



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 47 OF 2018

(CORAM: R.E. ABURILI – J.)

ERICK ODHIAMBO MUNGAYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and sentence dated 10.9.2018

in Ukwala SRM Cr. Case No 38 of 2018, Hon. G. ADHIAMBO - SRM)

JUDGMENT

1. The Appellant **Erick Odhiambo Mungaya** was on 10.9.2018 convicted vide **Ukwala P.M's Court Criminal Case No. 38 of 2018** with the offence of **Defilement contrary to Section 8 (1) as lead with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.**

2. He was convicted on his own plea of guilty and sentenced to serve 20 years imprisonment. He has now appealed against the said conviction vide his Petition filed in Court on 14.9.2018, claiming that he was misled by the Arresting Officer into believing that he would be set free if he agreed to have committed the act of defilement and that although he pleaded guilty in the Lower Court, he did not commit the offence of defilement hence he would wish to apply for retrial in the Lower Court to make Justice take its course.

3. He also submitted orally and stated that he was arrested and beaten by Police Officers that is why he admitted the charge. That he did not complain to the lower Court because he did not know what was happening. That he is 29 years old and not related to the victim. That he was tricked by the Police to admit the offence so that he can be released by the Court and that he should be re-tried so that he can go on with his case.

4. In opposing the appeal, the Prosecution Counsel Mr. Okachi submitted that the plea of guilty was unequivocal that the language used was understood by the Appellant hence the appeal is misplaced and therefore it should be dismissed.

5. I have considered the Appeal herein and the trial record as well as submissions by both the Appellant and the Prosecution.

6. I note that the Appellant appeals against conviction and sentence on a plea of guilty. **Section 348 of the Criminal Procedure Code** bars this Court from hearing an appeal based on a plea of guilty except where lawfulness of sentence is in question. However, where the plea of guilty was equivocal, this Court has power to interfere with the conviction.

7. Examining the trial record. The Appellant was arrested on 7.9.2018 on allegations that on 7.9.2018 at around 2100 hours at [particulars withheld] Sub-Location, Bar Ober trading Center in Ugenya Sub-County within Siaya County, he intentionally caused his penis to penetrate the vagina of (**M.A.O.**) a child aged 14 years. He was arraigned on 10.9.2018 before Hon. G. Adhiambo, SRM. The Appellant stated that he was aged 27 years old and that he understood Luo.

8. The main charge was read to him as interpreted by Mr. Achieng in Luo and Kiswahili and he stated on being asked whether he admits or denies the truth of the charge:

“It is true I inserted my penis into her vagina.”

9. A plea of guilty was entered and detailed facts were read out and interpreted to him in Luo. A P3 form for the Complainant filed on

8.9.2018 was produced as P. Exhibit No. 1 and a Birth Notification showing the Complainant was born on 2.6.2004 was also produced as P. Exhibit No. 2.

10. The Appellant was then asked whether the facts as read out to him were correct and he stated:

“It is true”

And a conviction on the main charge was entered.

11. The Prosecutor stated that the appellant was a first offender and in mitigation, the Appellant stated that:

“The girl was brought and I was told that her father sent her to shave and she found that there was no electricity. The girl went home and she was chased. The one who brought her to my house is what I am crying about.”

12. The trial Magistrate after considering mitigation, nature and gravity of offence committed and the fact that the Appellant was a first offender and the age of the victim and the need to rehabilitate the Appellant and the law regarding sentences, sentenced him to a Minimum of 20 years imprisonment as stipulated in **Section 8 (3) of the Sexual Offences Act** as the victim was found to be 14 years. The P.3. Form produced showed a torn hymen of the victim who was a standard 5 pupil.

13. The facts also disclosed that on 7.9.2018 the appellant/ Accused convinced the victim Child to have Sexual Intercourse with him by removing her clothes including her inner pant, he removed his clothes, took his penis and inserted it into her vagina.

14. Her further learnt that the victim was in the Appellant’s house on 8.9.2018. They went to his house and found both the Appellant and the victim. The two were arrested. The victim was taken to Khunyangu Sub-County Hospital where she was examined and found that her hymen was torn. The Appellant was escorted to Bar Ober Police Patrol Base. He was later charged. The victim’s Birth Notification was availed showing she was 14 years old.

15. The Appellant does not complain that the plea of guilty was improperly taken or that facts do not disclose an offence. He simply wants a retrial because he was lied to by the Police to plead guilty so he could be released. In his submissions he changed the story and alleges that he was beaten by the Police Officers that is why he pleaded guilty. He does not state that the plea was equivocal. I do not find the plea of guilty as taken defective or at all. It was unequivocal. I also note that the appellant did not inform the trial court that he was beaten by the police.

16. Accordingly, a retrial not being a right or an alternative to an unequivocal plea, I find the appeal herein against conviction unwarranted. I dismiss it. On sentences, the same was lawful pursuant to Section 8 (3) of the Sexual Offences Act. However, in view of the recent Court of Appeal decision in **Jared Koita Injiri v Republic [2019] e KLR**, I hereby set aside the minimum sentence of 20 years and substitute it with a prison term of 15 years to be calculated from 7/9/2018.

17. Orders accordingly.

Dated, Signed and Delivered in open court at Siaya this 26th June, 2019.

R.E. ABURILI

JUDGE

In the Presence of:

Mr. Okachi: Senior Prosecution Counsel for Respondent

Appellant present in person.

CA: Brenda Ochieng and Modestar