REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 20 OF 2015

(Formerly Nakuru HC.CR.A. No. 176 of 2014)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 6 of 2014 of the Chief Magistrate's Court at Naivasha before S. Muchungi - RM)

JOSEPH TINNG'A LESAYATON……APPELLANT

-VERSUS-

REPUBLIC……PROSECUTOR

J U D G M E N T

1. The Appellant herein pleaded guilty to a charge of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars stated that on the diverse dates between 20th of April to 5th June 2014 at [particulars withheld] area Kongoni, Naivasha Sub-County within Nakuru County unlawfully and internationally he did cause his genital organ namely penis to penetrate the vagina of **E.P.L.** a girl aged 14 years..

2. Following his mitigation, the prosecution successfully applied to amend the charge to one punishable under Section 8 (3) of the Sexual Offences Act rather than Section 8 (4) of the Sexual Offences Act. Thus the Appellant was sentenced to 25 years imprisonment.

3. In some respects, the Appellant's rather lengthy grounds of appeal filed through Kiplenge & Kurgat Advocate appear to suggest that the matter went to a full trial before the conviction was recorded. Some of the grounds however allude to the fact that the Appellant was convicted on his own plea of guilt. It seems to me that the counsel who drafted the Petition of Appeal had not perused the record of the proceedings.

4. Indeed while addressing the court in respect of the application to extend time for filing the appeal, Mr. Kariuki, then representing the Appellant told this court on 12/7/2016 that the defence filed the appeal *"as we waited for proceedings."* The fact that the proceedings had not been supplied to the defence cannot excuse their failure to peruse the court file to satisfy themselves at to the actual position.

5. Be that as it may, when the appeal came up for hearing, a Mr. Makau represented the Appellant. Mr. Makau elected to only argue the ground relating to the propriety of the plea taking procedure. Although none of the grounds in the Petition of Appeal expressly raised the question of the plea being unequivocal as such, Mr. Makau based his submissions on that issue.

6. The grounds touching on the plea-taking procedure raise the question whether the Appellant

understood the charges read out to him. Nonetheless, Mr. Makau submitted that the trial court failed to comply with Section 207 of the Criminal Procedure Code and that the court erred by failing to note that the Appellant's plea was not unequivocal. Because, in his address to the court the Appellant had asserted that the complainant was his wife. That this negatived the plea of guilt. Thus the plea taking procedure was defective.

7. Mr. Mutinda for the DPP opposed the appeal and supported the procedure adopted by the court. He disputed the assertion that the Appellant's words in response to the alternative charge on the first occasion and subsequently in mitigation, raised a defence as anticipated under Section 8 (5) of the Sexual Offences Act. Rather, that the Appellants said words confirmed his admission of the offence. In his view therefore the Appellant understood and unequivocally pleaded guilty to the charge. He urged the court to dismiss the appeal.

8. The procedure for plea taking is stipulated in Section 207 of the Criminal Procedure Code which states that:-

> **"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**
>
> **(5) ……."**

9. Concerning the correct plea taking procedure the Court of Appeal for Eastern Africa in **Adan -Vs- Republic [1973] EA 445** stated that:

> **"(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 in 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 the facts or raises any question of his guilty 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."**

10. In the case of **John Muendo Musau -Vs- Republic [2013] eKLR** the Court of Appeal having quoted the above passage in **Adan** proceeded to state:

"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence. The procedure laid out in Adan -Vs- Republic (Supra) is also provided for under Section 207 of the Criminal Procedure Code."

11. Having outlined the correct procedure this court has reviewed the procedure adopted by the trial court in this case. The record of the 11th June 2014 shows that the charges were read out in Kiswahili language which the Appellant understood. In response to the main count he replied "True". Unlike the initial plea date on 9/6/2014 when the Appellant was also erroneously required to respond to the alternative count after admitting the main count, in the second session he did not respond thereto. Going back to the session of 11th June 2014, the prosecution laid out the facts to the main charge after the Appellant had pleaded thereto.

12. In response to the facts read out the Appellant responded as follows:-

"The facts are true. The complainant's father offered her to me to marry her. I went with my brother and even slept at their home. We sat as elders and with her parents and we ate together.

I even went to the market and bought cows and blankets as directed by the complainant parents. The father said the girl is in school but he was unable to raise school fees. I came with her to Sambulai and stayed with her as a wife and had sex with her. I blame the minor's parents."

13. In his mitigation, the Appellant took issue with the fact that the parents of the complainant had not been charged, presumably for giving the complainant to him as a wife. The prosecution facts also contained the assertion that the Appellant had taken the complainant to Sambulai and told her she was henceforth his wife. That subsequently, they commenced cohabitation as husband and wife and had sex, before the complainant escaped and reported to police.

14. The Appellant admitted these facts and restating them in his response did not render his plea equivocal. The Appellant merely repeated the same facts which moments earlier had been stated by the prosecution. And, as the DPP has observed, the Appellant did not raise any matter in that address as to indicate that he was disputing any of the facts related to the charge. More specifically, he did not raise any question concerning his being deceived or belief in respect of the complainant's true age.

15. The statement that the complainant was his wife cannot be stretched, as proposed by the Appellant's advocate, to mean that the Appellant was thereby saying that he was deceived and believed the complainant was of age when he took her as a wife. Ignorance of the law is not a defence. No defence can be raised on the basis that the Appellant did not know that a girl of 14 years could not legally be a wife. In the circumstances, I have found no merit in this appeal.

16. Regarding the sentence, the minimum prescribed under Section 8 (3) of the Sexual Offences Act is 20 years. The court allowed the prosecution to correct the reference to Section 8 (4) of the Sexual Offences Act in the statement of the offence by inserting instead Section 8 (3) of the Sexual Offences Act instead. In my own view no prejudice was occasioned thereby as the age of the complainant was stated to be 14 years in the charge sheet particulars. The age assessment form confirming this was produced as facts were read out.

17. Sections 8 (2) to 8 (4) of the Sexual Offences Act contain prescriptions of sentences graduated depending on the age of the victim. The actual offence of defilement is created under Section 8 (1) of the Sexual Offences Act.

18. Ideally, the court ought to have once more read over the charge to the Appellant in light of the slight amendment. However the amendment was of a minor nature and fell in line with the specific facts

already admitted by the Appellant. In my view therefore, the Appellant was properly convicted. The appeal against the conviction is therefore dismissed.

19. On the sentence of 25 years imprisonment, Mr. Makau argued while responding to the DPP's submissions that it was excessive. The minimum sentence for a conviction under Sections 8 (1) as read with 8 (3) of the Sexual Offences Act is twenty (20) years imprisonment. There is nothing on record to indicate why the court decided on the sentence of 25 years imprisonment. Indeed the prosecution did not prove any past records against the Appellant.

20. In the circumstances I would reduce the sentence to the minimum term of 20 years imprisonment from the date of sentence, namely, 11th June 2014. To that extent only the appeal has succeeded.

Delivered and signed at Naivasha, this 28th day of July, 2017.

In the presence of:-

Mr. Baraka for the DPP

N/A for the Appellant

C/C - Barasa

Appellant - present

C. MEOLI

JUDGE