



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
CRIMINAL APPEAL NO.67 OF 2017
(FORMERLY NAKURU HCRA.254/15)

(Appeal Originating from Nyahururu CM's Court Cr.No.898/14 by: Hon. A. Mukenga – R.M.)

CHARLES KARANJA MWANGI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant **Charles Karanja Mwangi** appeals against the conviction and sentence imposed on him by **Mukenga R.M.** in **Criminal Case No.898/2014**. Charles Karanja Mwangi was charged with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual offences Act No.3 of 2006.

The particulars of the charge were that on 7/4/2014, at [particulars withheld],, caused his penis to penetrate the anus of D M W. a child aged 9 years.

In the alternative, he faces a charge of committing an indecent act with a child Contrary to Section 11(a) of the Sexual Offences Act in that he caused his penis to come into contact with the anus of the child D M W. who was aged 9 years old. No finding was made on the alternative charge.

The appellant was arraigned before the court on 20/4/2014 when he denied the charge and the case was set down for hearing. The case came up for hearing on 18/6/2014 and the appellant persisted in his plea of not guilty. The hearing commenced with the complainant testifying. The case was adjourned to 2/7/2014 and on that day, the appellant informed the court that he wanted to change plea and he pleaded guilty to the charge. He was convicted on his own plea of guilty and sentenced to serve life imprisonment.

The appellant has now appealed against both conviction and sentence. The grounds of appeal are as follows:

- (1) That the court failed to have him examined as to his mental status;***
- (2) That the court failed to investigate the reason why he changed plea;***
- (3) That the court failed to consider his mitigation;***
- (4) That the trial court failed to warn him of the consequences of the plea of guilty.***

He prays that the conviction be quashed, sentence set aside and he be set at liberty.

In opposing the appeal, Mr. Mutembei, Counsel for the State argued that the plea was unequivocal; that the appellant was informed of the consequences of pleading guilty and he persisted therein; that the court considered the mitigation and the court handed him a legal sentence under Section 8(2) of the Sexual Offences Act.

This being the first appeal, it behoves this court to look afresh at the evidence that was presented before the trial court, evaluate the same in order to determine whether or not the appellant was properly convicted (*see Okeno v Republic 1972 EA 32*). In the instant appeal, the appellant pleaded guilty to the charge and was convicted on his plea. Section 348 of CPC bars any appeal from the subordinate court where an accused was convicted on a plea of guilty except as to the extent and legality of the sentence. The section reads as follows:

“348 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.”

The appellant by virtue of the above section is barred from challenging the conviction except that he can challenge the extent and legality of the sentence meted on him by the trial court. The court in *Olal v Republic (1989) KLR 444* emphasized the above position when the court said;

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the CPC (Cap75) does not merely limit the right of appeal in such cases but bars it completely.”

Guided by the said Provision (348 CPC) and the above decision, this court can only consider whether the plea that was recorded by the lower court was equivocal which would therefore render the conviction unlawful.

Section 207(1) of the CPC does not guide the court on how plea should be taken. However, the celebrated case of *Adan v Republic (1973) EA 443* did give directions on how a plea should be taken. The court held as follows:

(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 on 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 add any relevant facts;

(iv) If the accused does not agree with the facts or raises any questions 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 the facts relevant to sentence together with the accused’s reply should be recorded.”

First the appellant has blamed the court for not warning him of the severity of the sentence. It is the appellant who intimated to the court that he wanted to plead guilty. The court then recorded: ***“The accused person is warned about the sentence.”*** The appellant then said ***“I wish that the charges are read to me again”***. The charge was read to him and he answered in Kiswahili ***“Ni kweli”***. After the facts were read to the appellant, he said ***“the facts are correct”***, the court again recorded that the appellant had been warned about the sentence and he insisted that the facts were correct following which the court convicted him on a plea of guilty. The appellant now contends that the court did not mention the kind of sentence that was likely to be meted.

Whereas I find that the trial court should not have been vague by stating that accused is warned about sentence, I believe and find that the court did inform the appellant about the severity of the sentence and he persisted in his plea of guilty. The ground of appeal that he was not sufficiently warned of the consequences of the decision to plead guilty is rejected.

The appellant blames the prison officer for luring or enticing him into pleading guilty. At first, he told the court that the officers told him he could be released on bond if he pleaded guilty but later stated that he was promised to be released on probation. However, having been warned of the severity of the sentence by the magistrate, the appellant should have realized that what he was entering into was a lengthy jail term. The appellant who understands both English and Kiswahili did not raise any issue with the court regarding the alleged promise made by the prison officers and I find it hard to believe that allegation.

The appellant was remanded in prison custody after plea was taken on 22/4/2014 when he denied the offence. The hearing commenced with the taking of the complainant's evidence on 18/6/2014 and thereafter adjourned for further hearing on 26/6/2014 when the appellant changed plea. There is no allegation that there was any form of torture, threat or enticement to warrant the change of plea. In the case of ***Olal v Republic (Supra)*** the allegations of torture and promise were made to the appellant and this is what the court observed;

“Mere detention long or short in itself cannot be a factor to determine whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material except the record of the proceedings on which we can judiciously determine the question, we must go by the record and accept as true the position stated therein. In our view, to do otherwise would be tantamount to substitute the known and admitted facts of the case with unjustifiable speculation”.

In ***Ben Okello Onyango v Republic (2015) KLR*** the court observed that such promise made to an accused by police was against public policy.

Having considered the record there is no evidence of any promise or threat made to the appellant or that he was tortured and having found that the promise if any did not affect the plea taken by the court, I am satisfied that the plea of guilty recorded by the trial court was unequivocal and complied with the guidelines given in the ***Adan case (Supra)***.

Having come to the above conclusion that the plea was unequivocal, I find that the conviction was well founded and I find no reason to interfere with it.

After conviction, the appellant was found to be a first offender and the appellant was allowed to mitigate and he prayed for pardon and that he wished to continue with his education. He was then handed life imprisonment. The conviction was pursuant to Section 8(2) of the Sexual Offences Act. The complainant was a child aged 9 years. His health Card was (produced in court as an exhibit (Ex.2)). The Sexual Offences Act is a statute of strict liability and the trial magistrate complied with the said section when she sentenced the appellant to the only sentence provided under the section. The trial magistrate had no discretion to sentence the appellant to a more lenient sentence unless of course the appellant was a minor which was not the case. The appellant was said to be 25 years old at the time of appeal. This court has no discretion to interfere with the sentence. The appeal on sentence lacks merit and is hereby dismissed.

The appellant challenged the conviction on grounds that he was not taken for mental assessment. There is no requirement that a person charged with an offence of defilement be sent for mental assessment. The court can on its own motion request for a mental assessment if it notices that an accused's behaviour is abnormal. The appellant has not displayed any signs of insanity because this court would have ordered that he be examined by a psychiatrist to ascertain his mental status. He has not alleged that he was insane at the time the plea was taken and I find no basis for that ground and I dismiss it.

Lastly, the appellant claimed that he was not allowed to mitigate. The record speaks for itself. He was

allowed to mitigate when he asked for pardon and that he wanted to continue with his education. There is no evidence that he was in school. That ground is baseless.

In the end, I find that the appeal is without any merit. The conviction is sound and sentence lawful. I hereby dismiss the appeal.

.....

R.P.V. Wendoh

JUDGE

Dated and Signed at NYAHURURU this 22nd day of May, 2017.

Present:

Before R.P.V. Wendoh Judge

Mr. Mutembei for state

Appellants in person present

Ropita Court Assistant