



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 46 OF 2018

NICHOLAS KIPLAGAT.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal

Case No. 2064 of 2014 at the Principal Magistrate's Court, Kapsabet (Hon. G.Adhiambo, SRM) dated 25 July 2014)

JUDGMENT

[1] The Appellant herein, **Nicholas Kiplagat**, was arraigned before the court of the Senior Resident Magistrate, **Hon. G. Adhiambo**, charged with the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged in the Particulars of the Charge that on the **23 June 2014** at [particulars withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of **C.A.** a girl then aged 17 years. In the alternative thereto, the Appellant was charged with the offence of Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3 of 2006**. The Particulars of the Alternative Charge were that on the **23 June 2014** at [particulars withheld] Village within Nandi County he intentionally and unlawfully caused his penis to come into contact with the vagina of **C.A.** a girl aged 17 years.

[2] The record of the lower court shows that the Appellant admitted the Main Charge when it was read to him on the **25 June 2014** and that the statement of the facts in support of the Charge was deferred to **26 June 2014**. The facts were accordingly stated and interpreted to the Appellant in Kiswahili language; and that in response thereto, the Appellant admitted the facts to be correct and added that they had been having sex with the Complainant since **2012** and that he was responsible for her pregnancy. He was accordingly convicted on his own Plea of Guilty and was sentenced to imprisonment for a term of 15 years.

[3] The Appellant felt aggrieved by the Sentence that was imposed on him; and therefore, with the leave of the Court, he filed this Appeal on **4 July 2018** contending that:

[a] The Trial Magistrate erred in law by upholding the conviction and sentence of 15 years' imprisonment for the offence of defilement on the plea of guilty;

[b] At plea-taking, he was underage and could not follow the proceedings; and that the Investigating Officer prejudiced him into admitting the offence without knowledge of the consequences;

[c] The Investigating officer failed to request for age assessment order to authenticate his age;

[d] The trial court's proceedings were irregular as he was not given the chance to elect a language of his own choice and understanding as provided for in **Section 198(1)** of the **Penal Code**.

[4] In addition to the foregoing grounds, the Appellant filed what he referred to as Mitigating Grounds of Appeal on **8 November 2018**, setting out the facts that he pleaded guilty to the Charge in the first place and that he has served a substantial part of his sentence and has 6 years to go. He also stated that he suffered a fracture of one of his limbs and is therefore in need of proper medical attention. He also mentioned that there is an offspring from their relationship with the Complainant who requires his parental attention; adding that he is remorseful and has reformed and is therefore ready to be reintegrated back in the society. He accordingly prayed that his appeal be allowed.

[5] The Appellant urged his appeal by way of written submissions which he filed along with his so called Mitigating Grounds of Appeal

pointing out that what they had with the Complainant was consensual sex in the belief that she was old enough to be his wife given her conduct. He submitted that the Complainant voluntarily left her parent's home to go and live with him and that they were together and had sexual intercourse between **17 June 2014** and **23 June 2014** when he was arrested. He relied on the provisions of **Section 8(4)** of the Sexual Offences Act and the cases of **Mohamed Makokha vs. Republic** and **Martin Charo vs. Republic [2016] eKLR** in urging the Court to find that his conviction and sentence was improper.

[6] On behalf of the State, the appeal was opposed by **Mr. Mulamula**. He submitted that the **Sexual Offences Act** is clear on sentence, depending on the age of the victim. He further submitted that the age of the Appellant was also ascertained before he was sentenced and a P3 Form in this respect exhibited before the lower court. Counsel further pointed out that the language of communication was Kiswahili; which is what this Court has been using to communicate with him without any complaint. He therefore urged for the dismissal of this appeal.

[7] I have carefully considered the appeal, the grounds relied on by the Appellant as well as the submissions made herein in respect thereof. There is no dispute that the Appellant pleaded guilty to the offence with which he was charged; and therefore his appeal is deemed to target the sentence imposed on the Appellant by the lower court. Indeed, **Section 348** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya** is explicit that:

"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 and legality of the sentence."

[8] Accordingly, in the case of **Olel v Republic [1989] KLR 444**, this posturing was expressed as follows:

"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."

[9] Having analyzed the record of the lower court as indicated herein above, there can be no controversy that the plea was unequivocal; for it complied strictly with the formula laid down in **Adan vs. Republic [1973] EA 446** by **Spry, V.P.** that:

"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

[10] The lower court record shows that the Appellant was present before the lower court on **25 June 2014** when his plea was taken; and that the language of communication was Kiswahili. The record further shows that he not only admitted the Charge but also the facts in support of that Charge. It is instructive that **Section 198(1)** of the **Criminal Procedure Code** states that interpretation be done to a language that the accused person understands, not a language of his choice or preference. It provides that:

"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

That the Appellant understands Kiswahili language is not in doubt as he opted to use that very language in his communication with the Court in this appeal.

[11] Regarding the assertion that the Investigating Officer prevailed upon him to plead guilty, the Record of Appeal shows that he had numerous opportunities for introspection and reflection on the gravity of the Charge. This is evident from the fact that the sentencing process was not rushed by the trial court. The facts were given on the **26 June 2014**. Thereafter, upon his conviction, a Probation Officer's Report was called for which was not available until **24 July 2014**; whereupon the sentence was passed, not on the **24 July 2014** but on **25 July 2014**. Accordingly, the contention by the Appellant that the Investigating Officer prevailed upon him to plead guilty is clearly without any foundation. Indeed, in his Petition and Grounds of Appeal, and the Mitigating Grounds, which were filed herein on **8 November 2018**, he explicitly reiterated that he pleaded guilty to the Charge.

[12] Regarding his age, again the record of the lower court is explicit. It shows that the Appellant was also examined and a Treatment Sheet as well as a P3 Form in respect of that examination were produced before the lower court by the Prosecution. They were marked **Prosecution's Exhibits 2a and 2b**. The documents show the age of the Appellant as 21 years. Likewise, in the Social Inquiry Report dated **24 July 2014**, it was ascertained that the Appellant was born in **1994** and was therefore over 18 years old at the time. Indeed, in his submissions before this Court, he acknowledged as a fact that:

"...at the time of my conviction I was a young man aged 21 years who had friendship with a girl aged 17 years..."

In the premises, not much turns on the contention that he was not accorded a fair trial, in that he was underage at the time of his conviction and was not treated as such.

[13] On whether the Appellant's right to a fair trial was compromised by the fact that he was not accorded legal aid, it is true that the Appellant was unrepresented before the lower court. He was neither informed that he was entitled to legal representation nor provided with legal aid. **Article 50(2)(g) and (h)** of the Constitution does provide that:

"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;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[14] There can be no doubt that the Appellant raised a valid point; and that the Charge he was faced with was a fairly serious one that would otherwise necessitate legal advice and counsel. However, it is also appreciable that the State is incapable, due to paucity of resources, to provide legal aid to every accused person in cases where substantial injustice would otherwise result without legal representation. Hence in **David Njoroge Macharia vs. Republic [2011] eKLR** the Court of Appeal expressed the view that:

“Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...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.”

[15] To my mind, the Court of Appeal made it clear that, other than capital offences, the right to legal representation at the expense of the State would only be considered and granted in cases involving complex issues of law or fact, or in situations where the accused is unable to conduct his own defence, or where public interest requires that legal aid be provided. It is instructive, however, that the legal framework for the implementation of **Article 50(2)(g) and (h)** of the **Constitution** was not in place at the time of the Appellant's arraignment; and that the **Legal Aid Act No. 6 of 2016**, an Act of Parliament to, *inter alia*, give effect to the aforementioned provision of the Constitution, only came into effect on **10 May 2016**. There was therefore no legal or institutional framework for ascertaining who would be entitled to legal representation at the material time that the Appellant was charged and prosecuted. Accordingly, I find no merit in that ground as well.

[16] As to the legality of the sentence, the Appellant was sentenced to 15 years' imprisonment; which is the penalty provided for in **Section 8(4)** of the **Sexual Offences Act**. It is noteworthy that the age of the Complainant was specified in the Charge Sheet as falling within the age bracket specified in **Section 8(4)** of the **Sexual Offences Act**. The Complainant's age was demonstrated to be 17 years. Needless to add that the Appellant admitted those facts without any equivocation and reiterated that stance in his written submissions. Having admitted those facts, any contention now that he believed the Complainant to be over 18 years are ineffectual and the authorities cited in that regard unhelpful to the Court; as the lower court could only have tried the issue had he pleaded not guilty.

[17] In the result, I find no merit in the appeal and would accordingly dismiss it.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH 2019

OLGA SEWE

JUDGE