



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 148 OF 2016

BRYSON MWANZI MAGE.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in CR. CASE No. 135 of 2014 by Hon. ANN NDUNGU (RM) at Shanzu Law Courts dated 2/09/2014)

JUDGMENT

1. The Appellant pleaded guilty to a charge of Defilement contrary section 8 (1) as read with section 8 (3) of the sexual offences Act No. 3 of 2006.

2. The particulars of the charge were that on 9th February 2014 at [particulars withheld] area in Kisauni County within Mombasa County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of XX a girl aged 14 years old.

3. The facts were as follows:-

On 9th February, 2014 the complainant who was a student at [particulars withheld] Secondary School met the Appellant at around 0100pm on her way home and he got hold of her and dragged her to his house. He locked the house from the inside. He started squeezing her breast and sucking them and later he defiled her. The complainant spent the night in the Appellant's house. The following day the Appellant released her. The complainant went home and reported to the mother. The matter was thereafter reported to the village elder. Eventually the matter was reported at Bamburi Police Station and investigations began. The complainant was taken to Coast General Provincial Hospital for examination. It was confirmed the hymen -had been freshly perforated. Later one Dr. Ngone filled a P3 form which confirmed the same. The complainant' certificate of birth was produced and it confirms that the complainant was born on 16th April, 1999. During investigation, the investigating officer received a vest from the complainant. The Appellant was arrested on 15th January, 2014 charged with this offence.

4. The Appellant has appealed on the following grounds:-

(i) THAT the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that CHARGE of defilement preferred against me by the prosecution was not proved beyond any reasonable doubt for the AGE of the complainant as well as penetration being the material factors in sexual matters were never established.

(ii) THAT the learned trial magistrate erred in law and fact by convicting and sentencing him without considering that the same was un safe for he was not a warded an opportunity to defend himself as required by the law.

(iii) THAT the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering that the plea was equivocal.

(iv) THAT the learned trial magistrate erred in law and fact by convicting the Appellant without considering that he was not a warded affair trial as he was not represented by an advocate as required the supreme law (constitution).

5. The Appellant filed written submissions in which he stated that he has now reformed and he regrets the mistake he made. He is now a baptized church member and asked the court to give him an opportunity to join his family where he was the sole bread winner.

6. I have re-evaluated the evidence before the trial court. The Appellant was convicted on his own plea of guilty. In the case of **Henry O.**

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"

7. My findings are as follows:-

(i) In the instant case, I find that the plea was NOT 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 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 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"

(ii) The plea of guilty was not entered in the current case until the facts had been given by the prosecution. The trial court entered the plea of guilty and at the same time convicted the Appellant which should not be the case. The trial court should have entered a plea of guilty after the Appellant pleaded guilty. However, the plea of guilty was entered on page 8 of the proceedings, after the facts were presented to the trial court, both the plea of guilty and the conviction were rendered in the following terms:-

Court:

Plea of guilty entered.. Accused is convicted on his own plea of guilty.

(iii) I accordingly find the plea was not unequivocal as the procedure in Adan case was not followed and I find that and the sentence is unlawful.

The Appeal is allowed, the conviction quashed and the sentence set aside.

(iv) I further order that the Appellant be set free unless lawfully held for any other case.

Delivered, Dated and Signed at Mombasa this 19th day of June 2017.

ASENATH ONGERI

JUDGE.