REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 174 OF 2017

MORRIS OBUNY DIAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal From The Original Conviction And Sentence Of The Principal Magistrate's Court At Eldama Ravine Cr. Case No. 15 Of 2017 Delivered On The 3rd Day Of July, 2017

By Hon. J. Tamar, Pm]

JUDGMENT

1. The appellant was on 3rd July 2017 convicted and sentenced to imprisonment for life for defilement contrary to section 8(1) (2) of the Sexual Offences Act, the particulars whereof were that he *"on the 29th day of June 2017 at 13.00 hrs, at [particulars withheld] Centre in Koibatek Sub-County within Baringo County intentionally caused his penis to penetrate the vagina of EWM aged 4 ½ years."*

2. In conceding the appeal, the DPP urged, and the appellant agreed to, a retrial as follows:

> *"**DPP***
>
> *Appeal is not opposed. Appellant was convicted of defilement Contrary to Section 8 (1) (2) of the Sexual Offences Act and sentenced to life imprisonment on 3/7/2017.*
>
> ***Appellant pleaded guilty and there is nothing to show that the court explained the gravity of the offence and severity of the sentence.***
>
> *Appellant was unrepresented and in the circumstance, the Court ought to have explained to him the consequences of a plea of guilty. The appellant may have ignorantly pleaded guilty. In the circumstances and in the interest of justice, I urge the Court to declare a mistrial and order a retrial. That is all.*
>
> ***Appellant in Kiswahili***
>
> *I did not know what I was saying on the date of plea. I shall abide by the order of the Court.* ***I agree to a retrial."***

Plea not unequivocal

3. This case emphasizes the need for caution in taking and accepting a plea of guilty in serious offence. There always is the need especially in serious offences with severe punishment upon conviction that the accused is fully appraised of the elements of the offences and the punishment upon a finding of guilt so that in pleading guilty he accepts both the offences and all its elements or ingredients as well as the possible sentence that may be imposed upon conviction. When this is not done, it may be that the accused thought that the offence was one for which penalty would be minor and therefore, convenient for him to plead guilty and take the punishment. Such a plea, not being based on full knowledge of the nature of the offence and its penalty, cannot be said to be unequivocal. Had he known the full weight of the offence, he may not have pleaded guilty to the charge.

4. The court has noted with approval that the trial court did comply with basic plea-taking procedure set out in the leading case of ***Adan v. R*** (1973) EA 445, as observed in the judgment of the trial court that:

"The accused pleaded guilty to the main count and the facts and particulars constituting the offence were equally read out in detail by the prosecution. The accused was invited to state whether the facts as read out were true and to which the accused admitted the facts as true."

Penal consequences

5. Today, however, conventional judicial policy of our courts is to require an even more careful testing of unequivocality of the plea based on **full knowledge of the penal consequences** of a conviction on a finding of guilty. The factor of seriousness of the offence and the penal consequence of conviction was not brought to the active attention of the accused before his plea of guilty was accepted. The record only shows acceptance of the facts as set out by the Prosecution. No warning of the grave consequences of conviction on plea of guilty for the charge of defilement under section 8 (2) of the Sexual Offences Act was given to the appellant. Therefore, the conviction of the appellant, herein, purportedly on his plea of guilty was not safe as the plea was not unequivocal for want of full explanation as to the nature and consequence of conviction therefor.

Existence of Evidence to support charge

6. Without making conclusive finding on the case, so as not prejudice retrial, I find that there is, on the test of ***Fatehali Manji v. R*** (1966) EA 343, evidence, if the facts admitted set out by the Prosecution are proved, upon which a court may on a proper trial convict for the offence of defilement as charged.

Nature of the Charge

7. The offence of defilement of a child under section 8(2) of the Sexual Offences Act is a most serious sexual offence by way of the effect on the life of the child as well as the penalty prescribed therefor.

Availability of witnesses

8. In seeking a retrial, the prosecution must be taken to consider that the evidence and the witnesses are still available for purposes of a retrial.

Interests of Justice.

9. The interests of justice call for both the fair trial of the accused and the punishment for suitable retribution and deterrence and prevention, where an accused is proved guilty, of the serious offence of defilement. See the Court of Appeal decision in ***Opicho v. R*** (2009) KLR 369. The appellant has only been in custody for two years, as in ***Opicho,*** supra, and he cannot therefore, be said to have served a ***substantial*** portion of his life sentence and justice for the child complainant is paramount. The case must be retried.

Orders

10. Accordingly, for the reasons set out above, the court quashes the conviction for the offence of defilement contrary to section 8 (2) of the Sexual Offences Act and sets aside the sentence of imprisonment for life imposed therefor.

11. The appellant shall be retried before a differently constituted court at Eldama Ravine Law Courts, and for that purpose, the matter shall be mentioned for directions before the Principal Magistrate/head of station Eldama Ravine on **Monday 29th July 2019.**

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.