



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO 109 OF 2017

SAUL KHAGULI MUSOGA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

[Being an appeal from original conviction and sentence in Eldama Ravine PM'S Court Cr. Case No. 129 of 2015 delivered on 16.11.2015 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was convicted and sentenced to life imprisonment on 16/11/2015 for the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that the appellant had on diverse dates of 16th February 2015 and 17th February 2015 at [particulars withheld] in Koibatek Sub-County within Baringo County committed an act which caused the penetration of his penis into the anus of R K K, a child aged 8 years. The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

2. The record of the proceedings shows that the appellant pleaded guilty to the charge and after the facts were read out he replied: "it is true". The trial court then recorded that "Accused is convicted on his own plea of guilty". The record then shows that the accused made a statement in mitigation and the court said "I do note the accused's mitigation however, I note that he is not sincere and he is hereby sentenced to life imprisonment with a right of appeal."

3. In his Amended Memorandum of Appeal dated 27/6/2016 the appellant raised the issues:

1. The learned trial magistrate erred in law and fact in failing to note that the charge sheet was incurably defective.
2. The learned trial magistrate erred in law and fact in failing to note that the prosecution case was inconsistent and not proved beyond any doubt and or all reasonable doubt.

The appellant therefore prayed that "the appeal be allowed, conviction quashed, sentence set aside and the appellant be set at liberty and or be given a retrial."

4. At the hearing of the appeal, the appellant relied on his written submission particularly alleging inconsistency in the charge against the evidence given in the facts and the haste of the court in accepting his plea of guilty, and sought therefore a second chance to cross examine the witnesses. **Yongo v. R** [1983] KLR 319 on defective charge was relied upon.

5. For the DPP, Miss Macharia submitted that the appeal was not opposed and citing **Elijah Njihia Wakianda v. R** Court of Appeal at Nyeri (sitting at Nakuru) Cr.Appeal No. 437 of 2010 submitted that the trial court should have explained to the unrepresented accused the severe consequences of his plea of guilty. The DPP submitted that the evidence showed that the appellant had administered a drug and he should have been charged with offence of intentionally administering a substance with intention to stupefy to engage with sexual activity with another person contrary to section 27 (3) of the Sexual Offences Act, and that by pleading guilty the appellant had denied the prosecution the chance to add the charge which it had indicated it would do at page. 9 line 19 of the Record. Counsel therefore urged that the court quashes the conviction, but in the interest of justice to both the complainant and the appellant order a retrial to ensure that the trial is conducted in a fair manner.

6. I have considered the directive by the Court of Appeal in **Elijah Njihia Wakianda v. R**, supra, as to the need to warn an accused person who pleads guilty to a charge of a serious consequences of plea of guilty especially where the sentence is severe and mandatory and the accused is unrepresented by Counsel. The Court said as follows:

“We also think that the elements of the offence are not complete if the sentence, especially if it is severe and mandatory sentence is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process...Where, as here, a plea of guilty is not unequivocal, the ensuing conviction and sentence cannot be allowed to stand. We consider the plea taking to have been a nullity”

7. Similarly, in this case, the appellant was not represented by counsel and as conceded by the DPP he was prejudiced by the acceptance of his plea of guilty without being warned of the consequences of his plea in view of the severity and mandatory nature of the life imprisonment prescribed for the offence of defilement under Section 8 (1) as read with 8 (2) of the Sexual Offences Act. I find the plea taking in this matter to have been a nullity and the conviction and consequent sentence are, respectively, quashed and set aside.

8. However, as in **Opicho v. R** [2009] KLR 369. I consider that cases of defilement are extremely serious as to warrant retrial in public interest and I respectfully adopt the logic of the Court of Appeal in that case that:

“it is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law.”

Fortunately, even the appellant in this case called for a retrial of the case.

Orders

9. Accordingly, for the reasons set out above, the Court quashes the appellant’s conviction for the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act and sets aside the sentence of imprisonment for life imposed on the appellant.

10. The appellant shall be retried by a competent court at Eldama Ravine Law Courts differently constituted, and for that propose, considering that the appellant has been in custody since February 2015, the Court directs that the appellant shall be presented before the Magistrate in charge, Eldama Ravine Law Courts, within 7 days for necessary directions as to the retrial.

DATED AND DELIVERED ON 14TH DAY OF DECEMBER 2017

EDWARD M. MURIITHI

JUDGE

Appearances: -

Ms. Macharia, Ass. Director of Public Prosecutions.

Appellant in person.