



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 128 OF 2013**

**P R N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant herein P R N was the accused in Criminal Case No. 293 of 2012 before the Principal Magistrate's Court at Kilgoris where he was charged with the offence of Defilement of a Girl contrary to section 8 (1), (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that between 26<sup>th</sup> January and 15<sup>th</sup> April, 2012 at [particulars withheld] of Transmara East District within Narok County he unlawfully and internationally caused his penis to penetrate the vagina of B C, a girl child aged 16 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to Section 11 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charges were that between 26<sup>th</sup> January and 15<sup>th</sup> April, 2012, at [particulars withheld] of Transmara East District within Narok County, he intentionally and unlawfully caused his penis to come in contact with the vagina of B C a girl aged 16 years.
3. When the above charges were read out to him, the appellant pleaded guilty but stated that they had agreed to get married and that he had indeed impregnated the complainant. The trial court proceeded to enter a plea of guilty.
4. The prosecution then narrated the facts of the case as follows:

**"That on 26<sup>th</sup> January, 2012 at [particulars withheld] Transmara East Narok County the accused in this case engaged in a love affair with the complainant and they agreed to marry. On same date accused took complainant to his homestead where they stayed as husband and wife engaging in sexual intercourse. Later on the parents reported to the AP Dikirr of disappearance of the girl. They looked for the subject on the 13<sup>th</sup> they got information that the complainant a young girl aged 16 years school at [particulars withheld] School in standard 7 was staying with accused.**

**Administration police found the girl with the accused. Both were arrested and taken to Soit then Kilgoris District Hospital and later on to the police station. Subject was examined and found to be pregnant. The age of the subject was assessed to be 16 years. Accused was charged. The P3 form is here indicating the girl was pregnant dated 16th April 2012. The age assessment report is here indicating subject was 16 years. i produce it as exhibit-P2. Accused was charged with the offence hereof."**

5. In reply to the above facts, the accused stated:

**"We agreed with her and we got married and I never escaped with her. They are our neighbours and mother of the complainant subject and mine talked and agreed. I just found myself being charged. The girl stopped school. Both sides agreed and we got married."**

6. A plea of guilty was entered and in mitigation the appellant requested that the case be taken back to elders and that they were already married.
7. The Trial Magistrate proceeded to convict and sentence the appellant to 20 years imprisonment while observing that the sentence should serve as a deterrence to other people with similar inclinations.
8. The said conviction and sentence triggered the instant appeal. In his home made petition of appeal, the appellant states that the prosecution did not prove its case beyond reasonable doubt, the charges were not interpreted to him in the language that he understood and that he was not warned of the consequences of a guilty plea. The appellant also contended that he was not granted a fair trial.
9. When the appeal came up before me for hearing on 3<sup>rd</sup> March, 2016, the appellant submitted that the complainant got pregnant as a result of their relationship and bore him a child. He stated that the said baby and mother are now suffering in his absence as a result of his imprisonment. He therefore pleaded for leniency so that he could go back home and take care of his young family.
10. Mr. Otieno Counsel for the State conceded to the appeal on the basis that the appellant pleaded guilty to the offence of defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act** yet the charge sheet indicated that the complainant was 16 years of age. According to Mr. Otieno the proper section under which the appellant ought to have been charged is under **Section 8 (1) (4) of the Sexual Offences Act** bearing in mind the age of the complainant. Mr. Otieno therefore submitted that the appellant pleaded guilty to a wrong charge and such a plea cannot be said to have been unequivocal.
11. He further submitted that a perusal of the proceedings clearly shows that the appellant's plea was not unequivocal as the appellant justified the allegations made in the charges both during the plea and on mitigation.
12. He submitted that the plea of guilty by the appellant was qualified and therefore raised issues that ought to have been ventilated or canvassed in a trial.
13. This being a first appeal, I am under a duty to reconsider and re-evaluate the evidence tendered before the lower court afresh with a view of reaching my own independent conclusion. See **Pandya vs Republic [951] E.A 336** and **Okeno vs Republic [1972] E.A. 32**.
14. In this appeal however the appellant was convicted in his own plea of guilty meaning that a full trial was not conducted. I will therefore scrutinize the record to in order to discern whether the plea was unequivocal or not.
15. Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The section does not however lay down the steps to be undertaken by the court when taking plea. In **Adan vs Republic (1973) E.A 443**, the Court of Appeal set out the steps to be taken in recording a guilty plea 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 not possible, then in a language which he can speak and understand. 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 facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true might raise a question as to this 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 alleged facts in any material respect, the magistrate should reach a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the**

**accused's reply must of course be recorded.”**

16. The statement of facts assists the court to confirm if the accused really understood the position when he pleaded guilty. In **Njuki vs Republic [1990] KLR 334** the court while citing **Ando & Akuncay vs R [1951] 18 EACA 305** re-emphasized the need for caution in recording a guilty plea. It held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.
17. This brings me to the question on whether or not the appellant in the instant appeal understood every element of the charge and pleaded guilty to it unequivocally. I do not think so, because as correctly submitted by Mr. Otieno learned state Counsel, the appellant's plea was qualified and was not an unequivocal admission of guilt. The appellant's response to the charge was as follows:

**“We have agreed to get married and impregnated her. I am 18 years old.”**

18. In my humble view, this was not an unequivocal plea of guilty, but a statement of defence. The trial magistrate should have entered a plea of not guilty and set the above case for trial. Furthermore after this plea, the facts were read out to the appellant who answered:

**“We agreed with her and we got married and I never escaped with her”.....the girl had stopped school both sides agreed and we got married.”**

19. Again as correctly submitted by Mr. Otieno when conceding to this appeal, even if the appellant's initial answer to the plea had been that of “guilty” his response after facts were read out altered his plea to that of “not guilty”. I find that the trial magistrate misdirected himself when he went ahead to convict the appellant despite the apparent change of plea.
20. The manner in which the plea was taken in this case was not the only issue in this appeal. It also turns out that the appellant was charged under the wrong section of the law and he is therefore serving an illegal sentence. I say so because the appellant was charged with defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006** which relates to defilement in respect to a child aged between twelve and fifteen years yet the charge sheet and the facts of the case showed that the complainant was aged 16 years.
21. Section 8 (1) (3) and (4) of the Sexual Offences Act No. 3 of 2006 provides as follows:

**"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen is liable upon conviction to imprisonment for a term of not less than fifteen years."**

22. In effect therefore the appellant ought to have been charged under Section 8 (1) (4) of the Sexual Offences Act which provides for minimum sentence of 15 years as opposed to 20 years for a person convicted under Section 8 (1) (3). To this extent I am satisfied that this irregularity in the charge sheet did in fact imperil the appellant and occasion him an injustice as he was subjected to an inapplicable harsher and excessive sentence. This defect is not curable under section 382 of the Criminal Procedure Code which provides as follows:-

**“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularly in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the**

**error, omission or irregularly has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

23. In the present case, the appellant was unrepresented in the trial court and therefore he was not in a position to raise an objection on the defective charge in the proceedings before the trial court.
24. Furthermore, this court has already established that the appellant's plea in the trial court was not unequivocal. Coupled with the fact that the charge was defective as it cited an inapplicable section of the law being Section 8 (1) (3) of the Sexual Offences Act and which resulted to the appellant being sentenced for an inapplicable and excessive sentence, it is therefore my finding that this appeal is well merited.
25. I will therefore allow the appellant's appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, signed, and delivered in open court at Kisii this 30<sup>th</sup> day of March, 2016.**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno/Mochama for the State
- Appellant for the Appellant
- Omwoyo Court Clerk