REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.83 OF 2017

(Appeal Originating from Nyahururu CM's Court SOA No.54/2015 by: Hon. V. Ochanda – R.M.)

GERALD WAIGWA NDEGWA..…APPELLANT

- V E R S U S –

REPUBLIC……..……..…..RESPONDENT

J U D G M E N T

The appellant, **Gerald Waigwa Ndegwa** was 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***.

The particulars of the charge are that on diverse dates between 1st August, 2015 and 31st August, 2015 at [particular withheld] Trading Centre, intentionally and unlawfully caused his genital organ i.e. penis to penetrate the genital organ (vagina) of **SWK** a child aged 16 years.

In the alternative, he faced the charge of ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006***.

He is alleged to have intentionally and unlawfully caused his genital organ to come into contact with that of **SWK** a child aged 16 years.

The appellant pleaded guilty to the charge and was sentenced to serve 15 years imprisonment.

Being dissatisfied with the conviction and sentence, he lodged this appeal based on grounds filed in court on 16/12/2015 and a supplementary petition of appeal filed in court on 14/10/2016.

The appellant was represented by the firm of **Munene Chege & Co. Advocates** who also filed submissions. **Ms. Wangeci** argued the appeal on behalf of the appellant.

The grounds can be summarized as follows:

1. That the trial court erred in failing to find that the charge was defective because Section 81(4) of Sexual Offences Act does not exist;

2. That the court failed to find that the appellant was illiterate and did not understand either English or Kiswahili;

3. That the court contravened Articles 49(1)(c), 49(1)(d), 50(2)(g), 50(2)(h) and 50(2)(m);

4. That the court erred by not finding that the appellant was compelled by the investigating officer to admit to the charges;

5. That the prosecution failed to prove its case to the threshold of beyond reasonable doubt;

6. That the sentence meted on the appellant was harsh;

7. That the court erred by relying on contradictory and unsubstantiated evidence;

8. That the court erred by disregarding the law.

The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set out.

At the hearing of the appeal, Ms. Wangeci realized that she had only filed grounds in respect of the alternative charge instead of the main charge of defilement. She abandoned ground I of to the effect that the facts did not disclose a charge of defilement.

Counsel submitted that the appellant did not understand the language of the court which was English and Kiswahili as he only understands the Kikuyu language; that when the appellant replied '***ni kweli'*** the court should have confirmed that he understood the charge or the gravity of the offence. For that ground counsel relied on the decision of ***Danvid Nyongesa v Republic (2010) KLR*** and ***Elijah Njihia v Republic Cr.A.437/2010***.

Secondly counsel argued that the investigating officer convinced the appellant to plead guilty to the charge and that being a first offender he would be forgiven. Counsel also submitted that the judgment of the court was flawed because it did not comply with Section 169 of the Criminal Procedure Code and cannot be cured by Section 382 of the Criminal Procedure Code. Counsel stated that the proceedings are flawed and a nullity and the appellant should be acquitted.

In reply, ***Ms. Rugut*** learned counsel for the respondent opposed the appeal. She observed that the appellant understood Kiswahili and participated in the trial; that after the facts were read to him, he stated that the facts were correct and that in mitigation he prayed to be forgiven. It was counsel's view that the plea was unequivocal.

As regards compliance with Section 169 Criminal Procedure Rule, counsel argued that it is curable under Section 382 Criminal Procedure Code and does not make the plea fatal.

As regards the first allegation that the charge was defective i.e. that Section 81(4) Sexual Offences Act does not exist. Indeed that section does not exist. The appellant faced a charge under section 8(1) as read with Section 8(4) of the Sexual Offences Act No.3 of 2006. I have seen the original charge sheet and the sections are the correct ones. The court has no idea where counsel got Section 81(4). That ground is baseless.

Another ground is that the court based the conviction on contradictory evidence. There was no such evidence because this matter did not proceed to full hearing.

The appellant was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Rule bars any appeal from a conviction by the subordinate court where an accused was convicted on a plea of guilty except as to the extent and legality of the sentence. The section reads as follows:

"Section 348 Criminal Procedure Code no appeal shall be allowed in 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 or legality of sentence."

In the case of ***Olel v Republic (1989) KLR 444*** the court held:

"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (Cap.75) does not merely limit the right of appeal in such cases but bars it completely."

From a reading of the above section if the plea is equivocal then an aggrieved party has a right of appeal against conviction. However, where the plea is unequivocal, then one can only appeal on the extent and legality of the sentence.

This court has to determine whether the plea was properly taken and therefore unequivocal. The Court of Appeal of East Africa gave guidelines on how a plea should be taken in the case of ***Adan v Republic 1973 EA 443***:

i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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; and

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.

The first complaint is that the appellant did not understand the language of the court and was not accorded a Kikuyu interpreter and hence his right to fair trial under Article 50(2)(m) of the Constitution was breached rendering the trial a nullity. Article 50(2)(m) states as follows:

"2. Every accused person has the right to a fair trial, which includes the right –

(m) to the assistance of an interpreter without payment if the accused person who cannot understand the language used to the trial."

The Court of Appeal in the case of ***Abdalla Hassan Hiyasa v Republic (2015) KLR*** had this to say of the said right:

"***Article 50(2)(m) guarantees every accused person the assistance of an interpreter without payment if he does not understand the language used at the trial."*** In ***Kyalo Kahani v Republic Cr.App.586/2010***, this court emphasized the importance of that guarantee as follows:

"The **importance of the right to an interpreter in a criminal trial cannot be gain said. It is an integral part of a fair trial and is intended to ensure that an accused person, who risks life and liberty, fully understands the case against him and is able to defend himself adequately. It was a right guaranteed under section 77(2)(f) of the former Constitution and is granted under Article 50(2)(m) of the Constitution of Kenya 2010. So important is the right to fair trial that it is one of the few rights and fundamental freedoms that cannot be limited under Article 25."**

Section 198 of the Criminal Procedure Code also underscores the right to an interpreter where one does not understand the language of the court.

In the instant case, I have seen the record of the trial court which indicates that the languages used by the trial court were English and Kiswahili and the interpreter was one Jackson. When the charge was read to

the appellant, he replied in Kiswahili language "***ni kweli"***. The facts were read to the appellant and he replied "***hayo maelezo ni kweli***". Thereafter he was convicted on his own plea and the record shows he asked to be forgiven. In my view, the appellant understood the Kiswahili language and the record clearly shows that he took part in the proceedings.

In the instant case, the appellant explained in Kiswahili that he understood the facts and went on to mitigate. Unlike the case cited by counsel ***Elijah Njihia Wakianda v Republic (Supra)*** the appellant's plea was recorded in English. In this case, it was recorded in Kiswahili and then went further to explain that the explanation given in the facts was the correct one. There is no indication that the appellant did not understand the proceedings. The appellant's right to an interpreter was not breached as he understood Kiswahili language. The facts that were read to the appellant were that the appellant took the complainant to his house where he defiled her. She did not disclose this fact till later in December when she got sick and upon examination by advocate, she was found to be pregnant that she disclosed. Penetration took place and the facts disclosed an offence under Section 8(1) of the Sexual Offences Act. I find that the plea was unequivocal.

The other ground that the appellant raised is that the arresting officer convinced him to plead guilty and that the court would be fair on him because he was a first offender. Apart from the allegation that the arresting officer convinced the appellant to plead guilty, there is no evidence on record that the appellant was threatened or tortured by the said officer. The appellant did not make any confession to the police. The court in ***Olel v Republic (1989) KLR 444*** faced such an allegation and the Court of Appeal stated thus:

> "**mere detention long or short of itself cannot be a factor to determine whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material except the record of the proceedings on which we can judiciously determine the question. We must go by the record and accept as true the position stated therein. In our view, to do otherwise would be tantamount to substitute the known and admitted facts of the case with unjustifiable speculation."**

In the instant case, proceedings before the Lower Court do not contain any evidence of the appellant being coerced or being made promises through deception or tricks into pleading guilty to the charge. The court is bound by the record before it.

The other grounds alluded to e.g. that the complainant was appellant's girlfriend or that she had told him she was 21 years or that the complainant was not a virgin are issues that may have only arose had the matter gone to full hearing. This court is precluded from considering what is outside the record of appeal.

Lastly, it was argued that the court did not comply with Section 169 of Criminal Procedure Code. Section 169(1) of the Criminal Procedure Code requires that the judgment contain the facts for the decision, reasons for the decision must be dated and signed by the presiding officer. Counsel argued that the court did not indicate under which law the appellant was convicted as required by Section 169(2) Criminal Procedure Code.

The appellant pleaded guilty to a charge of defilement. The section of the law under which he was charged had just been read to him. I find that failure by the magistrate to state the section under which he was convicted or sentenced is not fatal to the conviction or sentence. It would have been different if he had undergone a trial because a person can be charged for a particular offence and yet he is convicted of a different one depending on the evidence adduced. This is a different scenario from a conviction arrived at after a full trial.

Whether the sentence is harsh or excessive: The appellant was charged under Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The complainant's birth certificate was produced in evidence and it shows that she was born on 10/12/1999, meaning she was about 16 years old at the time the offence was committed. Section 8(4) Sexual Offences Act provides that where the victim of defilement is aged between 16 and 18 years, the accused will be sentenced to not less than 15 years imprisonment. The

appellant was handed the minimum sentence under Section (4) Sexual Offences Act.

The sentence is lawful and the court has no discretion to interfere.

In the end, I find that the appeal is without merit and is hereby dismissed in its entirety.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***26th*** day of ***January***, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Ms. Rugut – for prosecution

Mr. Chege - for the appellant

Mr. Soi - court assistant

Present – appellant