



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

HC. CRI. APPEAL CASE NO. 177 OF 2016.

EMMANUEL WAFULA WANJALA.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[An appeal from Conviction and Sentence in Original Kimilili PM CR. 49/2016 delivered on 26.7.2016 by D. Onyango (SPM)].

JUDGMENT.

The Appellant Emmanuel Wafula Wanjala was charged with offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 . The particulars of offence were; on the diverse dates between the months of January 2016 and February 2016 at [particulars withheld] village, in Bungoma North District within Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of D K W, a girl child aged Fifteen [15] years.

He appeared before the trial magistrate on 26.7.2016 and from the proceedings the Charges were read to him in Kiswahili where the proceedings show he replied;

Accused: It is True.

Pros: The facts are that on the diverse dates between January and February, 2016 the complainant D K W who lives with parents at [particulars withheld] village used to meet the accused on the way to school and from school. In the course of their meeting, the accused lured her to have sex with him. She initially refused the accused but due to persistence the accused eloped with her to Bungoma North area. In his grandfather's homestead. He started cohabiting with her. The parents reported issue of her disappearance to are administration. They traced them at [particulars withheld] village where they were apprehended on 23.7.2016. By then the complainant had become pregnant. She was issued with a P3 Form. She was examined and same was filled. The police recorded statements. Her birth certificate indicates she was born on 10.6.2007. The accused was charged. The birth certificate was produced as an exhibit.

Court: P3 Form is PExh. 1.

Birth Certificate for complainant is PEXH 2.

Accused: Facts are true.

Court: Plea of guilty entered.

Pros: Accused is a first offender.

Mitigation: I take care of my grandmother.

Court: Mitigation considered. The hands of the court are tied.

Court: How old are you? Where was the complainant leaving?.

Accused: I was born on 23.11.1993. The complainant was a student at

[particulars withheld] Secondary School in Form 1.

Court: The accused is now 22 years old.

Court: It is clear the accused knew that the complainant was a student.

Sentence: The accused is sentenced to serve 20 years imprisonment. Right of appeal 14 days explained.

The appellant being dissatisfied with the conviction and sentence filed this appeal on three grounds;

1. That the magistrate erred in relying on extraneous factors.
2. The ingredients of the offence were not proved as there was insufficient evidence.
3. That the sentence of twenty years is excessive in the circumstances.

The appellant filed his written submissions where he submitted that he was not of sound mind at time of taking plea; that the proceedings were rushed as they were concluded within 4 days; he was not informed of the seriousness of pleading guilty and the sentence of pleading guilty and sentence it will attract. He therefore for the above reasons prays for a retrial.

Mr. Oimbo for the State opposed the appeal. He submitted that the appellant pleaded guilty; and the sentence of 20 years imprisonment is as provided in Section 8(1) and read with Section (2) of the Sexual Offences Act and therefore legal. He urged the court to dismiss the appeal.

The appellant does not dispute that he did plead guilty. He readily concedes and but submits that he was not in his best frame of mind. The procedure of plea taking is as provided in the case of **Adan -Vs- Rep [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 raised 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.”

Upon perusal of the proceedings it is evident that the Charge was read to the accused, which he admitted; the facts to be true. He was then convicted. Prosecution did not have previous conviction and treated him as a first offender. He was asked to Mitigate which he did. The court sought from him how told he was and was said to be 22 years old having been born in 1993 and he said he knew the complainant was a student in Form 1.

All these in my view shows the appellant understood the charge, actively participated in the proceedings and there is no evidence that he was of unsound mind or not in right frame of mind. I find that the plea was properly taken and the plea of guilty entered was unequivocal. While it may be desirable that where the offences carry minimum sentence or death penalty and the accused is unrepresented, for the court to inform him of the penalty in this event they plead guilty, failure to do so does not vitiate the plea or is it defect in the proceedings. The appellant having been convicted on own plea of guilty, cannot appeal against conviction. Section 348 Criminal Procedure code provides;

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on the plea by a subordinate court, except as to the extent of legality of the sentence.

The appellant can therefore appeal to this court on the extent of sentence only. The appellant was charged with the offence of defilement Contrary to Sec 8(1) as read with 8(3) of the Sexual Offences Act. The Section provides;

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years.

The sentence of 20 years imprisonment cannot be said to be irregular as it is the minimum provided for under the law. In the result, I find no merit in this appeal and same is dismissed.

Dated and Signed at Bungoma this 25th day of October, 2018.

S.N. RIECHI

JUDGE