REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.152 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.36 of 2017

by: Hon. S.N. MWANGI – S.R.M.)

GEOFFREY MWANGI GATHIGA.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Geoffrey Mwangi Gathiga (the appellant), was convicted by **Hon. Mwangi – SRM** for the offence of **defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act** and sentenced to serve 15 years imprisonment. The particulars of the charge are that on 9/4/2015 at [particulars withheld],, in Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of **M.W.M**. a child aged 17 years.

In the alternative, the appellant was charged with the offence of indecent act contrary to section 11(1) of the Sexual Offences Act. It was alleged that on 9/4/2015 at [particulars withheld], in Laikipia County intentionally and unlawfully caused his penis to come into contact with the vagina of **M.W.M**. a child aged 17 years.

No finding was made on the alternative charge.

When the appellant was arraigned in court on 7/3/2017 for plea, he denied the offence. However on 15/3/2017 he informed the court that he wished to admit the charges which were read to him.

On 16/3/2017 an amended charge was read to the appellant and he admitted, the facts were read to him and he admitted them to be true and a plea of guilty was entered against him. The court requested for the appellant's birth certificate and a presentence report after which the court sentenced the appellant to 15 years imprisonment. He has now challenged the conviction and sentence based on the following grounds:

(1) That the trial court erred in convicting the appellant on an equivocal plea of guilty;

(2) That the trial court failed to observe the provisions of Section 207 Criminal Procedure Code;

(3) That the court erred by not warning the appellant of the consequences of pleading guilty to the charge;

(4) That the court erred by accepting a plea of guilty when the appellant had initially pleaded guilty on 7/3/2017;

(5) That the court erred by allowing the production of the P3 form as an exhibit, DNA result by the court prosecutor from the bar without calling the maker and without the appellant's consent;

(6) That the court erred by relying on a Probation Officer's report without allowing the appellant to comment on it;

(7) That the court erred by not allowing the complainant who was over 18 years to reconcile with the appellant;

(8) That the trial magistrate erred in following a flawed procedure in sentencing the appellant.

Mr. Waichungo, counsel for the appellant filed submissions and highlighted the same. He argued that the plea taken on 10/3/2017 was not unequivocal because the appellant pleaded guilty to secure an early production in court in order to resume his studies; that the court failed to warn him of the consequences of pleading guilty to the charge that he faced which can be gleaned from his mitigation when he asked for noncustodial sentence; that the complainant and appellant had been romantically involved, a child was sired as a result and the appellant was only charged after he failed to provide for the child and it is clear from the time it took to report the matter to the police i.e. 2 years; that it is clear from the record of the court during sentence that the appellant attempted to change plea but the court refused to accept the change of plea yet one can change plea any time before sentence. Counsel further submitted that both the appellant and complainant were under age when the act took place and it should have been demonstrated why the police picked on one, charged one, while the other became a complainant. Counsel urged the court do order a retrial or acquit the appellant.

In opposing the appeal, Mr. Mutembei, counsel for the State, argued that the appellant changed plea and the court had no option but sentence him; that the provisions of Section 207 of Criminal Procedure Code were complied with. As regards production of exhibits, counsel argued that they were properly produced since it was a plea of guilty and that there was no requirement for the appellant to comment on the probation officer's report.

As regards the sentence, counsel argued that the same was lawful.

Before I consider the grounds of appeal, I think it is proper to consider the provisions of Section 348 of the Criminal Procedure Code which precludes an appeal where an accused person has pleaded guilty, Section 348 Criminal Procedure Code 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 or legality of the sentence".

In the case of ***Olel v Republic (1989) KLR 444 (C.A. 417/1987)*** the court of Appeal held:

"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."

By virtue of the above section and above cited case, the appellant is barred from challenging the conviction and his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court.

However, where the court finds that the plea was not unequivocal, then it can intervene. See ***Wandete David Munyoki v Republic CRA.56/2013***.

I will revert back to the plea that was taken after I consider the other issues raised by the appellant.

I will first consider the last grounds raised by the appellant. Having pleaded guilty, there would have been no possibility of calling the Doctor who filled the P3 form, or the Government Analyst nor was it necessary to allow the appellant to interrogate the report of the probation officer. The probation officer's report is supposed to guide the trial court in the exercise of its discretion when passing sentence. The contents of the probation officer's report are not binding on the court. I must also point out that a charge of defilement is not a misdemeanor but a very serious offence in which parties cannot be allowed to reconcile. The complainant was supposed to have been a minor and therefore lacks capacity to enter into a compromise or reconciliation. The trial court cannot therefore be faulted for declining the appellant and complainant from reconciling. In any event, the record does not show that there was any such attempt. It is the appellant who has alleged so but the prosecution did not have any such information.

The main ground in this appeal is whether the plea was unequivocal. Section 207 of the Criminal Procedure Code provides on how the plea will be taken. Section 207(1)(2)&(3) Criminal Procedure Code provides as follows:

> "(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***

The above section does not give details on how a pea is to be taken.

In the celebrated case of ***Adan v Republic (1973) E.A. 445*** the court went into detail on what plea taking entails. The court held as follows:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is possible, then in a language which he speaks and understands. The magistrate should then explain to the accused person all the essential ingredients of the offence charged, if the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant fats. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, or course, be recorded."***

The court will go through the proceedings of the trial court to establish whether the court complied with the guidelines given in the ***Adan case***.

The appellant appeared before the trial court on 7/3/2017 when the charge was read to him and he denied the offence. The court ordered that he be released on bond and a pre-bail report was called for.

On 15/3/2017 when the matter came up, the appellant indicated

"I do wish to admit to my charges."

The charges were read to him in Kiswahili but the court noted that there was a defect in the charge and set it aside for mention later.

At 11.43 a.m. the State Counsel presented to the court an amended charge sheet and the matter was adjourned to the next day, 16//2017. The amended charge was read to the appellant in Kiswahili language and he replied:

"***Ni ukweli***"

The following facts were read to the court:

> "***On 9/4/2015 at night the accused called the complainant to his home. She went and that night she slept with him and had sex. Complainant came back home the next morning and kept that secret and never told the grandmother whom she lived with. She was a student at*** [particulars withheld], ***School and kept going to school until 9/1/2016 when labour pains started. She was taken to Oljabet Private Hospital where she delivered a baby girl – H A W and was discharged from hospital on 11/1/2016. On 15/2/2016 her mother went to Nyahururu Police Station where she made a report and together with the complainant and the grandmother recorded their statements. They were issued with a P3 form which was filled by Dr. Karimi at Nyahururu District Hospital.***
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> ***The accused was arrested and charged as herein. The accused requested for DNA test and blood samples of the complainant and accused person plus the issue was sent to the Government Chemist at Nairobi for analysis. The results came back and confirmed he is the biological father to the issue in question. I do wish to produce the P3 form and Government Chemist results as (P.Exh.1 & 2) respectively. The complainant in question was 17 years old at the time of the offence. I do wish to produce a copy of her Birth Certificate as (P.Exh.3)."***

The appellant responded to the facts and said, '***the facts are correct'.***

The court thereafter entered a plea of guilty. The state counsel did not have previous records and the appellant was allowed to give his mitigation as follows:

> ***"The complainant forgave me for what I did. I do pray for court to forgive me so that I can proceed with my studies".***

The court thereafter went ahead to sentence the appellant.

I must point out that this being such a serious offence, which upon conviction, one is liable to a minimum of 15 years imprisonment, the trial court should have warned the appellant of the consequences of pleading guilty to the charge so that he would know what to expect. In my view, the warning is part and parcel of the charge and particulars that the appellant needed to be appraised of and failure by the court to do so led to a serious omission. To confirm that the appellant did not appreciate the seriousness of the offence or what he would face, he asked to be released so that he would continue with his studies which meant he was asking for a noncustodial sentence which would not be available to him unless he was a minor.

In the ***Adan case (Supra)*** the court also explained the need for facts which is to enable the court satisfy itself that the plea of guilty was indeed unequivocal. There is no doubt that the appellant understood the language of the court. The facts that were read to the appellant do reveal the offence of defilement, because the complainant was 17 years of age, had sexual intercourse with the appellant and as a result, a child was born out of the act. However, it seems that the appellant wanted to change plea before he was

sentenced but the court declined to allow him to do so. It is necessary to record verbatim, the court's ruling.

The court said:

> ***"I had already written that the Probation Officer's Report be availed in court before I pronounce it loudly in court. Also this was before the said Birth Certificate of the perpetrator was availed before the court. I do wish to state clearly that I have referred to the accused person in my file as a subject for he has all along been in a school uniform and he always used to say he is a form 4 student that the court presumed he was a minor since asked for a Probation Officer's Report to be availed in court. The accused person's Birth Certificate Serial No.*** [particulars withheld], ***states that he was born on 5/12/1996 which therefore makes him to be 20 years old and 3 months, hence an adult herein. It also ought to be noted that the charges were read over more than twice to the accused person in Swahili language which he stated he understand. Therefore, he cannot now claim not to have understood the charges facing him. I found him guilty on 16/3/2017 after he so pleaded guilty on his own volition and so I cannot go back and record he is not found guilty. Therefore, the accused person is hereby sentenced to 15 years imprisonment for the principal count of defilement contrary to Section 8(1) as read with Section 8(1) as read with Section 8(4) of the Sexual Offences Act No.3 of 2006. Right of appeal is 14 days."***

Even after a plea of guilty is entered, if the accused raises issues or says anything that seems to suggest that he does not agree with the facts; the court must enter a plea of not guilty or enquire as to what the accused actually means. The court said "***Therefore, he cannot now claim not to have understood the charges facing him.***" It means the appellant told the court that he had not understood the charges, though the court did not record his objection to the plea. In the case of ***Wandete David Njoki v Republic CRA.56/17 (2015) KLR,*** the Court of Appeal said as follows:

> ***"At any stage before passing sentence, the accused person is free to change his plea. Where the accused does not agree with the facts as outlined by the prosecution or where he raises any question of his guilt, his reply must be recorded and a change of plea entered. In that case the court shall proceed to hear the case by calling oral evidence."***

In the instant case, when the appellant told the trial court that he had not understood the proceedings, the plea became equivocal and the court should have entered a plea of not guilty and set the matter down for hearing. For the above reason I quash the conviction and set aside the sentence.

Having quashed the conviction, the question is whether I should order a retrial. The case of ***Fetahali Manyi v Republic (1964) EA 481*** set down some of the principles that the court should consider before ordering a retrial. The court said:

> "***even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame***, ***it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person***'.

In the instant case, the appellant faced a very serious charge of defilement; he was sentenced to 15 years imprisonment. On 23/3/2017, 5 months ago and I believe that the appellant will not suffer any prejudice if a retrial is ordered. Further, from the facts recorded, the potentially admissible evidence is likely to lead to a conviction if the case proceeds to full hearing. It is therefore in the interest of justice that I order a retrial and hereby do.

I direct that the case be remitted back to the Chief Magistrate's Court Nyahururu for fresh plea to be taken before any other competent magistrate other than S.N. Mwangi who took the plea under challenge. It is so ordered. Mention before Chief Magistrate's Court on 27/9/2017.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***22nd*** day of ***September***, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Present - Appellant

Mr. Waichungo - for appellant