REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 17 OF 2017

DANIEL MPAYO NGOIYAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*An appeal form a judgment on conviction and sentence of*

***the Chief Magistrate at Kajiado dated 3rd April, 2017*)**

JUDGMENT

The appellant was charged in the Chief Magistrate court at Kajiado with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 30 of 2006. The brief particulars of the offence are that on the night of 6th and 7th November, 2015 at Kajiado Township within Kajiado County, intentionally caused his penis to penetrate the vagina of L.S., a girl aged 15 years.

In the alternative the indictment was on the offence of indecent Act with a child contrary to section 11 as read with Section 11(10) of the Sexual Offences Act. The brief summary constituting this charge were that on the said night of 6th and 7th November, 2015 in the same sub-county of Kajiado Central intentionally and unlawfully caused his genital organs (penis) to come into contact with the genital organ of L.S stated to be aged 15 years. Initially denied both counts when he was first arraigned before court on 17th November, 2015. The next hearing date was scheduled on 3rd April, 2017 it would appear from the record that the appellant decided to plead guilty to the charges, in which he was convicted and sentenced to serve twenty (20) years imprisonment .

That facts relied upon by the prosecution were that on the night of 6th and 7th November, 2015 the complainant had spent the night at the house of the appellant. During the night they slept together and had sexual intercourse. The following day on the 7th November, 2015 they were seen at Kajiado stage 46. The good Samaritan who saw them telephoned their parents who travelled from Maili 46 to Kajiado stage and found the appellant in company of the complainant. The parents apprehended both of them and headed to the police station and a report on the incident was booked in the occurrence book. The police commenced the investigations, referred the complainant to Kajiado Central Hospital for examination and filling of the p3 form. The feedback from the medical Doctor revealed that the complainant had been defiled as there was mucus like substance and blood from her genitelia. The hymen was also broken. It also emerged from the facts that two have been in an intimate relationship since June, 2011.

From the record the appellant admitted these facts as presented by the prosecution counsel. In convicting

the appellant the learned trial magistrate relied on these facts and admission by the appellant. She also relied on the medical evidence as indicated in the p3 form.

Submissions on appeal:

The appellant now appeals to this court against conviction and sentence on the following grounds:

(1) That the plea taken by the appellant was not unequivocal

(2) That the age of the minor complainant was not ascertained

(3) That that was no interpretation of the language used by the court.

On appeal learned counsel for the appellant Mr. Ochieng submitted that there was an irregularity in the manner the trial was conducted rendering it unfair to the appellant. Mr. Ochieng pitched his submissions on the provisions of Section 207 of the Criminal Procedure code on trials before the subordinate courts the significant part relevant to this appeal Mr. Ochieng submitted was in respect with language of interpretation and subsequent remarks made by the appellant when the facts were presented by the prosecution counsel. It was further contended by Mr. Ochieng that the criminal trial held by the learned Magistrate did not comply with the fundamental legal Principles on plea taking as elucidated in landmark case of ***Adan v Republic 1973 EA***. Mr. Ochieng argued and submitted during the initial proceedings the appellant was represented by Mr. Musyoka Advocate when he pleaded not guilty on 17th May, 2015.

In the second scheduled trial dated 3rd April, 2017 the summary trial proceeded in absence of his legal counsel. Learned counsel further submitted that there was no inquiry as to absence of legal counsel for the appellant but the trial Magistrate went ahead to preside over the change of plea proceedings in violation of right to counsel. To this learned counsel added that in mitigation the appellant introduced a new matter about parents talking and the complainant going back to school. This statement Mr. Ochieng contended rendered the plea unequivocal.

According to Mr. Ochieng's view the negotiations between parents and the position of the complainant return to school was a condition that made him agree to change plea. Mr. Ochieng further submitted that the elements of the offence of defilement as defined under Sexual Offences Act was not proved beyond reasonable doubt. He specifically took issue with the element on the age of the complainant. By not establishing the exact age of the complainant Mr. Ochieng contended there is a possibility either she was an adult or not a minor aged 15 as stated in the charge sheet.

Mr. Ochieng further submitted and invited the court to apply the provisions of the constitution under Article 47(1) on fair administrative action and Article 50 on the right to a fair trial to vitiate the conviction and sentence against the appellant. In support of his submissions learned counsel cited the following provisions of the law and decisions. Constitution of Kenya Article 47 and 50. Section 207 of the Criminal Procedure Code. Sexual offences Act No. 3 of 2006 Section 14. ***Adan v Republic 1973 EA 445, Daniel Ndambiri Njiru v Republic 2004 eKLR, Stephen K. Murage v Republic 2016 EKLR, Republic v Francis Kitonyi 2008 eKLR.***

Mr. Ochieng contended and submitted that based on the above material this appeal should be allowed on both conviction and sentence.

Submissions by the respondent:

Mr. Akula, the Senior Prosecution Counsel opposed the appeal stating that the appeal lacks merit. Mr. Akula contended that the appellant was convicted and sentenced upon entering a plea of guilty to the charge of defilement he urged this court to dismiss the appeal for want of merit.

Discussion and determination

Based on the many divergent views and contestation which have arisen from both counsels I propose to dispose it off under the following sub-headings.

(1) Whether the plea of guilty entered by the appellant was not unequivocal

(2) Whether the trial Magistrate failed to explain the appellant of his right to legal representation before commencement of the plea-taking proceedings

(3) Whether from the factual documentary evidence produced by the state proved the ingredients of the offence of defilement under Section 8(1) (3) of the Sexual Offences Act.

From the record between the day of his arrest and the indictment of the appellant on 17th November, 2017 he did not admit the offence when first read by the trial Magistrate. At this initial appearance the appellant was represented by counsel. As indicated from the record there were several adjournments until the 3rd April, 2017 when the appellant purportedly changed plea.

There is no evidence if an application by the appellant that he wished to change the initial plea of not guilty to that of guilty.

The second plea of guilty has been challenged by learned counsel for not being voluntary and free from error. Indeed in view of counsels contention the language of interpretation is disputed. The issues raised on the validity of the plea of guilty can be answered by the provisions of Section 207 of the CPC. The general principles of unequivocal plea consist of that is freely and voluntarily entered by the offender, Secondly, it must be an informed plea originating from the offender and should be based on sufficient facts supporting the charge and offenders participation in committing the crime.

The facts outlined by the learned trial Magistrate do not indicate whether an application was made by the appellant to move the court to commence proceedings on a change of plea from that of not guilty to one of guilty. The record opens as follows:

"Before S.M. Shitubi, CM

Prosecutor – Njeru

cc. Caleb

Accused: present

I understand Kiswahili

Accused is reminded the charge and cautioned on the penal Section. The charge is read to him in Swahili.

Having understood the charge, and the particulars he responds in Kiswahili as follows:

Accused – Main count – It is true

The essentials of a plea of guilty encompasses where the accused fully understands the nature of the charges and the consequences of pleading guilty as required under Section 207 (2) of the CPC. The applicable standard for determining whether the plea is equivocal is that established and articulated in the case of ***Adan v Republic 1973 EA 445*** where the court of Eastern Africa held thus:

"The trial Magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused language or in a language he understands. He should then record the accused's own words and if they are an admission a plea of guilty should be recorded.

The prosecution may then, immediately state the facts and the relevant facts if the facts or raises

any question of his guilty his reply must be recorded and change of plea entered, but if there is no change of plea a conviction should be recorded"

In applying the above principles the motion to change pleas is lacking from the record of the trial court. As to whether the appellant was properly informed of the consequences of admitting the offence even in absence of his legal counsel is not demonstrated from the proceedings. The pertinent questions to be asked by the trial court is whether the appellant clearly understood the nature of the charge which has been filed against him by the state and the consequences of him pleading guilty is unclear.

One would expect the very answers on understanding of the charges and the consequences of his own plea of guilty to be recorded in so far as possible in the language of the accused. The record fails to provide any support to that effect. The record shows a summary statement by the learned trial Magistrate that the appellant has understood the charge and particulars. But there is no element of whether he was adequately and sufficiently informed of the consequences.

In the decision cited of ***Adan v Republic*** the accused must understand the nature of plea of guilty and consequences thereof of admitting the charge.

If the trial court has to be believed the Swahili language being the one used to communicate with the appellant should have featured in the answers given to the inquiry by the trial magistrate. There is sufficient factual basis that supports the complaint that the plea was not unequivocal. When the prosecution counsel read the facts the basis of the charge the appellant stated as follows in mitigation.

It is all true –

Our parents talked and agreed we were friends- The girl has gone back to school we intended to agree when she finishes school.

This mitigation turned an unequivocal plea into disarray and cast doubt whether he understood the nature of the offence. In the instant case the trial Magistrate should have recalled the illegality even after conviction.

At this stage the trial Magistrate should have recorded a plea of not guilty even after conviction. At this stage the trial magistrate should have entered into an inquiry on the alleged indictment against appellant. In the circumstances of this plea an inquiry as to the act of sexual intercourse with the complainant and whether he knew that he was committing the offence with a child aged 15 years old.

I therefore agree with the appellant counsel that this plea of guilty was equivocal and therefore occasioned a failure of justice for this court to exercise discretion by setting it aside.

Secondly, whether the appellant was informed of his right to legal representation. The relevant section in this respect of the constitution provides as follows Article 50(2) g and h –

"Every person has a right to choose and be represented by an advocate and to be informed of this right properly.

(h) To have an advocate assigned to the accused person by the state and at the state expense, if substantial injustices would otherwise result, and to be informed of this right properly"

It is evident that the accused had a lawyer during the initial appearance. There was no follow up by the trial court as to what happened to his legal counsel and whether he needed more time to consult and engage another counsel to represent him in the criminal trial. We are not even told whether the appellant had opted to conduct his own defence without counsel. What is reflected from the trial court record is the appellant being asked to plead to the charge of defilement.

I see no evidence from the trial Magistrate allowing the appellant time to procure legal counsel before the

plea change could be entertained. I respectively agree with comments and dicta in the case of ***Republic v. Radebe Sr. Mborani 1988 1 SA 191 at 195B*** where the following passage succinctly places emphasis on the issue of legal representation under Article 50 2(G), (H).

> ***"A general duty on the part of judicial officers to ensure that the unrepresented accused fully understands their rights and the recognition that in the absence of such understanding a fair and just trial may not take place. If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one to merit a sentence which could materially prejudice to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.***
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> ***Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of his right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in unfair trial in which there may well be a complete failure of justice"***

In relation to Article 50 2(G) (H) of the constitution the accused was not informed of his rights to legal representation.

The importance of legal representation was emphasized by none other than Lord Denning in his decision in the case of ***Pett v Grey Hound Racing Association 1968 2 ALL ER 545 at 549*** He held as follows:

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: You can use any questions you like: Where upon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him, and who better than a lawyer who has been trained for the task"***

Going by this dicta one cannot afford to notice the challenges faced by accused persons in our criminal justice founded on adversarial system. It is therefore necessary that the fundamental rights on a fair trial enacted pursuant to Article 50 of the constitution be secured to protect the accused persons. The failure by the trial magistrate not to inform the appellant of his right to continue exercising his right to legal counsel occasioned prejudice and a miscarriage of justice.

There was no evidence that the appellant had voluntarily rescinded the decision to engage legal counsel. From the record knowing or unknowingly the trial magistrate proceeded to preside over summary proceedings without proof of considering that substantial injustice may result if the appellant was not accorded legal representation. This is more so as evidenced from the proceedings the appellant had initially been represented by legal counsel.

This is not case in view of the seriousness of the offence and severity of the penalty in the event of a conviction legal counsel would have been provided to the appellant as specified under Article 50 2(h) of the constitution.

The third ground deals with the substance of the charge of defilement the ingredient of the offence under Section 8(1) 3 of the Sexual Offences Act to be proven by the prosecution including the following.

(a) That the appellant committed a sexual act with the complainant.

(b) That the sexual intercourse involved a female aged 15 years.

(c) That there was penetration of the appellant genital penis to that of the complainant.

(d) That there is cogent credible evidence identifying the appellant as the perpetrator of the crime.

Mr. Ochieng appearing for the appellant on this appeal submitted that the element on the age of the child was not proved from the facts placed before the trial court.

I now turn to examine and evaluate the record to make a finding on this ingredient. The main column of the charge on age indicates that the L.S. at the time of the offence was aged 15 years. The Post Rape Care form alludes to the fact that she was born on 31/12/1999. Doctor Barasa George specialized in Dental Medicine examination and assessed the age of the complainant at below 17 (seventeen years). The P3 Form issued to examine the complainant on the defilement charge proves that L.S. was aged 15 years.

In establishing the facts constituting the offence there is no mention by the prosecution counsel the exact age of complainant in view of the variances in the documentary evidence admitted in court.

In the instant appeal there was variance as to the age on the charge sheet and the medical assessment report. The onus of proof is upon the prosecution to adduce evidence as to the exact age of the victim of sexual assault beyond reasonable doubt. There is desirability and legal requirement that the age of the female complainant in defilement cases should not be in doubt. The unlawful carnal knowledge in defilement offences is against a child. Further Section 2 of the Children's Act defines the word child for purposes of the sexual offences Act under Section 8(1) to mean a human being under the age of eighteen years. In the same Act, there is the definition of a child of fewer years to mean a child under the age of 10 years.

The prosecution in the present case ought to have established the elements of the offence under Section 8(1) as read with Section 8(2) of the Act. The provisions have prescribed various penalty levels depending on the age of the child victim. That besides the complainant fitting into the definition of a child under the children's Act for purposes of imposing appropriate sentence the age must be proved and ascertained by cogent evidence.

What the trial court was presented by the prosecution did not prove the age of the complainant which remained unresolved throughout the trial. It is a fact in this case that even the Dentist did not confirm the age of the child as his assessment report only indicates the age of the child to be below 17 years. I see difficult with that kind evidence in view that it is the age of the victim which used in sentencing the appellant to 20 years imprisonment.

I come to the conclusion that the failure to deal with this issue at an early period at the trial stage weighed in against the appellant's right to a fair trial.

The crucial question that arises at this point is whether the complainant was aged 15 years or below 17 years. On age there can be no middle ground. I therefore agree with the appellant counsel on this ground that age of the minor was not proved by the prosecution beyond reasonable doubt.

Having found the above defects in the trial record what is the effect of the entire appeal? My conclusion is that the irregularities, errors and omissions cited in this judgment have occasioned a failure of justice that are not curable under Section 382 of the Criminal Procedure code. The appellant did not have a fair trial. In the result I allow the appeal quash the conviction and set aside the sentence.

However this is a proper case pursuance to the principles in the cases ***of Patel hal Kanji V Republic 1966 EA 343, Republic v Vashanjeel Dossani 1946 13 EACA*** an order for retrial should be made. Accordingly the file is returned back to the Chief Magistrate for a retrial to be held by some other Magistrate other than Hon. S. Shitubi the presiding magistrate in the impugned proceedings.

Dated, delivered and signed on this 20th day of March 2018.

R. NYAKUNDI

JUDGE

RIC Police Kajiado Police Station.

In the presence of:

Mr. Itaya for Mr. Ochieng for the appellant

Mr. Akula for DPP

CC. Mateli