



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 44 OF 2016

MICHAEL OCHIENG OSELE
APPELLANT

VERSUS

REPUBLIC **RESPONDENT**

[Being an appeal against the conviction and sentence of the Chief Magistrate’s Court at Kisumu (Hon. P. L. Shinyada SRM) dated the 3rd October 2016 in Kisumu CMCRC No. 22 of 2016]

JUDGMENT

The appellant was sentenced to fifteen years imprisonment upon his own plea of guilty to defiling a seventeen year old child Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. Being aggrieved he preferred this appeal on grounds that –

- 1. “That I pleaded guilty to the charge;**
- 2. That I am remorseful and humbly beg leave of this honourable court to have leniency on me and substantiate the sentence with a lesser punishment;**
- 3. That I was the sole breadwinner in my family however they have adversely suffered in my absence as they can no longer afford their basic necessities;**
- 4. That since my incarceration, my health has markedly deteriorated due to severe illness such as currently I am suffering from acute ulcers;**
- 5. That I humbly request the hon. court to have leniency on me accord me a more reasonable sentence such as a non custodial sentence to seek for proper medication.”**

At the hearing he relied on written submissions which introduce grounds that he was not allowed to personally mitigate, that he was not given an opportunity to give evidence, the trial magistrate did not evaluate the medical report which showed there was no penetration and also that his plea of guilty was obtained through coercion and intimidation by the officers who arrested him.

The appeal was opposed. Prosecution Counsel, Miss Chelengat submitted that the appellant having pleaded guilty to the charge this appeal cannot stand. She contended that the sentence meted was the minimum provided by law and urged this court to dismiss the appeal.

In reply the appellant submitted that at the time of plea he was confused; that he had been told to plead guilty by the police upon a promise that he would be discharged. He urged this court to order a retrial.

Section 348 of the Criminal Procedure Code provides that –

“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 legality of the sentence.”

I have examined the record of the proceedings in the trial court. That record shows that the charge was read and explained to the accused person several times and on different days. The Trial Court being cautious that he may not have understood the gravity of his guilty plea and fearing he could suffer prejudice even appointed a lawyer for him. The record shows that he was even sent to the hospital for a psychiatric test just so that the court could be sure that he knew and understood the gravity of his plea. He nevertheless maintained his plea of guilty and when the facts were read and explained to him he confirmed they were true.

It is clear from the proceedings right from the day he was brought before the court to the day he was convicted and then sentenced that he was aware of his surroundings and that he knew what he was saying. His plea was unequivocal. The record shows that after his first appearance in court he was remanded in prison custody. His allegation that the police induced him to plead guilty cannot therefore hold.

In his petition of appeal he merely seeks leniency. However it is my finding that the sentence meted for this offence is the minimum provided by law and is therefore lawful.

At the hearing he introduced new grounds which in my view this court ought not to consider as they were so filed without the leave of this court – (see Section 350 (2) of the Criminal Procedure Code). Moreover the grounds do not have merit. The person who mitigated on behalf of the appellant was an Advocate appointed by the court so that he, (the appellant) would not suffer injustice given the gravity of the offence. Secondly as he had pleaded guilty to the charge it was not open for him to adduce evidence. The record shows that the court recorded as nearly as possible what the appellant stated before it. The facts disclosed the offence charged; medical evidence was tendered and age of the victim was proved and when all these facts were put to him he admitted they were true. The appellant having pleaded guilty there was no need for the magistrate to hold a trial. Thirdly as I have already stated there is evidence from the proceedings that the appellant at the time he pleaded guilty was no longer in the custody of the police. His allegation that they induced him to plead guilty cannot therefore be true. In any case the trial magistrate exercised a lot of caution – including as I stated above getting him an Advocate and sending him for medical examination so as to ensure that he understood what faced him. It is also clear from his conduct in this appeal that this appeal is an afterthought. Initially his petition of appeal was all about asking for leniency meaning that he conceded he had committed the offence. He would otherwise have appealed against the conviction.

This appeal has no merit and it is dismissed.

Signed, dated and delivered at Kisumu this 21st day of December 2017

E. N. MAINA

JUDGE