



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 72 OF 2019

STEPHEN OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from the judgment in the Principal Magistrate's Court at Bondo in Criminal Case No. 65 of 2019 dated 6.9.2019 by Hon. E.N. Wasike Senior Resident Magistrate.)

JUDGMENT

1. The Appellant **Stephen Otieno** was convicted of the offence of defilement contrary to **Section 8(1) as read with Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. He was sentenced to serve 40 years imprisonment after being given an opportunity to mitigate. The conviction followed his plea of guilty which was entered on 6.9.2019 by **Hon. E.N. Wasike, Senior Resident Magistrate in Bondo Principal Magistrate Sexual Offences Case No. 65 of 2019**.

2. The Charge Sheet dated 4.9.2019 reads that the Appellant on the 28.8.2019 at about 15:35 hours in Bondo Sub-County within Siaya County he intentionally and unlawfully caused his penis to penetrate the vagina of SA, (SA) a child aged 3 years old.

3. Dissatisfied with the Conviction and Sentence, the Appellant tried this appeal on 12.9.2019 setting out the following grounds of appeal

- 1. That the trial magistrate did not take into account my mental status during the trial.**
- 2. That I was not given fair hearing during the trial Under Article 50(2) (b) of the constitution.**
- 3. That I am epileptic and was totally confused during the whole trial.**
- 4. That I am pleading for the retrial of this case or acquittal as a result of Violence (sic) of my rights.**
- 5. That I was not promptly informed by the trial court if I could be represented by an advocate as stipulated Under Article 50(2)(b).**
- 6. That I have a mental problem that has been running since childhood.**

4. The appeal was canvassed by way of written submissions which the appellant filed on 27.10.2020.

5. In the said submissions, the appellant complains that the trial court failed to exercise the advantage of seeing and hearing the witnesses so that it could appreciate that the appellant had a mental disorder. Further, that the fact that the appellant unequivocally pleaded guilty to the offence of this nature should have raised the court's attention to question whether his mental status was alright. That the court should have warned the appellant of the dangers of pleading guilty on such serious offences which was not done in the instant case. He cited Section 12 of the Penal code on criminal responsibility of a person suffering a disease affecting his mind.

6. In his submission, the appellant claims that he had been suffering from mental disorder occasioned by acute epilepsy which existed since childhood. He relied on **W.K. Vs. R (2019) eKLR** on what the court should do where the accused is found guilty but insane.

7. On identification, the appellant submitted that the evidence tendered by the prosecution indicated that the assailant was reported to be Pitalis Otieno and so does the report made to the police on 28.8.2019 at 15.00 hrs as reflected in the P3 form.

8. He laments that those names are neither official nor alias names of the appellant hence the plea of guilty could have been done on behalf of another person. He urged this court to allow his appeal.
9. This being a first appeal, I must, as required by law, reassess and re-evaluate the evidence adduced before the trial court afresh and arrive at my own independent conclusion bearing in mind that neither saw nor heard the witnesses as they testified.
10. Revisiting the trial court record, and as earlier stated, the record shows that on 4.9.2019 the appellant was arraigned before Hon. E.N. Wasike, S.R.M., Bondo and the language used was Dholuo. The charges were read out to him (charge of defilements in Dholuo language and he replied - True.
11. The prosecution then stated that facts were not ready so the matter was adjourned for facts on 6.9.2019.
12. On 6.9.2019 the prosecutor read out facts of the case and produced exhibits namely P.3 form dated 28.8.2019 as P.EX 1, A Notification of Birth for the victim child as P.Ex2.
13. The accused was then recorded as saying: fact are correct.
14. The court then convicted the accused on his own plea of guilt and upon the prosecution saying that the accused was a first offender, the accused in mitigation stated: "I do not have anything in mitigation." Sentence of 40 years was then imposed and right of appeal explained to him.
15. From the above trial court record, of a plea of guilty, the court observes the following:
- That albeit the charge was read to the appellant in Dholuo, It is NOT indicated in which specific language the facts were read out or interpreted to the appellant. The coram for 6.9.2019 simply**
- States: Inter: English/Kiswahili/Dholuo the record does not indicate that facts were read out to the appellant in English or Kiswahili and/or interpreted in Dholuo language.**
16. In addition, the response by the appellant was: "**Facts are correct.**"
17. It is also not indicated in which language the appellant responded to the facts. The appellant in mitigations stated that he had nothing to say in mitigation.
18. In the P3 form produced as Exhibit 1, the person named as being known to the complainant and who defiled her was Pitalis Otieno.
19. The charge of defilement of a child aged 11 years and below carries up to life imprisonment upon conviction.
20. The trial Magistrate did not warn the appellant of the dangers of pleading guilty to such serious offence to enable the accused have a choice of pleading unequivocally to the charge.
21. In addition, there is no indication that the trial court accorded the appellant an opportunity to be represented by an advocate either of his own choice or at the state expense in view of the seriousness of the offence and the likely prejudice or injustice that the appellant was likely to suffer if he proceeded with the case on a plea of guilty as he did plead guilty to the charge in an equivocal manner.
22. The Appellant claims that he had a mental issue. There is no evidence that he or his relatives raised this issue before the trial court. However, having raised such issue before this court which is a first appellate court, this court is bound to inquire into the matter in order to ensure that the ends of Justice are served.
23. Having so found, I hereby find and hold that the plea taken by the appellant was equivocal.
24. The conviction of the appellant cannot, therefore, stand. It is hereby quashed and sentence of 40 years' imprisonment set aside.
25. In its place, I order for retrial of the appellant before Bondo Principal Magistrate's Court and direct that before a plea is retaken, the appellant shall be subjected to mental assessment to determine his suitability to stand trial.
26. I so order.**Dated, Signed and Delivered at Siaya this 30th day of November, 2020**

R.E. ABURILI

JUDGE