REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL 135 OF 2019

JAMES WAMBETI ALIAS PETRO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***[*An appeal from the conviction and sentence in original criminal case number 29 of 2019**

delivered on 13.8.2019 by HON C.M. Wattimah]

J U D G M E N T

The Appellant James Wambeti was charged with the offence of defilement contrary to section 8(1) as read with (4) of the sexual offences act No. 3 of 2006.

The particulars of the charge were that on the 11th day of August November 2019 as [particulars withheld] in Bungoma County, intentionally caused his penis to penetrate the vagina of IC a child aged 7 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that on the 11th day of August November 2019 as [particulars withheld] in Bungoma County, Intentionally inserted his penis to the vagina of IC a child aged 7 years.

The appellant was convicted on his own plea of guilty and sentenced to serve 40 years of imprisonment.

Having been dissatisfied with that decision the appellant preferred this appeal on grounds that:

> **"the trial magistrate erred in law and fact by convicting and sentencing the appellant without considering the prosecution evidence is inconsistence; that the trial court erred in sentencing the appellant to serve 40 years imprisonment; that the age of minor was not properly proved; that the trial court failed to consider appellant was a layman and was never presented by lawyer."**

The appellant also filed written submissions in court which he reiterated grounds of appeal. He briefly submitted that section 12 pf PC was not taken into consideration to ascertain mental stability of the appellant He submitted that he was insane at the time of the offence.

Ayiekha Shakwila the prosecuting counsel filed written submissions opposing the appeal. Counsel for the state submitted that from the proceedings there was no evidence that at the time appellant was charged, he was suffering from any disease of the mind or that he was insane to plead the provisions of Section 12 of the Penal Code. Counsel submitted that the appellant mental capacities were fine as demonstrated by the fact that he knew his wife had left him.

On the issue that the appellant did not understand the consequences of pleading guilty, he submits that this is not material but that he knew the consequences of his act. Counsel for state submitted that the plea of guilty was unequivocal and that the sentence of 40 years imprisonment should be enhanced to life imprisonment in compliance with Section 292) of the Sexual Offences Act.

This being the first appellate court it has the duty of reevaluating the entire evidence and coming up with its own independent findings bearing in mind it did not have the privilege of examining the witnesses and will thus give that allowance for that. See **Okeno vs R 1972 EA**

On 13th August, 2019 the accused appeared in court for plea. The proceedings as recorded were as hereunder: -

"the substance of the charge(s) and every element thereof has been staged by the court to the Accused person in the language that he/she understands who being asked whether he/she admits(s) or denies the truth of charge(s) replies: in Kiswahili

Accused – principle Charge – True

Alternative Charge Nil

HON C M WATTIMAH

SRM

Court: the accused is cautioned against pleading guilty to the chare as it attracts a strict penalty.

Charges read to the accused again.

Accused: it is true, my wife left me that is why I did that.

HON C M WATTIMAH

SRM

Court: Plea of guilty on the principal charge.

HON C M WATTIMAH

SRM

Court Prosecutor: facts are that on 11th August, 2019 the victim IC a minor aged 7 years and a student at [particulars withheld] primary School as at their home at Chebumbai at 6.45 p.m. She was looking after the donkey of his grandfather. He spotted the accused who was guarding some potatoes that had been harvested. The accused owner to her. He held her by the mouth. He told he rot shut up. He forced her to the round, pressed her to the ground. He removed his penis. He pressed her on the ground and defiled her. She could not raise alarm as the accused had closed her moth. He then left her at the maize plantation and left. The mother to the minor went to the plantation. She found her daughter crying at the plantation. She identified the accused as the one who had defiled her.

They reported to Cheptais police, they were referred the Cheptais dispensary. P3 form was filled. It confirmed the minor had been defiled. Age assessment done showed the victim was aged 7 years. On the same day at 9.45 p.m., the police went to the maize plantation, they found a minor's panty. They managed to arrest the accused on the 12th August, 2019. The accused was taken to Cheptais dispensary where he was examined. The P3 form is in Court as P Exhibit 1, the treatment book for complainant P exhibit. 2 Age assessment – Pexhbit3. Treatment book (for Accused) P – Exhibit 4. The minor's pant which is blood stained – PExhibit 5.

HON C M WATTIMAH

SRM

Accused: - True

HON C M WATTIMAH

SRM

Court: Accused convicted on plea of guilt.

HON C M WATTIMAH

SRM"

The appellant upon conviction on his own plea of guilty was asked to state his mitigation. He said in mitigation…

"Mitigation: the court to forgive me. I shall not repeat such an offence again. It is human to commit an offence. The Court to forgive."

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 contention is that he was mentally unstable during the offence among other grounds.

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."**

There is no dispute here that the Appellant pleaded guilty to the charge and the detailed particulars read over to him as per the proceedings of the trial court. The Appellant now says he was insane at the time of the offence. I have gone through the proceedings and on the 13/8/2019 the particulars of the charge were read to appellant in a language he understands and he pleaded guilty. Appellant further stated "***It is true,my wife left me that is why I did that"***

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 the main charge and the facts and the plea was unequivocal in every sense.

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 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."**

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.**

The evidence on record points to the fact that the Appellant was of sound mind at the time he pleaded guilty to the charge of defilement. There is also no evidence that he suffered from unsoundness of mind at the time he committed the offence.

In the case before me, there is no medical evidence on the Appellant's state of mind at the time he took plea, and there is nothing from the Court record to show that he may have been of unsound mind. In view of what I have stated above.

Having pleaded guilty to the charge, I find that **Section 348** of **Criminal Procedure Code** precludes him from appealing on conviction.

In the circumstances, the plea taken was unequivocal and **Section 348** of the **Criminal Procedure Code** bars the Appellant from appealing on conviction in such circumstances.

On sentence the appellant submitted that the sentence of 40 years imprisonment was manifestly excessive. Though the offence is serious,

having been committed to a 15 years old victim, I find the sentence of 40 years excessive in the circumstances. I, therefore set aside the sentence of 40 years imprisonment imposed. I sentence the Appellant to serve **Twenty Five (25) years imprisonment** from the date of sentence on **13th August, 2019.**

Dated, signed and delivered at Bungoma this 25th day of November, 2020.

.....

S N RIECHI

JUDGE