



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 48 OF 2016

MJELA NYOTAMATANDI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal from the judgment of Hon. H. NYAWEKA (PM) in CR. CASE No. 22 of 2016 at Mombasa law court on 4/04/2016)

JUDGMENT

1. The Appellant pleaded guilty to charge of defilement contrary to section 8 (1) as read with section 8 (4) of the sexual offences Act No 3 of 2006 and he was sentenced to 15 years imprisonment.

2. The particulars of the charge were that on 27/02/2016 in Likoni District within Mombasa County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of XX, a child aged 17 years.

3. The fact as given by the prosecution were as follows:-

On 27/02/2016 the complainant herein left home and went to Likoni to visit a friend. On her way through [particulars withheld] primary school she met the Appellant who was a watchman to the school.

The complainant interacted with the Appellant. He lured her to his house which is near the school where he defiled her till the wee hours of the morning.

The following day the complainant returned to home but on her way she met her family member who escorted her to Kruka Police Station.

She was taken to Coast General Hospital and a PRC form was filled and also a P.3 form. The Doctor confirmed that her hymen was broken.

The accused was arrested on 29/02/2016 and charged in court on 4/03/2016. The birth certificate of the complainant was produced which shows she was born on 30/08/1998 which means on 27/02/2016 she was 17 years old.

4. The court convicted the Appellant on his own plea of guilty and sentenced him to 15 years imprisonment. The Appellant has now appealed against conviction and sentence on the following grounds:-

AMENDED GROUNDS OF APPEAL

(i) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the charge sheet relied upon by the prosecution was fatally defective thus contravening section 134,137 (9) (i) (ii), 214,276(i) (2)of CPC and section 7 of the penal code.

(ii) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the Burden of proof in the present case was not established beyond any reasonable doubt to warrant the conviction of the appellant thus contravening section 107 as read together with section 109 of the CPC.

(iii) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the complainant's

AGE was 18 years contrary to section 8 (4) and chapter 17 of article 259 sub-section 5(6) of the constitution.

(iv) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the evidence that was adduced by MZ MBAE on the facts were invariance and contradiction to the evidence that was adduced in the P3 form which would have formed an integral part in proofing the present case thus violating section 153 (1) as read together with section 154 of the evidence Act.

(v) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the appellant was a LAYMAN IN LAW and did not know the consequences of accepting the offence which was never committed thus violating Article 50 (4) of the constitution.

5. The Appellant submitted in writing as follows:-

(i) That the charge sheet is defective in that it does not clarify the exact person who did the defilement.

(ii) That the prosecution did not proof the case beyond reasonable doubt.

(iii) That the complainant was 18 years old at the time of the offence and therefore the sentence passed was not legal.

(iv) That the prosecution evidence was full of contradictions as what was stated in the P3 Form is not the same as what was said in court.

(v) Finally the Appellant submitted that his mitigation was not given any consideration.

6. The respondent opposed the Appeal on the ground that the Appellant pleaded guilty and he was convicted on his own plea and sentenced.

7. I have re-evaluated the evidence before the trial court. The Appellant was convicted on his own plea of guilty. In the case of Edwin v Republic [2015] eKLR *the Court of Appeal stated as follows:-*

"In order to sustain a conviction on an accused person's own plea of guilt, that plea must be unequivocal; the accused must admit not only to the charge, but to the particulars of the charge as well as to the facts that will be presented by the prosecution"

8. My findings are as follows:-

(i) The appellant in this appeal, has challenged both conviction and sentence. Conviction having been on a plea of guilty, the only way this Court can address itself on the issue is to determine whether the plea recorded by the lower court was equivocal which would make the conviction unlawful thus allow this Court to address itself on that issue of conviction.

(ii) In the instant case, I find that the plea was unequivocal. In the case of *ADAN -VS- REPUBLIC* (1973) EA, 443, the procedure of taking a plea was summarized 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 an admission, a plea of guilt 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 the facts relevant to sentence together with the accused 's' reply should be recorded"

(i) I accordingly find that the plea was unequivocal as the procedure in the Adan case (supra) was followed and I find that and the sentence is also lawful.

(ii) Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. It provides as follows:-

"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."

(vi) In the case of *Ole! v Republic* [1989] KLR 444, the court held as follows:- *"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."*

(vii) The appellant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.

(viii) I find that the sentence meted by the trial court is lawful. This appeal is accordingly dismissed for want of merit and both the conviction and sentence are confirmed.

Dated and signed and delivered at Mombasa this 20th day of June 2017.

ASENATH ONGERI

JUDGE.