REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 90 OF 2012

ABDALLAH MOHAMMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of M. O. Obiero, Resident Magistrate

in Criminal Case No.241 of 2011 at the Resident Magistrate's Court, Hola)

JUDGEMENT

1. The Appellant, Abdallah Mohamed has filed an appeal against conviction and sentence. He was convicted on his own plea for the offence of defilement contrary to Section 8(1) as read with sub-section (4) of the Sexual Offences Act, 2006, and sentenced to imprisonment for 15 years.

2. In summary his grounds of appeal are that he was coerced to offer a plea of guilty on a promise of being granted his liberty as the offence was said to be minor; that the charge was fatally defective; that facts as read in support of the charge did not prove his guilt beyond reasonable doubt; that no medical evidence was adduced to prove defilement; that there was no age assessment report; and that the sentence was harsh and excessive in the circumstances of the case. The Appellant later sought and obtained leave to introduce an additional ground of appeal in which he challenged his conviction on the ground that no age assessment report or birth certificate was produced to confirm the age of the complainant.

3. The appeal was disposed of by way of written submissions. The Appellant submitted that the ingredients of the offence of defilement include proof of age of the victim and this was not done in his case. He asserts that the trial Court relied on mere assertions on the age of the victim and this was contrary to the law. He relied on the decision of Muiruri Njoroge v Republic, Cr. Appeal No. 115 of 1982 to buttress the point that assertions must be supported by evidence. He, in addition, emphasized that proof of age was paramount to sentencing in a defilement case as was stated in Kaingu Elias Kasomo v Republic, C.A. Cr. App. No. 504 of 2010; Gilbert Miriti Kanyampiu v Republic [2013] eKLR; Flappyton Mutuku Ngui v Republic [2013] eKLR; Eldoret C. A. Cr. Appeal No. 129 of 2009, Hillary Nyongesa v Republic; Alfayo Gombe Okello v Republic (C.A) and Chrispine Waweru Njeri v Republic, Voi HCCrA No. 6 of 2015.

4. The Appellant further submitted that he was alive to the provisions of Section 348 of the Criminal Procedure Code, Cap. 75 but it was still mandatory for the prosecution to prove the age of the complainant.

5. The Appellant also submitted that even the alternative charge could not stand as the age had not been proved for purposes of sentencing. He faulted the trial court for failing to analyze the evidence in order to form a just decision and in his view this omission occasioned a failure of justice. On this he relies on the decision in Okeno v Republic [1972] EA 32.

6. The State opposed the appeal. The DPP's position is that the Appellant was convicted on his own plea of guilty and is barred by Section 348 of the CPC from appealing against the conviction except as to the extent or legality of the sentence. Further, that the age of the victim was proved through the P3 form which also established that the victim had been defiled. It is the State's case that the Appellant was found in the act and he knew that the victim was a school going child. The State's view is that the conviction was safe as there was no need to establish that there was injury to the victim's genitalia before a conviction for defilement could be reached. The decision in James Ng'ang'a Njau v Republic [2014] eKLR is cited to buttress this point.

7. The Appellant was convicted on his own plea of guilty and Section 348 of the CPC comes into play. It states:

"No appeal shall be allowed in the 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 the sentence."

8. How has the above cited provision been interpreted? In Alexander Lukoye Malika v Republic [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

"A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

The submission by the State that a conviction based on a plea of guilty cannot be interfered with on appeal is thus erroneous. If the plea is equivocal, the court has a duty to step in.

9. In **John Muendo Musau v Republic [2013] eKLR,** the Court of Appeal reiterated the law on plea taking as follows:-

"The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of Adan vs Republic [1973] EA 445 where the Court held:-

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language 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.

(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."

We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in Adan vs Republic (supra) is also provided for under section 207 of the Criminal Procedure Code."

A plea of guilty that is offered outside the standards set by the law is defective and a conviction arising out of such a plea cannot be allowed to stand.

10. A brief history of the trial is that when the Appellant was charged on 21st September, 2011 he pleaded not guilty. The charges were again read to him at his request on 22nd September, 2011 and he again denied committing the offence. The hearing date and bond terms were set. On the hearing date a doctor testified and produced a medical report (P3 form). The Appellant did not ask any questions of the doctor but later in the day requested for adjournment on the ground that he was feeling unwell. The application was allowed. On 31st October, 2011 when the matter came up for hearing the Appellant indicated that he wished to change plea and the charges were read to him afresh. He pleaded guilty to the main count.

11. The change of plea by the Appellant was legal and the Appellant has correctly not taken up issue with his decision to plead guilty. His allegation that he was coerced to enter a plea of guilty is also not supported by the record and neither has he adduced any evidence to back up the allegation.

12. What I get the Appellant to be saying is that the ingredients of the offence were not established. A plea of guilty can only be entered in respect of an offence known to the law. Where recovery was made, the exhibit ought to be produced.

13. In the case at hand, the Appellant's plea is captured in the court record in the following words:

"It is true."

After the plea was recorded the prosecutor went ahead and read the facts of the case upon which the Appellant stated that the facts were true. The prosecutor indicated that the P3 form was in the court record as it had earlier been produced by the doctor.

14. In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that

the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.

15. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by Joel Ngugi, J in Simon Gitau Kinene v Republic [2016] eKLR when he stated that:

> **"19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)* this is what I said and I find it relevant here:**
>
> **In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence…..To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea. "**

16. Under Section 8 of the Sexual Offences Act minimum sentences are set out guided by the age of the victim of the sexual assault. The Appellant urged that the age of the victim was not proved beyond reasonable doubt. The duty of the prosecution to prove the ingredients of an offence does not cease the moment an accused person offers a plea of guilty. In presenting the facts of the case to the court, the prosecutor should support the facts with the exhibits that are available.

17. In the case at hand the prosecutor had a duty to establish the age of the victim. The prosecutor told the court that the complainant was seventeen years old. The prosecutor never produced a birth certificate, a baptismal card or an age assessment report.

18. I am now told that the P3 form that was produced before the trial Court also established the age of the complainant. I am not persuaded by that argument. In Dennis Abuya v Republic [2010] eKLR the Court of Appeal stated that:

> **"There is a P3 Form in the record before us and it shows that on 26th June, 2007, the appellant's "*Estimated age*" was eighteen years. By "*estimated age*" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at the date he was said to have committed the offence."**

19. In the present case, the age of the victim was not the reason for her visit to the doctor. Her visit to the doctor was to be examined in order to establish if she had been defiled. In the circumstances of this case the P3 form cannot therefore be treated as an age assessment report. The age is as given to the doctor by the patient and could only be confirmed by carrying out an age assessment or production of any other documentary evidence that is acceptable as proving the date of birth of a person. In the circumstances of this case, it was risky to rely on the P3 form alone as a guide to the age of the complainant considering that the complainant was said to be was said to be seventeen years old and thus close to the majority age.

20. In my view therefore a key ingredient of the offence for which the Appellant was charged and convicted was not established. That age is an important cog in a defilement charge was stated by the Court of Appeal in *Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo v R* thus:

> **"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".**

21. I therefore find that a critical component of the charge that led to the Appellant's conviction was not established by the prosecution. The appeal therefore succeeds on this ground.

22. The question is whether a retrial order should be made in this case. A retrial is ordered where a trial was illegal or defective. Insufficiency of evidence is not a reason for ordering a retrial and neither should a retrial be ordered to enable the prosecution improve their case-see Joseph Lekulaya Lelantile & another v Republic [2002] eKLR.

23. This is a matter that was concluded about seven years ago. A retrial will be prejudicial to the Appellant who is almost halfway through his sentence. It is also important to note that the Appellant is entitled to remission of sentence if the prisons authorities are satisfied that he has earned it. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is thus set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT