal challenging both the conviction and sentence raising 7 grounds which are that; ***the trial court failed to consider that he had been coerced into pleading guilty, the major ingredient of age was not proved, the appellant was not informed of his right to an advocate and the life sentence imposed was excessive and unconstitutional.***

6. The facts of the case were that, on 6/11/2018 at about 6.00 pm, the complainant went to see her mother at the market. On arrival, she met the accused who bought her mandazis. Her mother told her to go home. However, afraid that her mother would beat her, she agreed to accompany the appellant to his home.

7. At the appellant's home, the appellant slept with the complainant and had sexual intercourse with her. When she tried to scream, he threatened her with death. The following day, the complainant's mother sought to know the whereabouts of the complainant and on learning that she was at the appellant's home made a report at Chwele Police Station. The accused was arrested and the minor taken to Chwele Sub-County Hospital where it was confirmed that her hymen was recently perforated.

8. The appellant submitted that he was not warned of the consequences of pleading guilty in view of the serious consequences attendant thereto. That the plea of guilt was obtained after having been beaten by the police. He was not afforded an opportunity to communicate with an advocate or one being appointed for him. Finally, that the sentence was harsh in the circumstances.

9. It was submitted on behalf of the respondent that; the case against the appellant had been proved beyond reasonable doubt from the exhibits produced. That the procedure required in a plea of guilt as set out in the case of **Adan v. Republic [1973] EA 445** was strictly adhered to by the trial Court. That there was no evidence that the plea of guilt was obtained through coercion as contended. In the respondent's view, the sentence was lawful and reasonable.

10. The first ground was that the trial court failed to consider that the appellant had been coerced into pleading guilty. The record is clear. When the appellant was arraigned in court, he never raised that issue with the trial Court. It is true that when a suspect is in the custody of the police, all manner of things may happen to him.

11. However, when a suspect has the very first opportunity to complain about such wrong doing or mistreatment, which is the first appearance in court, he/she must voice it up. This is so because the courts are the citadels of the Justice, the law and the liberty of the populace. They are the custodians of citizens' rights under the constitution. If a suspect fails to take that advantage, it will not be entertained at a later date as it may as well be an afterthought.

12. Accordingly, that ground is rejected.

13. The second ground was that the major ingredient of age was not proved. On record are, amongst others, the P3 form and the age assessment form. Both documents allude to the complainant's age being 10 years. To this Court's mind, the age of the complainant was satisfactorily proved.

14. The 3rd ground was that the appellant was not informed of his right to legal representation. The issue is whether substantial injustice was caused by the lack of legal representation being afforded the appellant. That right is provided for in ***Article 50 (2) of the Constitution*** which provides: -

> ***"2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly; ...'***

15. In **David Macharia Njoroge v Republic (2011) Eklr**, the Court of Appeal held: -

> ***"We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

16. In **KARISA CHENGO & 2 OTHERS V R, CR Nos. 44, 45 & 76 OF 2014,** the court held that substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. That it is only then that the state's obligation to provide legal representation would arise.

17. In the present case, the appellant was charged with defilement and not murder or robbery with violence or treason which carry death sentence. The record shows that the appellant not only were the facts and the ingredients of the offence read to him in a language he understood, but also that when the facts were read to him he answered that; *"It is true I raped her"*.

18. In **Adan –vs- Republic (supra),** the procedure for taking of a guilty plea was set out as follows: -

> ***"i) The charge and all the essential ingredients of the offence should be read and 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 add any relevant facts.***
>
> ***iv) If the accused does not agree with the facts or raises any question of his guilty in reply must be recorded and a 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 the sentence together with the accused's reply should be recorded."***

19. In the present case, all these steps were clearly followed by the trial court. In this regard, this Court sees no prejudice that the appellant might have suffered as a result of failure to be informed of his right to representation or being afforded one. In any event, there was no substantial injustice to be suffered and none was suffered.

20. In any event, ***section 348 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya*** prohibits an appeal from a plea of guilty. It provides: -

> ***"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."***

21. In view of the foregoing and the fact that the appellant clearly confirmed his guilt, the appeal on conviction fails.

22. The final challenge is about the sentence. The appellant contended that the life sentence meted out on him was excessive and unconstitutional. It was submitted otherwise for the state.

23. ***Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006*** provides: -

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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".***

24. In **Jared Koita Injiri v Republic [2019] Eklr,** the Court of Appeal held: -

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated* by *section 8 (1)* of the *Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."***

25. In **Dennis Kibaara v Republic [2019] Eklr,** Limo J. held: -

> ***"Before considering which appropriate sentence to impose guided by the above principles, courts must also consider mitigating circumstances and it is now trite going by the decision in Muruatetu consideration of mitigating factors constitutes an element of fair trial enshrined under Articles 25 and 50 of the Constitution. It is therefore clearly apparent that if courts were to continue being bound by prescriptive nature of minimum sentences, mitigation would be rendered superfluous because at the end of the day, it would matter less if a convicted person spends a whole hour giving mitigating circumstances or just 30 seconds to simply pray for leniency. Invariably a court would record the mitigating circumstances and hand in the minimum sentence even if it feels that the prescribed minimum is way too harsh in some given circumstances such as the circumstances obtaining in this case".***

26. In view of the foregoing and the age of the appellant who was said to be 65 years old at the time of trial and considering that he saved the Court time, I find the sentence of life imprisonment to be excessive. I set aside the life sentence and substitute therefor a sentence of 20 years imprisonment from the date the applicant was first sentenced.

DATED AND DELIVERED AT MERU THIS 12TH DAY OF AUGUST, 2020.

A. MABEYA

JUDGE