REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 25 OF 2015

JULIUS KIPRUTO MARITIM.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O. Barasa – Resident Magistrate delivered on the 1^{3th} June, 2011 in A/CR Case No. 88 of 2011*)*

JUDGMENT

1. On 30/05/2011, Julius Kipruto Maritim ("Appellant") was presented before the Nakuru Chief Magistrate's Court charged with a single count of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The facts alleged were that the Appellant intentionally and unlawfully inserted his penis into the vagina of V C L, a child of ten years on 26/05/2011.

2. The Appellant faced an alternative count of committing an indecent act with the same child contrary to section 11(1) of the Sexual Offences Act. The alternative count allege that on 26/05/2011, the Appellant intentionally and unlawfully committed an indecent act with the child by touching her vagina.

3. When the Appellant was presented before the Learned Trial Magistrate, the Trial Court record indicates that the charges were read to him in "Kiswahili, a language he understands". The Appellant pleaded guilty. The Court deferred the case to 06/06/2011 for the facts to be read to the Appellant for him to confirm his guilty plea.

4. According to the Trial Court record, on 06/06/2011, the charge was read over and explained to the Appellant again in Kiswahili and he was asked to plead. The Appellant replied in Kiswahili: "*Ni Kweli kabisa*".

5. The facts of the case were then read to the Appellant. The Court record indicates that the facts were read by the Prosecutor in English with translation into Kiswahili done by the Court Clerk.

6. After the facts were so read, the Trial Court record indicates that asked if the facts were true, the Appellant responded as follows in Kiswahili: "*Maelezo ambayo nimesomewa ni ya kweli*."

7. The Court then proceeded to convict the Appellant on his own plea of guilty. The Learned Trial Magistrate thereafter sentenced the Appellant to life imprisonment.

8. The Appellant is aggrieved. In his appeal to this Court, he now says that his plea was equivocal and that it should be quashed. He also protests against the sentence as excessively harsh.

9. On conviction, the Appellant raises four arguments. I will reproduce them verbatim:

> i. ***"Plea of guilty*** *– whether the Appellant was given an opportunity to state and explain the reasons as to why he pleaded guilty and the consequences arising thereof and more so, whether his actions negated the offence.*
>
> *ii.* ***Language used:*** *whether the language used during the trial at court was clearly understood by the Appellant as required by law.*
>
> *iii.* ***First offender:*** *Whether, the Appellant having been treated by the trial magistrate as a first offender, the said treatment as a first offender was translated or had any effect in sentencing having been extremely remorseful.*
>
> *iv.* ***Mental assessment:*** *whether , at the time of the trial, the Appellant was of sound as alleged by the appellant and whether an*

order for mental assessment was necessary before the second plea was scheduled for 6/6/2011 after the first and one on 30/5/2011 and for facts."

10. Mr. Chigit, the State Counsel, supported both the conviction and sentence. He argued that the plea was unequivocal and that it was taken in Kiswahili, a language the Appellant understood. It was, also, he argued, explained in Kiswahili. Mr. Chigiti argued that the Court record reflects that the Appellant understood Kiswahili.

11. Further, Mr. Chigiti submitted that the Appellant was informed of the consequences of pleading guilty; and that there is no requirement that an accused be taken for mental assessment before plea.

12. On sentence, Mr. Chigiti submitted that the sentence meted out was the minimum so there was no room for the court to give a lesser sentence.

13. This is a first appeal. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

14. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic*** *(1973) EA 445* at 446:

> *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 the accused then 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 guilty, 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 sentence. The statement of facts and the accused's reply must, off course, be recorded.*

15. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***Ombena v Republic 1981 KLR 450*** to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

16. In the present case, I am persuaded that the Appellant understands and speaks Kiswahili. The Trial Court record is quite clear on that; and the Learned Trial Magistrate follows good practice to record the actual language spoken by the Appellant. I do not entertain any doubt that the Appellant understood exactly what he was doing when he pleaded guilty. It is important to note that the facts were actually read to him ten days after his initial plea of guilty and he still persisted in his plea. Finally, the Trial Court record indicates that the Appellant offered mitigation – a clear indication that he followed the proceedings and understood what had happened.

17. As Mr. Chigiti submitted, there is no universal requirement that the Trial Court orders mental assessment for an Accused Person in all instances before entering a guilty plea. There is nothing in the Trial Court record which would have given an inkling to the Court that the Appellant was mentally ill. Indeed, even on appeal, the Appellant does not claim to have been mentally unfit at the time of the trial. His argument is technical: that he should have been assessed.

18. Section 11 of the Penal Code and Section 162 (1) and (2) of the Criminal Procedure Code are the applicable provisions of the law. Section 11 of the Penal Code provides as follows:

> *Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.*

19. On the other hand, section 162 of the Criminal Procedure Code reads as follows:

> *162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.*
>
> *(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.*

20. The law is that every Accused Person is presumed to be of sound mind under section 11 of the Penal Code. The burden is on the Accused Person to rebut this presumption. However, the Court is obligated under section 162 of the Criminal Procedure Code to take action – for example by ordering a mental assessment – where it comes to the attention of the Court that the Accused Person may be of unsound mind.

21. In this case, the Trial Court had no reason to suspect that the Appellant suffered from mental illness. Therefore, its obligation to order for a mental assessment was not triggered.

22. Consequently, all considered, the guilty plea entered by the Trial Court was unequivocal and it is hereby upheld.

23. Turning to the sentence, Mr. Chigiti is right that once a conviction is entered under section 8(2) of the Sexual Offences Act (where the victim is less than eleven years old), the only possible sentence is life imprisonment. That was the sentence imposed on the Appellant. His appeal against sentence is, therefore, equally without merit.

24. **The upshot is that both the appeals against conviction and sentence are without merit. The entire appeal is dismissed and both the conviction and sentence upheld**.

25. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018

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PROF. J. NGUGI

JUDGE