



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 10 OF 2015

KENNETH KIRUI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from Criminal case No. S.O 1 of 2014 Bomet PM's Court – Hon Karanja – SRM)

JUDGMENT

The appellant was convicted and sentenced to fifteen years imprisonment in respect of count 1 and a further 15 years imprisonment in respect to count II. The sentences were ordered to run concurrently.

In the first count he was charged with the offence of attempted defilement C/S 9) (1) (2) of the Sexual Offences Act No. 3 of 2006. Those particulars were that on the 19th day of January 2014 within Bomet County Intentionally attempted to cause his penis to penetrate the vagina of F.C a child aged 3 /12 years.

On the second count the Appellant was charged with Indecent Act with a child C/S 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 19th day of January 2014 within Bomet County intentionally touched the vagina of F.C a child aged 3 ½ years with his penis.

From the onset the particulars given in the two counts relate to the same event, the same date and the same locate.

What is shown as the 2nd count is the effect an alternative count to the 1st count which is the substantive one.

The learned trial magistrate treated the alternative count as a second one and proceeded to convict the appellant on it and subsequently sentenced him to 15 years imprisonment though she ordered that the sentence do run concurrently with that in count one.

The conviction and sentence in the 2nd count which was the alternative one was improper and irregular.

In respect to the main count which was that of attempted defilement C/S 9(1) (2) of the Sexual Offences Act. It is shown that the charge was read to the appellant in Kipsigis language which language he understood. On the 21/1/2014 he pleaded not guilty on the two counts.

On 18th April 2014 the appellant is shown to have indicated to the court that he intended to change plea.

The court did caution him as to the sentence under the Sexual Offences Act and he responded that he still wanted to change plea.

The facts are shown to have been read to him in Kipsigis language which language he understood and he pleaded guilty.

The facts which were given to the court by the prosecutor were: “On 19th January 2014 at about 10.00 a.m. in the morning, the complainant in this matter ‘F.C’ a aged 3 years was left at home together with her sibling one L K aged one year as one S C C want to fetch water from a river about 200 meters away. She had left them playing in the house and on coming back, the mother found the complainant crying and on asking her why she was crying, she informed the mother that one Kenneth who is their immediate next door neighbour took her into his house, removed her underpants and inserted something in her vagina. The mother removed her underpant and checked. She found her private parts had bruises on the sides. She called some women who confirmed the same. She escorted the minor to Bomet Police Station. She made a report and she was accompanied by one officer to Longisa level five hospital where the minor was examined, treated and discharged.

P3 form was filled. I have a copy of the P3 form. After further investigations, the Accused was traced and arrested on 19/1/2014 and was charged for the offence after investigations.

The appellant is shown to have admitted that the facts were correct whereat the court convicted him on his own plea of guilty.

The issue for determination is whether the plea was unequivocal.

The principles on plea taking were set out in the case of *Adan –vs- R* 1973 E.A as follows:-

1. That the charge and all essential ingredients of the offences should be read to the Accused in his language or a language he understands.
2. The accused own words should be recorded and if they are an admission, a plea of guilty should be recorded.
3. The prosecution should immediately state the facts and the Accused should be given an opportunity to dispute or explain the fact or add any relevant facts.
4. If the Accused does not agree with the facts or raises any question as to his guilty, his reply must be recorded and a change of plea entered.
5. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to the sentence together with the Accused reply be recorded.

In the present case the charge was read to the appellant in Kipsigis

Language which he understood. This was after he had earlier on pleaded not guilty to the charges. He was properly cautioned as to the consequences of change of plea and the sentences to be meted out to him in the event of change of plea. The facts were read to him in Kipsigis language which he understood and he stated that they were correct.

I am satisfied that the requirements of taking plea under S.207 of the Criminal Procedure Code were observed.

The appellant alleges that the court did not consider his health status as he had been subjected to mob justice.

I have perused the record of proceedings and nowhere is it shown that the appellant had informed the court that he had been beaten, his allegations at the appeal stage is an afterthought.

I have perused the P3 form which indicates that there were bruises on the labia majora but the hymen was intact with no tears. I am satisfied that the offence of attempted defilement was proved beyond reasonable doubt.

The punishment provided for Under S. 9 (2) of the Sexual Offences Act is imprisonment for a term of not less than ten years.

In the present case the appellant was treated as a first offender. He was sentenced to fifteen years. I find that sentence to be harsh and excessive for a first offender and more so when the appellant had pleaded guilty to the charge and had not wasted court's time.

The conviction and sentence in the second court was found to be improper and irregular. It is hereby altered and vacated. The conviction on the main court is hereby upheld but the sentence of 15 years is reduced to 10 years from the time of conviction.

This appeal succeeds to that extent only.

Judgment delivered dated and signed to open court and in the presence of learned counsel for the prosecution Mr. Wawire learned counsel for the defence absent.

Appellant present

Court Assistant Mr. Rotich

M. MUYA

JUDGE

13/4/2017