REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 92 OF 2013

JOHANA KIPKEMEI…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. E. Bett, Acting Senior Magistrate dated 8th May 2013 at Kabarnet in Criminal Case No. 203 of 2013)

JUDGMENT

1. The appellant was convicted on his own plea of guilt for defilement contrary to section 8 (1) of the Sexual Offences Act. The offence was committed on the 6th May 2013 in Baringo District. The charge read that he caused his penis to penetrate the vagina of *C. K.* a girl aged *eleven years*. The appellant was sentenced to *life* imprisonment.
2. The petition of appeal is against the conviction and sentence. There are seven grounds of appeal. They can be condensed into six. First, that the plea of guilt was *equivocal* because the appellant did not understand the language of the court; secondly, that learned trial magistrate failed to explain to the appellant that he had a right to an advocate; thirdly, that the appellant was not taken for a mental examination; fourthly, that the lower court did not explain to the appellant about his right of appeal; fifthly, that no age assessment of the complainant was carried out; and, sixthly, that the sentence of life imprisonment was harsh and excessive.
3. At the hearing of the petition, learned counsel Mr. Tarus submitted that the response by the appellant to the charge and facts should have been recorded in *Kiswahili*. The fact that the record states *"it is true"* shows that the appellant never understood the proceedings. He submitted further that failure to carry out the age assessment of the complainant was fatal. Lastly, he submitted that the court should have explained to the appellant his right of appeal.
4. The appeal is contested by the State. The case for the State is that the plea of guilt was *unequivocal*; and that the sentence meted out was well within the law. Learned State Counsel Ms. Karanja referred to the mitigation tendered by the appellant. She was of the view that the appellant understood the proceedings; and, that the appeal is an afterthought. I was implored to dismiss the appeal.
5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. I have carefully studied the original record of the trial court. The charge was first read to the appellant on 8th May 2013. The record indicates that there was *Kiswahili* interpretation. The substance of the charge and its elements were read to the appellant in *Kiswahili*. The appellant answered "*It is true*". A plea of *guilt* was entered.
7. The facts were read out at 2:30pm the same day. They were straightforward. On the 6th May 2013

the complainant, a child aged 11 years, was taking her father's cattle to the water point. On the way the appellant emerged from the bush, grabbed her and dragged her to the bush. He removed her clothes. The child started to cry and pleaded with him to let her go. The appellant went ahead to defile the child. After the incident the appellant gave the child Kshs 100 and ordered her not tell anyone. The child took the money and went home leaving the cattle in the bush. She narrated the incident to her mother and gave her the money. She was taken to Kabarnet District Hospital where she was treated and discharged. The matter was reported to Kabarnet AP Camp. She was issued with a P3 form which was filled out at Kabarnet District Hospital (exhibit 1). The Kshs. 100 was also produced (exhibit 2). On the 7th May 2013 at about 3.00 pm the appellant was seen and arrested in Kabarnet. He was then charged with the present offence.

8. When *those* facts were read to the appellant, he replied: *"It is true"*. A final plea of guilt was then entered. I accept that the answer given by the appellant was *not* recorded in *Kiswahili*. But what is required of the court is to record as closely as possible the actual answer given by the appellant. In this case, the actual translated answer was that "it is true". I am unable to fault the trial court on that score. The appellant was properly convicted for the offence. I find the plea was *unequivocal*. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Kariuki v Republic* [1984] KLR 809, *Feisal Adan v Republic*, Mombasa High Court Criminal Appeal 77 of 2008 [2008] eKLR.
9. I am fortified in that finding by the mitigation tendered by the appellant. He said as follows-

> *"I pray for leniency. I apologize for the act. I did not think it would go this far. I also pray for leniency as I have children who depend on me"*

10. That mitigation clearly shows the appellant *understood* the proceedings. Regarding the age of the complainant, the charge sheet stated the minor was *eleven*. When the facts were read out, it was again stated that the girl was *eleven*. The appellant agreed that both the charge and the facts were *true*. Since the plea of guilt was *unequivocal*, it was no longer necessary to carry out an age assessment. Lastly, the nature of the charges facing the appellant did not require the trial court to explain the right to an advocate.
11. I have studied the original record. The learned trial magistrate did not explain to the appellant that he had a right of appeal. That was misdirection. But it is all water under the bridge because the appellant lodged this appeal within the required time. I am unable to hold that the appellant suffered prejudice from that omission.
12. That leaves the matter of the *sentence*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Simon Muge Kipketer v Republic* Eldoret, Criminal Appeal 25 of 2014 [2015] eKLR.
13. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may…….(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

14. The lower court considered that the appellant was a *first* offender. The court considered his mitigation particularly the fact that he has children. The learned trial Magistrate was of the opinion that considering the age of the complainant, the act was *"barbaric and immoral"*. The lower court was also cognizant that section 8 (1) of the Act provided for a *mandatory* life sentence. The plea for mercy before this court must be looked at through those lenses. I am unable to say that the sentence was illegal, harsh or excessive.
15. In the result, I uphold the conviction and sentence. The entire appeal is accordingly dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of February 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Tarus for the appellant.

Ms. Mokua for the State.

Mr. J. Kemboi, Court clerk.