



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 20 OF 2017

JUMAA YAA BAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of Hon. Dr. Oseko, CM delivered on 14th July, 2017, in Malindi Chief Magistrate's Court Criminal Case No. 523 of 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with sub-section 3 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between the month of July and September 2016 within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of SC [name withheld] a girl aged 15 years by then (sic).
2. He was charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between the month of August and September, 2016 within Kilifi County, intentionally and unlawfully touched the vagina of SC [name withheld] a girl aged 15 years with his penis.
3. On 14th July, 2017, the appellant was arraigned in court and he pleaded guilty to the main charge of defilement. He was convicted on the said date and sentenced on 21st July, 2017 to serve 20 years imprisonment.
4. On 9th October, 2017, he filed a petition of appeal. He thereafter filed an application to amend the petition of appeal on 10th April, 2018. On the said date, this court deemed the amended grounds of appeal to be properly on record. On the same day, the appellant also filed his written submissions. The amended grounds of appeal state as follows:-
 - (i) That the Learned Trial Magistrate failed to consider that the plea was un-procedural hence the sentence imposed was unsafe;
 - (ii) That the Learned Trial Magistrate did not consider that he was not informed of the charges and its consequences which prejudiced him;
 - (iii) That the Learned Trial Magistrate did not consider that he was not given time to reflect on the plea he was about to make;
 - (iv) That the Learned Trial Magistrate did not consider that he was couched by the Police to plead guilty to the charges hence prejudicing him; and
 - (v) That this court should not order for a re-trial as it will not be fair to him.
5. In his written submissions, the appellant argued that the Hon. Magistrate erred by failing to consider that the plea was un-procedural thus the sentence imposed on him was illegal. He stated that the language through which the plea was read and explained to him was not indicated as to whether it was English or Kiswahili. The appellant also contended that the proceedings do not show who interpreted the charge to him. In addition, the language used by the appellant to answer to the charge was not shown. The appellant submitted that the plea was equivocal.
6. The appellant contended that his rights under the provisions of Article 50(2) (c) of the Constitution were contravened as he was not given an opportunity to reflect on the plea and prepare a defence. He relied on the case of **Anthony Njeru Kathiari and Another vs. Republic** [2007] eKLR where the court held that failure by a Trial Magistrate to keep the record of at least the name of the Interpreter and the nature of the interpretation was a serious defect in the trial and must render the conviction of the appellant unsafe and unsustainable. He urged the

court to adopt the same view as in the aforesaid case and allow the appeal.

7. The appellant stated that he was misled by the Police to plead guilty by being told that the offence was a simple matter and if he pleaded guilty, he would be acquitted. He added that the foregoing is what made him to admit the offence.

8. In his last submission, the appellant argued that the Hon. Magistrate failed to inform him of the dangers of him pleading guilty to the charge before convicting and sentencing him. He contended that a re-trial in this case will not serve the best purposes but will deny him his fundamental rights as the Hon. Magistrate is the one who erred by not informing him of the gravity of the offence. On the issue of a retrial, he relied on the case of **Fatehali Manji vs. Republic** [1966] EA 343.

9. The respondent filed its written submission on 26th March, 2018. It was submitted that the appellant was convicted on his own plea of guilty, which was unequivocal as the procedure was properly undertaken by the Hon. Magistrate. The procedure followed was in line with the provisions of Section 207 of the Criminal Procedure Code as espoused in the case of **Adan vs. Republic** [1973] EA 445 at 446.

10. The respondent stated that the manner in which the appellant responded to the charge showed that he knew the charge he was facing and as a result thereof, he was properly convicted on his own plea that was unequivocal.

11. On the sentence imposed on the appellant, the respondent submitted that it was lawful and that his constitutional rights were not infringed.

12. The respondent invited the court to consider the provisions of Section 348 (A) of the Criminal Procedure Code and evaluate and re-appraise itself of the evidence on record during the proceedings conducted by the trial court and draw its own conclusions. The court was urged to affirm the finding of the Hon. Magistrate and dismiss the appeal.

13. The proceedings of 14th July, 2017 show that the appellant appeared before Hon. Dr. Oseko, CM for plea taking. The Prosecution was represented by Ms. Mathangani. The Court Assistant was Roba Jarsan. Interpretation of the charge as per the court record, was from English to Kiswahili.

14. The charge was read out and explained to the appellant. The appellant responded by saying- *"it is true, I did impregnate a school girl. I am 19 years old. I did sleep with her and she became pregnant and had a child. The child is mine. I agree. I know she is 15 years (sic)".*

15. The facts were then read out to the appellant who responded by saying - *"yes the facts are true. I am the father of the child. I had sex with her. I know she was a (sic) school going and a minor".*

16. The Hon. Magistrate entered an unequivocal plea of guilty and gave the appellant an opportunity to mitigate, which he did. He was then sentenced to 20 years imprisonment.

17. The lower court record shows that at 4:00 p.m., on the same day, the Hon. Magistrate reopened the proceedings by stating that there was a possibility that the appellant was a minor when he committed the offence and the sentence meted out may be inappropriate in the circumstances. She then decided to confirm the age of the appellant. She reviewed and cancelled the sentence and ordered for an age assessment to be done on the appellant and for a pre-sentence report to be presented before the said court.

18. On 21st July, 2017 when the appellant appeared before the Hon. Magistrate, the court confirmed that he was 19 years of age as per the age assessment report. The earlier sentence of 20 years imprisonment was then imposed.

19. The foregoing facts reveal that between the 14th July, 2017 when the plea in this case was taken and the 21st of July, 2017 when the appellant attended court for the second time, he did have time to reflect on the proceedings that took place on 14th July, 2017. He could have informed the Hon. Magistrate on 21st July, 2017 that he wanted to change his plea to one of not guilty and that the Police had misinformed him about pleading guilty to the charge of defilement. He however said nothing. Nothing therefore turns on that ground of appeal.

20. The law and practice related to recording of a plea of guilty was stated in the case of **Adan vs Republic** (1973) EA 445 at 446 as follows:-

"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 then the accused 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 the sentence. The statements of facts and the accused's reply must, of course, be recorded."

21. It is evident from the court record that interpretation of the charge was from English to Kiswahili. The appellant did understand the charge and he admitted having committed the offence as a result of which a child was born.

22. When the facts were read out to him, he admitted the facts and went ahead to state that he was the father of the child and he had sex with

the victim despite knowing that she was a school going minor. Faced with the foregoing circumstances, the Hon. Magistrate's hands were tied by the clear and unequivocal plea of the appellant.

23. I see nothing in the proceedings before the lower court that show that the appellant's right to a fair hearing were infringed. The sentence provided under the provisions of Section 8(3) of the Sexual Offences Act is imprisonment for a term of not less than 20 years. This court therefore has no discretion to vary the sentence that was imposed against the appellant. His appeal is therefore dismissed. The appellant has 14 days right of appeal from the date of delivery of this judgment.

DELIVERED, DATED and SIGNED at MALINDI on this 20th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms. Otulo for the respondent

Mr. Oliver Musundi - Court Assistant