REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 40 OF 2016

GEOFFREY KIPCHUMBA ..... APPELLANT

VERSUS

REPUBLIC ..... DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No. 670 of 2016 at the Principal Magistrate's Court, Kapsabet (Hon. E.A.Obina, SRM) dated 29 February 2016)

JUDGMENT

[1] This is an appeal that was filed herein by the Appellant, **Geoffrey Kipchumba** on **11 March 2015.** The Petition of Appeal is expressed to have been filed against both conviction and sentence passed in **Criminal Case No 670 of 2016** by Kapsabet PM's Court on **29 February 2016**. The Appellant had been charged before the lower court with two Substantive Counts and one Alternative Charge. In Count 1, he 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 were that, on the **21st day of February 2016** within Nandi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **D.J**., a child then aged 17 years and 3 months. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on **21st day of February 2016** within Nandi County, the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of **D.J**. a child aged 17 years 3 months.

[2] In Count 2, the Appellant was charged with Being in Possession of Narcotic Drugs contrary to **Section 3(1)(a)** as read with **Section 4(1)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars were that on the **21st day of February 2016** at Siret Village within Nandi County, he was found in possession of two rolls of cannabis sativa (bhang) with a street value of Kshs. 400/= which was not medically prepared.

[3] The record of the lower court shows that the Appellant was arraigned before the lower court on **23 February 2016** and that he admitted the substantive charge in Count 1 as well as Count 2. The matter was then stood over to **26 February 2016** for the facts to be supplied. However, the Appellant expressed the desire to change plea. The charges were again read over to him in Kiswahili language and he denied the same. Hence, a plea of not guilty was entered. Hearing was consequently fixed for **29 February 2016**, on which date the Appellant again opted to change his plea to guilty. The Learned Trial Magistrate dutifully caused the Charges to be read over to the Appellant one more time. The record shows that this was done in Kiswahili language and that the Appellant admitted the main charge in Count 1 as well as Count 2; the facts were then given by the Prosecution and the exhibits duly produced before the lower court; namely, two P3 Forms in respect of the Complainant and the Appellant, the Complainant's Birth Certificate, the Complainant's Treatment Notes and two rolls of Bhang that had been recovered from the Appellant.

[4] The record further shows that the Appellant admitted those facts and was thereupon convicted on his own plea of guilty. He was consequently sentenced to 15 years' imprisonment on the substantive charge set out in Count 1 and 3 years' imprisonment in respect of the second count. The sentences were to run consecutively. The Appellant was, however, unhappy with the sentence. He consequently filed this appeal for reconsideration in that regard, as he was entitled to by the law. He relied on the following grounds:

[a] That he was not served with statements to enable him get well-armed with the facts;

[b] That the Complainant lied about her age; and that she is not a school girl but a mother of one child;

[c] That he admitted the offence;

[d] That he is the bread winner of his family comprised of a wife and two children; and that his wife is unable to work and feed the family on account of an operation.

[5] In addition to the foregoing grounds, the Appellant filed what he referred to as Appeal Based on Mitigation for Leniency. The said document was filed on **21 June 2018** by the Appellant to demonstrate that he is remorseful and has transformed his life into a role model, having undergone spiritual courses while in prison. He urged for the reduction of his sentence and asserted that he is not challenging the conviction or sentence. It is noteworthy however that in urging his appeal on the **12 July 2018**, the Appellant made a total departure from the documents he filed herein and addressed the Court as hereunder:

> **"The Complainant is a person I know well. We used to work together. Our dispute arose over money. I owed her Kshs. 1,500/= which she wanted me to pay. I told her I was looking for money and would pay. On the material day, we met and she demanded for her money and a struggle ensued after she got hold of me. She then started raising alarm and people gathered. She falsely claimed that I had raped her which was untrue. I was beaten up and taken to the Police Station. I did not commit any such offence. I ask the Court to reconsider this matter and release me."**

[6] Learned Counsel for the State, **Ms. Kagali,** opposed the appeal, contending that the Appellant's plea was properly taken as required and in compliance with **Adan vs. Republic**. It was therefore her submission that, in the circumstances, an appeal can only lie on sentence, by dint of **Section 348** of the **Criminal Procedure Code, Chapter 75** of the Laws of Kenya. **Ms. Kagali** further submitted that the offence imposed on the Appellant was not only lawful but also lenient. She urged the Court to uphold that sentence.

[7] Section 348 of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"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 and legality of the sentence."**

[8] Accordingly, any grounds or submissions made herein by the Appellant that seem to attack the soundness of his conviction are clearly untenable. Indeed in the case of **Olel v Republic [1989] KLR 444**, this posturing was expressed as follows:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[9] Having analyzed the record of the lower court as indicated herein above, there can be no controversy that the plea was unequivocal; for it complied strictly with the formula laid down in ***Adan vs. Republic* [1973] EA 446** by **Spry, V.P**. that:

> ***"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 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 sentence. The statement of facts and the accused's reply must of course be recorded."***

[10] Indeed in the document filed herein on **21 June 2018** by the Appellant, he was explicit that he pleaded guilty and was remorseful and that he was not challenging the conviction or sentence. Clearly, his plea was unequivocal. As to the sentence, the Appellant was sentenced to 15 years' imprisonment; which is the penalty provided for in **Section 8(4)** of the **Sexual Offences Act**. It is noteworthy that the age of the Complainant was specified in the Charge Sheet as falling within the age bracket specified in **Section 8(4)** of the **Sexual Offences Act**. The Birth Certificate was also produced to buttress the allegations in the particulars and the facts presented before the lower court by the Prosecution. Needless to add that the Appellant admitted those facts without any equivocation.

[11] Similarly, the 2 rolls of cannabis sativa that formed the subject of Count 2, and which were said to have been recovered from the Appellant were produced before the lower court as exhibits. As pointed out herein above, the Appellant admitted those facts; and since **Section 3(1)** as read with **Section 3(2)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** provides for a penalty of up to 10 years, it cannot be validly argued that the sentence of 3 years imprisonment that was meted out on the Appellant for that Count is excessive in the circumstances. I note that an order was made for the sentences to run consecutively. The Learned Magistrate cannot be faulted for that either granted that disparate nature of the two counts.

[12] In the result, I find no merit in the appeal and would accordingly dismiss it.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2018

OLGA SEWE

JUDGE